NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2001-KA-0141**
VERSUS	*	**COURT OF APPEAL**
SAMUEL HULL	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 390-293, SECTION "F"
Honorable Dennis J. Waldron, Judge
* * * * * *
Judge Miriam G. Waltzer
* * * * * *

(Court composed of Judge Steven R. Plotkin, Judge Miriam G. Waltzer and Judge Patricia Rivet Murray)

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CONVICTION AND SENTENCE AFFIRMED.

Samuel Hull was charged by bill of information on 23 June 1997, with

simple burglary in violation of La. R.S. 14:62. At his arraignment on 25 June 1997 he pleaded not guilty. Probable cause was found after a hearing on 22 July 1997. On 5 November 1997 Hull withdrew his earlier plea and entered a plea of guilty as charged. On that same day, the state filed a multiple bill charging him as a second offender, and, after being advised of his rights, Hull pleaded guilty. He was then sentenced to serve six years at hard labor.

There are no facts in the record, and the facts are not relevant to this appeal.

In a single assignment of error, Hull argues that the trial court erred in finding him a second offender because the retroactive application of the ten-year cleansing period is a violation of the *ex post facto* clause. Hull was convicted of simple escape on 25 July 1986 and sentenced to three years at hard labor. At that time the cleansing period under the Habitual Offender Law was five years. Hull committed his second offense on 22 April 1997. The cleansing period runs from the defendant's release on his prior offense to his commission of his second offense. If Hull served the entire three years on the simple escape conviction, he would have been released in July of 1989 or almost eight years prior to his current conviction.

He now questions whether the current ten-year cleansing period of La.

R.S. 15:529.1 (C) should have been applied to his 1986 conviction.

La. R.S. 15:529.1, provides in relevant part:

> C. This Section shall not be applicable in cases where more than ten years have elapsed since the expiration of the maximum sentence or sentences of the previous conviction or convictions, or adjudication or adjudications of delinquency, and the time of the commission of the last felony for which he has been convicted. In computing the period of time as provided herein, any period of servitude by a person in a penal institution, within or without the state, shall not be included in the computation of any of said ten-year periods. (Emphasis added).

Prior to 1994 this section provided for a five-year cleansing period. However, in August of 1994 the cleansing period was enlarged from five to seven years, and in September of 1995 the cleansing period was enlarged still further to ten years.

The defendant argues that under State v. Everett, 99-1963 (La. App. 4 Cir. 9/27/00), 770 So. 2d 466, the cleansing period had elapsed between his prior offense and his recent conviction. He maintains that the five-year cleansing period in effect in until August 1994 applies to him, and he arrives at the 1994 date by adding the five-year cleansing period to July of 1989, the date of his estimated release from prison. Because his current offense did not occur until 1997, Hull contends that he should not have been sentenced

under the Habitual Offender Bill.

However, Hull misreads State v. Everett. In that case, the defendant had three felony convictions: the first in 1984, for which he received a three-year sentence; the second in 1993, for which he received an eighteen-month sentence; and the third in 1999, for which he was sentenced to life imprisonment. This court reasoned that, if after serving his three-year sentence from 1984, the defendant was released in 1987, he could not have been multiple billed in 1993 (after his second offense) because the five-year cleansing period would have expired in 1992.

This court concluded that under State v. Rolen, 95-0347 (La. 9/15/85), 662 So. 2d 446, such an application of the La. R.S. 15:529.1(C) would violate the *ex post facto* clause. Comparing Rolen and Everett and finding them critically different, this court stated:

> In *State v. Rolen*, 95-0347 (La. 9/15/85), 662 So.2d 446, the Louisiana Supreme Court was faced with an expansion from 5 to 10 years of the cleansing period for the DWI multiple offender statute, R.S. 14:98(F). The defendant's first DWI conviction occurred in April 1985, when the law in effect was a 5-year cleansing period. In June 1993, the legislature amended the cleansing period to 10 years. Eight months later, in March 1994, the defendant committed a second DWI. Thus, more than five years elapsed between his first offense and the amendment that enlarged the cleansing period to 10 years; however, the second DWI offense occurred less than 10 years after Rolen's first DWI offense, while the 10 year period was in force.
>
> Rolen challenged the application of the 10-year cleansing period to him as an unconstitutional *ex post facto* law. The

Louisiana Supreme Court rejected the challenge, because the amended cleansing period did not disadvantage him in his reliance on the law. It did not increase the penalty for the first offense, the relevant offense was the current crime not the predicate offense, and the defendant could not legitimately have relied on a cleansing period that was subject to change and did change before his new crime. Of significance here is this statement by the Supreme Court:

> At the time of his arrest on March 27, 1994, relator had been placed on notice by the state that the definition of "prior conviction" in La. R.S. 14:98 had changed and that he could no longer rely on the former five-year cleansing period to abate the collateral consequences of his prior D.W.I. offense for any **future** violation of the statute. The *Ex Post Facto* Clause required no more.

Rolen, at 449 (emphasis in original).

In other words, Rolen, a citizen, was put on notice of the expanded cleansing period before he committed his second DWI offense. After the law changed, he was presumed to know that he would not be treated as a first offender if he committed a second DWI offense five years and a day after his first offense. He now had to wait 10 years and a day. Although Rolen received notice of the change in the law more than five years after the first offense, the notice was timely for him to conform his conduct when the cleansing period was expanded to 10 years.

In this case, Everett conformed his conduct to the then existing cleansing period. He waited more than five years before he committed his second felony offense. Everett's case is thus critically different from the defendant in *Rolen*. For, at the time he committed the second (the 1993) offense, Everett "had **[not] been placed on notice** by the state that [the cleansing period] had changed" and that "he could **no longer rely** on the five-year cleansing period to abate the collateral consequences of his prior [the 1983] offense for any *future* violation." In this case, "[t]he *Ex Post Facto* Clause

> **required… more**." *Rolen, supra.* In effect, Everett had complied with the Habitual Offender Law in effect at that time.
>
> Under these facts, using an extended cleansing period, enacted after the prior offenses (i.e. *ex post facto*), to link said prior offenses would violate the *ex post facto* clause.

Everett, 770 So. 2d at 476-477.

Thus, the state could not use Everett's 1984 conviction in the multiple bill because the five-year cleansing period in effect in 1993 had elapsed at the time he committed his second offense.

However, in the instant case, it is State v. Rolen, 95-0347 (La. 9/15/85), 662 So. 2d 446, rather than Everett that applies. When Hull committed his second offense in 1997, the cleansing period under La. R.S. 15:529.1(C) was ten years. Like Rolen, Hull had been placed on notice that he could no longer rely on an earlier and shorter cleansing period "to abate the collateral consequences" of his prior conviction for any additional violations of the laws. Id., 662 So. 2d at 449. Thus, Hull's 1989 release occurred less than ten years before his commission of his second offense in 1997, and there is no violation of the *ex post facto* clause.

Accordingly, for reasons cited above, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.