

STATE OF LOUISIANA

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NO. 2000-KA-2281

VERSUS

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COURT OF APPEAL

ALFRED CLAY

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 386-621, SECTION "H"
Honorable Camille Buras, Judge

JUDGE

JOAN BERNARD ARMSTRONG

(Court composed of Judge Joan Bernard Armstrong, Judge Michael E. Kirby, Judge Terri F. Love)

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CONVICTION

AFFIRMED.

MULTIPLE BILL

AND SENTENCE

STATEMENT OF CASE

On December 5, 1996, the defendant, Alfred Clay, was indicted on two counts of possession of heroin with intent to distribute, a violation of La. R.S. 40:966. On May 27, 1997, the jury found the defendant guilty as charged on count one and guilty of simple possession on count two. He was sentenced on September 10, 1997 to life imprisonment, without benefit of parole, probation or suspension of sentence on count one, and to ten years on count two, sentence to run concurrent with the sentence on count one.

On March 17, 1999, the defendant's conviction on count two was affirmed but his conviction and sentence on count one were reversed. State v. Clay, 97-2858 (La. App. 4 Cir. 3/17/99), 731 So.2d 414, writ denied, 99-0969 (La. 9/17/99), 747 So.2d 1096.

On November 5, 1999, the State filed a multiple bill of information on count two. On June 23, 2000, the trial court adjudicated the defendant a second offender, and sentenced him to ten years imprisonment. The

defendant now

appeals his multiple bill conviction and sentence.

STATEMENT OF FACT

The facts of the defendant's arrest are set out in his previous appeal. State v. Clay, 97-2858 (La. App. 4 Cir. 3/17/99), 731 So.2d 414, writ denied, 99-0969 (La. 9/17/99), 747 So.2d 1096.

ASSIGNMENT OF ERROR NUMBER 1

In his first assignment of error, the defendant argues that the trial court erred in ruling that the multiple bill of information was timely filed. He argues that he was prejudiced by the State's delay in multiple billing him because he was denied his the right to know within a reasonable time whether he was going to face enhanced penalties. He further argues that by the time of his multiple offender adjudication, he had less than fourteen months remaining on his original ten-year sentence

La. R.S. 15:529.1(D) provides that a defendant may be charged as a multiple offender if at any time after either conviction or sentence, it appears that a person convicted of a felony has previously been convicted of another felony. The statute does not contain a prescriptive period; but, in State v. Broussard, 416 So.2d 109 (La.1982), the Supreme Court held that a multiple bill must be filed within a reasonable time after the State becomes aware of

the defendant's prior felony record. The court stated that upon conviction, a defendant was entitled to know the full consequences of the verdict within a reasonable time, and proceedings to

sentence a defendant as a habitual offender should not be unduly delayed. In cases of alleged unreasonable delay, it is essential to look at the circumstances of each case to determine whether a multiple offender bill was filed timely. State v. Morris, 94-0553 (La. App. 4 Cir. 11/17/94), 645 So.2d 1295. The length of the delay is one factor to consider. Other important factors include prejudice to the defendant, reason(s) for the delay and whether there was maliciousness in the delay. Id.

A review of recent jurisprudence indicates this Court has reviewed cases involving delays of five months to two years between conviction and the filing of a multiple bill of information, and found the delays neither unreasonable nor prejudicial to the defendant, based upon a Broussard fact-specific inquiry. See State v. Morris, 94-0553 (La. App. 4 Cir. 11/17/94), 645 So.2d 1295; State v. Langlois, 96-0084 (La. App. 4 Cir. 5/21/97), 695 So.2d 540, writ granted in part and remanded, 97-1491 (La.11/14/97), 703 So.2d 1281; State v. Carter, 93-0537 (La. App. 4 Cir. 12/30/93), 630 So.2d

926; State v. McNeal, 99-1265 (La. App. 4 Cir. 6/14/00), 765 So.2d 1113.

In this case, the record indicates that the defendant was sentenced to life imprisonment September 9, 1997. On March 17, 1999, this Court reversed that conviction and sentence. The Supreme Court denied writs on September 17, 1999, and the State multiple billed the defendant November 5, 1999. Although approximately two years elapsed between the defendant's sentencing and the filing of the multiple bill, the defendant was not prejudiced. From the time he was sentenced, until the Supreme Court denied the State's writ application, the defendant reasonably expected to serve a life sentence. The State filed the multiple bill three months after the date of finality of the judgment reversing his conviction. Moreover, there is no allegation the defendant's right to present a defense to the multiple bill was compromised by the State's delay.

This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 2

In his second assignment of error, the defendant charges prosecutorial vindictiveness in the State's multiple billing him, claiming the State retaliated against him for exercising his right to appeal.

A defendant has the burden of proving, by a preponderance of the evidence, the affirmative defense of prosecutorial vindictiveness. U.S. v.

Krezdorn, 718 F.2d 1360 (5th Cir. 1983), cert. denied, Krezdon v. U.S., 465 U.S. 1066, 104 S.Ct. 1416, 79 L.Ed.2d 742 (1984). In that regard, the court will examine the state's actions in the context of the entire proceedings. Id. The events in the case will create a presumption of vindictiveness if, to a reasonable mind, the filing of the habitual offender bill can be explained only by a desire to deter or punish the exercise of legal rights. Id. But where the government's conduct is equally attributable to legitimate reasons, a defendant must prove actual vindictiveness for a presumption will not apply. U.S. v. Esposito, 968 F.2d 300 (3d Cir. 1992). A mere opportunity for vindictiveness does not suffice. U.S. v. Goodwin, 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982).

A district attorney has great discretionary power to file an habitual offender bill under La. R.S.15:529.1(D), just as he has the initial unlimited power to prosecute "whom, when, and how" he chooses. See La.C.Cr.P. Art. 61.

In the present case, defendant was sentenced to life on September 9,1997. The multiple offender bill was not filed at that time because the district attorney believed the sentence was adequate. There was no purpose to enhancing the sentence when the defendant faced a life sentence on the other count. However, when the defendant's life sentence was vacated and

the case remanded, the prosecutor took the steps necessary to ensure that the defendant would receive what the prosecutor considered a proper sentence. In addition, as a second offender for simple possession of heroin, the defendant faced a sentence of ten to twenty years and the possibility of a fine. La. R.S. 40:966 C (1); La. R.S. 15:529.1 A(b)(i). He received a ten year sentence, the same term as the original sentence. The prosecutor's actions were neither vindictive nor malicious.

This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 3

In his third assignment of error, the defendant contends the trial court erred in adjudicating him a second offender. Specifically, the defendant argues that the State did not provide sufficient evidence that he received his Boykin rights at sentencing when he pleaded guilty to armed robbery in 1982.

In 1993, the Louisiana Legislature enacted La. R.S. 15:529.1(D)(1)(b) to establish "the procedure to be followed to attack the validity of a prior conviction" and "to set forth burdens of proof." 1993 La. Acts 1993, No. 896. La. R.S. 15:529.1(D)(1)(b) provides as follows:

Except as otherwise provided in this Subsection, the district attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. The presumption of regularity of judgment shall be sufficient

to meet the original burden of proof. If the person claims that any conviction or adjudication of delinquency alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the prosecutor. A person claiming that a conviction or adjudication of delinquency alleged in the information was obtained in violation of the Constitutions of Louisiana or of the United States shall set forth his claim, and the factual basis therefore, with particularity in his response to the information. The person shall have the burden of proof, by a preponderance of the evidence, on any issue of fact raised by the response. Any challenge to a previous conviction or adjudication of delinquency which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

To prove that a defendant is a multiple offender, the state must establish by competent evidence that there is a prior felony and that the defendant is the same person who was convicted of the prior felony. State v. Chaney, 423 So.2d 1092 (La. 1982). Where the prior conviction resulted from a plea of guilty, the State must show that the defendant was advised of his constitutional rights and that he knowingly waived those rights prior to his plea of guilty, as required by Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

The Louisiana Supreme Court adopted a scheme for burdens of proof in habitual offender proceedings in State v. Shelton, 621 So.2d 769 (La.

1993) as follows:

If the defendant denies the multiple offender allegations then the burden is on the State to prove (1) the existence of a prior guilty plea, and (2) that defendant was represented by counsel when the plea was taken. Once the State proves those two things, the burden then shifts to the defendant to produce affirmative evidence showing (1) an infringement of his rights, or (2) a procedural irregularity in the taking of the plea. Only if the defendant meets that burden of proof does the burden shift back to the State to prove the constitutionality of the guilty plea. In doing so, the State must produce either a "perfect" transcript of the Boykin colloquy between the defendant and the judge or any combination of (1) a guilty plea form, (2) a minute entry, or (3) an "imperfect" transcript. If anything less than a "perfect" transcript is presented, the trial court must weigh the evidence submitted by the defendant and the State to determine whether the State met its burden of proof that defendant's prior guilty plea was informed and voluntary.

At the multiple bill hearing, the State called Officer Terry Bunch, an expert in taking and analyzing fingerprints. The officer identified State's exhibit 1 as the set of the defendant's fingerprints, which he took the morning of the multiple bill hearing, and State's exhibit 2 as a certified copy of the arrest register documenting the defendant's arrest for armed robbery. Officer Bunch next identified a packet of information, including the bill of

information, docket master, guilty plea form, arrest register and minute entry of the guilty plea in case number 286-581, as State's exhibit 3 in globo. He compared State's exhibit 2 to the copy of the arrest register included in State's exhibit 3 in globo, and linked the documents by identical arrest register and item numbers. Next, the officer compared the fingerprints on State's exhibit 1 to the fingerprints on State's exhibit 2 and concluded the fingerprints belonged to the defendant. The guilty plea form indicates that the defendant was represented by counsel at the time he entered the guilty plea. The defendant, his attorney, and the trial judge signed the waiver of rights, which indicates that the trial court advised the defendant of his right to a jury trial, right to cross-examination of witnesses, privilege against self-incrimination, and right to compel and confront witnesses. The waiver form also notes that the defendant could be sentenced from five to ninety-nine years. The trial court ultimately sentenced the defendant to serve ten years at hard labor.

These documents reveal that the State met its burden of proving the validity of the guilty plea. At that point, the burden of proof shifted to the defendant to show that there was an infringement of his rights and/or a procedural irregularity in the plea. The defendant failed to produce any such evidence. Therefore, the trial court did not err in adjudicating the defendant

a second felony offender.

This assignment is without merit.

For the foregoing reasons, the defendant's multiple bill conviction and sentence are affirmed.

**MULTIPLE BILL CONVICTION
AND SENTENCE AFFIRMED.**