

**STATE OF LOUISIANA**

\*

**NO. 2001-KA-0137**

**VERSUS**

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**COURT OF APPEAL**

**RICARDO HERNANDEZ,**

\*

**FOURTH CIRCUIT**

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**STATE OF LOUISIANA**

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APPEAL FROM  
CRIMINAL DISTRICT COURT ORLEANS PARISH  
NO. 416-500, SECTION "G"  
Honorable Julian A. Parker, Judge

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**Chief Judge William H. Byrnes III**

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(Court composed of Chief Judge William H. Byrnes III, Judge Miriam G. Waltzer, Judge James F. McKay III)

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#### COUNSEL FOR DEFENDANT

The defendant, Ricardo Hernandez, was charged by bill of information on August 31, 2000, with possession of cocaine in violation of La. R.S. 40:967(C). At his arraignment on September 6<sup>th</sup> he pleaded not guilty. On September 14<sup>th</sup> at a preliminary hearing, the trial court found probable cause and denied the motion to suppress the evidence. A six-member jury found the defendant guilty as charged on September 20<sup>th</sup>. The state filed a multiple bill charging the defendant as a triple offender, and after being advised of his rights and pleading guilty to the bill, the defendant was sentenced on October 17<sup>th</sup> to serve forty months at hard labor as a triple felony offender. The judge recommended the defendant be placed in the Blue Waters Drug Rehabilitation Program. The defendant's motion for an

appeal was granted.

At trial Officers Carl Razor and Brian Firstley testified that on July 24, 2000, they were patrolling in a marked police car at the intersection of Mandeville and Urquhart Streets when they observed the defendant on the side of a corner store. He was involved in a transaction in which he was giving money and receiving something from another man. Both men noticed the police car and began to move in different directions. The defendant, who was on a bicycle, rode off on Mandeville Street. When he was stopped, Officer Firstley found a rock of what appeared to be crack cocaine in his top left pocket.

The parties stipulated that the rock found in the defendant's possession was tested and proved to be crack cocaine.

Ricardo Hernandez, the forty-four year old defendant, testified that he was on the corner of Urquhart and Mandeville Streets on July 24, 2000, but he denied that he was buying drugs. Hernandez claimed that he happened to meet his godfather's son and stopped to speak with him. Hernandez acknowledged that he possessed cocaine when he was stopped by the officers; however, he maintained he had it in his pocket before he met his friend. He said he often smoked cocaine, but he has never sold it. Mr. Hernandez testified that he is employed fixing air conditioners, washing

machines, and dryers. He has a long-standing relationship of seventeen years with a woman who is the mother to his six children; they have sixteen grandchildren. He admitted to having two prior convictions: one in 1984 for “firing a gun” and another for simple robbery in 1993. However, on cross-examination, he stated that his earlier conviction was for possession of cocaine; he also acknowledged he had several misdemeanor convictions.

Counsel filed a brief requesting a review for errors patent. Counsel complied with the procedures outlined by Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), as interpreted by this Court in State v. Benjamin, 573 So.2d 528 (La. App. 4th Cir.1990). Counsel filed a brief complying with State v. Jyles, 96-2669 (La. 12/12/97), 704 So.2d 241. Counsel's detailed review of the procedural history of the case and the facts of the case indicate a thorough review of the record. Counsel moved to withdraw because he believes, after a conscientious review of the record, that there is no non-frivolous issue for appeal. Counsel reviewed available transcripts and found no trial court ruling which arguably supports the appeal. A copy of the brief was forwarded to defendant, and this Court informed him that he had the right to file a brief in his own behalf. He has not done so.

As per State v. Benjamin, this Court performed an independent, thorough review of the pleadings, minute entries, bill of information, and

transcripts in the appeal record. Defendant was properly charged by bill of information with a violation of La. R.S. 40:976(C), and the bill was signed by an assistant district attorney. Defendant was present and represented by counsel at arraignment, motion hearings, jury selection, trial, and sentencing. A review of the trial transcript reveals that the State proved the offense beyond a reasonable doubt.

We note an error patent in the sentence. The defendant was sentenced as a third felony offender under La. R.S. 40:967(C) to serve forty months at hard labor. One of his prior offenses is for simple robbery/ purse snatching, a violation listed as a violent crime under La. R.S. 14:2(13)(z). Under La. R.S. 15:529.1(A)(1)(b)(ii), the Habitual Offender Law, a third offender with a violent offense should receive a sentence of life imprisonment. Thus, it appears that Hernandez's sentence is illegally lenient. However, the record suggests that there was a plea agreement as to the forty-month sentence. The waiver of rights form states that the sentencing range is forty months to ten years and that his sentence will be forty months. (Record, p. 25). At the hearing, the court recited the above range and the forty-month term and then stated: "Other than that, have you been promised anything else in connection with this plea." Furthermore, this court will not correct an error favorable to the defendant when he alone has appealed, and the State has not raised the

issue. State v. Fraser, 484 So. 2d 122 (La.1986).

Our independent review reveals no non-frivolous issue and no trial court ruling which arguably supports the appeal. Defendant's conviction and sentence are affirmed. Appellate counsel's motion to withdraw is granted.

**MOTION TO WITHDRAW GRANTED; CONVICTION AND**  
**SENTENCE AFFIRMED**