

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2002-KA-0265**
VERSUS * **COURT OF APPEAL**
NICK SCOTT * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 390-781, SECTION "B"
Honorable Patrick G. Quinlan, Judge

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Judge David S. Gorbaty

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(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris, Sr.,
Judge David S. Gorbaty)

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AFFIRMED

Nick Scott was found guilty of possession of cocaine with intent to distribute after a jury trial on August 12, 1999. Subsequently, he was adjudicated a multiple offender under La. R.S. 15:529.1 and sentenced as a triple offender to life imprisonment. He appealed, and in an unpublished opinion, this court affirmed his conviction for possession of cocaine with intent to distribute, but vacated his conviction and sentence as a third felony offender and remanded the case for resentencing. State v. Scott, 2000-1527 (La. App. 4 Cir. 5/30/01).

On July 31, 2001, he was resentenced as a second felony offender to serve twenty-five years at hard labor. He now appeals, arguing that he was not advised of his right to remain silent or to have a hearing prior to resentencing.

ERRORS PATENT

Before addressing the assignment of error, we note a potential error patent. When the defendant was sentenced, the trial court did not restrict the benefits of parole, probation, or suspension of sentence for the first five years as mandated under La. R.S.40:967(B). However, under La. R.S. 15:529.1(G), the defendant's sentence is imposed without benefit of probation or suspension of sentence. Thus, the sentence appears to be

illegally lenient because parole was not restricted. Formerly, this Court followed State v. Fraser, 484 So.2d 122 (La. 1986), which held that a sentencing error favorable to the defendant that is not raised by the State on appeal may not be corrected. However, the legislature recently enacted La. R.S. 15:301.1, which addresses those instances where sentences contain statutory restrictions on parole, probation or suspension of sentence. Paragraph A of La. R.S. 15:301.1 provides that in instances where the statutory restrictions are not recited at sentencing, they are contained in the sentence, whether or not imposed by the sentencing court. Moreover, in State v. Williams, 2000-1725 (La. 11/28/01), 800 So.2d 790, the Supreme Court has ruled that paragraph A self-activates the correction and eliminates the need to remand for a ministerial correction of an illegally lenient sentence, which may result from the failure of the sentencing court to impose punishment in conformity with that provided in the statute. (In Williams, the Supreme Court also held that the retroactive application of the 180-day time period announced in paragraph D of La. R.S. 15:301.1 to sentences imposed prior to August 15, 1999, is procedural and does not violate the prohibition against ex post facto laws. Additionally, the Court ruled that the 180-day time period defined in paragraph D is applicable only to paragraph B of the statute, and not paragraph A, under which this

defendant's sentence falls.) Hence, this court need take no action to correct the trial court's failure to specify that the defendant's sentence be served without benefit of parole, probation or suspension of sentence for the first five years. The correction is statutorily effected. La. R.S. 15:301.1A.

ASSIGNMENT OF ERROR NUMBER ONE

In his sole assignment of error, the appellant alleges that, at the latest multiple bill hearing, the trial court failed to advise him of his right to remain silent and his right to an adjudication. We disagree.

At the sentencing hearing the following dialogue occurred:

The defense attorney:

Your Honor, . . . we waive delays with the understanding that this case was remanded for *re-sentencing of Mr. Scott as a double bill as opposed to a triple bill.*

The trial court:

For the record, the Court did conduct a multiple bill hearing at which the State provided certified copies along with the testimony of the fingerprint expert. The Court did find Mr. Scott to be the same person who had committed the two prior offenses alleged in the bill being possession of cocaine and the aggravated battery. The Fourth Circuit Court of Appeal did find that the possession of cocaine charge was then under Title 40, Section 983, and that there had not been a revocation, so therefore it could not be used to make Mr. Scott a three-strikes-and-you're-out life-sentencer under the mandatory provisions of the multiple bill statute. And since they have removed that, *then based upon the finding that the Court had previously made, Mr. Scott is a second offender under the terms and*

conditions of Title 15, Section 529.1. Based upon the prior from Section "F" for the crime of aggravated battery, is he admitting to the aggravated battery?

The defense attorney:

It's my understanding, Judge, that he's already acknowledged that at trial or that the Court has already found that that is a prior conviction, but yes, that is a fact, he does have a prior plea of guilty in the early 90's to the offense of aggravated battery.

The trial court:

Okay, that'll be part of the record.

The court . . . will now find him to be second offender under the terms and conditions of Title 15, Section 529.1.

Here, the trial court recounted the evidence of the appellant's multiple offender status produced at the first sentencing hearing, and no objection was made to that status; in fact, the defense attorney agreed with the court that a re-adjudication was not needed.

Citing State v. Johnson, 432 So. 2d 815 (La. 1983), the appellant complains that the trial court did not tell him of his right to a hearing and to remain silent during that hearing. However, State v. Johnson is quite different from the case at bar. In Johnson, the defendant was forced to take the stand and testify against himself in order to establish his multiple offender status. In the case at bar, at a two-day hearing on September 2 and October 21, 1999, which included testimony from a fingerprint expert, the

state offered evidence that proved Nick Scott was a habitual offender. At the resentencing hearing on July 31, 2001, the trial court simply corrected the sentence to correspond to Scott's status as a second rather than third offender. Thus, the trial court did not err when the appellant was resentenced.

CONCLUSION

Accordingly, for the foregoing reasons, the appellant's sentence is affirmed.

AFFIRMED