

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA** \* **NO. 2002-KA-1450**  
**VERSUS** \* **COURT OF APPEAL**  
**DWAYNE A. ANDERSON** \* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**  
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APPEAL FROM  
CRIMINAL DISTRICT COURT ORLEANS PARISH  
NO. 425-594, SECTION "K"  
Honorable Arthur Hunter, Judge  
\* \* \* \* \*  
**Judge Terri F. Love**  
\* \* \* \* \*

(Court composed of Judge Steven R. Plotkin, Judge Miriam G. Waltzer,  
Judge Terri F. Love)

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### **REVERSED AND REMANDED**

The State appeals the trial court's grant of the defendant's motion to quash the multiple bill. The State argues that the trial court erred in denying the use of three prior convictions for theft of less than \$100 as enhancement in a habitual bill of information. For the following reasons, we agree with the State and reverse the trial court's decision and remand for rehearing.

### **FACTS AND PROCEDURAL HISTORY**

Dwayne A. Anderson was charged with possession of cocaine in violation of La. R.S. 40:967(C). After trial on March 19, 2002, a six-member jury found him guilty of attempted possession of cocaine. He was sentenced on April 4th to serve one year in DOC. The State filed a multiple bill charging the defendant as a fourth felony offender, and defense counsel filed a motion to quash the bill. At a hearing on June 5th, the defense's motion to quash was granted.

We preterm discussion of the facts of this case because they are irrelevant to the determination of this issue.

### **LAW AND DISCUSSION**

At the June 5th hearing, the defense argued that the multiple bill filed against the defendant was illegal in that his current offense and his three prior offenses (all for theft of goods worth less than \$100) could not be enhanced under the Habitual Offender Statute because La. R.S. 14:67.10(B) (3) contains its own enhancement provision. That statute provides:

When the misappropriation or taking amounts to less than a value of one hundred dollars, the offender shall be imprisoned for not more than six months or may be fined not more than five hundred dollars, or both. If the offender in such cases has been convicted of theft or theft of goods two or more times previously, upon any subsequent conviction he shall be imprisoned, with or without hard labor, for not more than two years or may be fined not more than one thousand dollars, or both.

Thus, the first conviction for theft of goods worth less than \$100 is a misdemeanor; the second is a felony. The defendant contends that the felony theft conviction cannot be further enhanced.

The jurisprudence does not support the defendant's position. The State cites State v. Rogers, 555 So.2d 500 (La. App. 4 Cir. 1989), where the defendant, convicted of attempted simple burglary, was sentenced as a fourth offender. Like the defendant in the case at bar, he argued that using enhanced misdemeanor theft convictions to enhance his present conviction resulted in an illegal double enhancement. This court noted that a

similar argument was rejected by this Court. In *State v. Whittaker*, 496 So.2d 1103, 1104 (La. App. 4 Cir. 1986), *writ denied*, 494 So.2d 326 (La. 1986). The defendants claimed that

the theft convictions at issue had already been enhanced from misdemeanors to felonies under LSA-R.S. 14:67 and therefore could not be enhanced again under LSA-R.S. 15:529.1. This Court observed in each case that the predicate offense was a felony by virtue of the fact that it was second offense, not because the defendant already stands adjudicated a felon. In the instant case, the defendant's prior conviction under LSA-R.S. 14:67 was not enhanced of a prior felony conviction but it was itself a felony conviction by virtue of its status as a repeated offense. Thus, there is no impediment to the State's use of the felony conviction in a multiple bill proceeding.

State v. Rogers, 555 So.2d at 503. In Rogers, this court upheld the use of enhanced misdemeanor thefts in subsequent multiple offender proceedings.

Furthermore, this defendant has a total of eight convictions for theft of goods worth less than \$100. The multiple bill filed in this case listed cases 380-699 "D" in 1996, 391-922 "E" in 1997, and 403-571 "I" in 1998 as the three prior offenses. Additionally, the record indicates the defendant has four more prior convictions, which were used to enhance the 1996 and 1997 offenses. Thus the defendant is able to be sentenced as a fourth felony offender because he has at least three prior felony theft convictions, and those convictions were each enhanced from misdemeanors to felonies.

The defendant, through counsel, concedes that there is no meaningful difference between the case at bar and State v. Rogers. However, counsel argues that the use of enhanced misdemeanor convictions in a multiple bill violates the Double Jeopardy Clause of the Fifth Amendment as well as the

Eight Amendment's prohibition against cruel and unusual punishment. Counsel cites two cases from the Federal Ninth Circuit in support of the double jeopardy argument. However, persuasive as these cases may be, they are not authority in the instant matter. As to the Eight Amendment argument, we cannot consider a sentence that has not been imposed.

### **CONCLUSION**

Accordingly, for the reasons cited above, the trial court's grant of the defendant's motion to quash is reversed, and the case is remanded for a multiple offender hearing. The defendant's right to reassert the Fifth and Eighth Amendment issues after he is sentenced under La. R.S. 15:529.1 is preserved.

**REVERSED AND REMANDED**