

STATE OF LOUISIANA

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NO. 2002-KA-1451

VERSUS

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COURT OF APPEAL

MARK HAYNES

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 361-868, SECTION "I"
Honorable Raymond C. Bigelow, Judge

Judge Steven R. Plotkin

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

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COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED.

The issue in this appeal is whether the defendant was resentenced in accordance with this Court's order in his original appeal and whether he was present at resentencing. For the reasons below, we affirm defendant's sentences.

PROCEDURAL HISTORY

The defendant, Mark Haynes, was convicted of two counts of armed robbery after a trial on July 14, 1993. He was sentenced to serve forty years at hard labor without benefit of parole, probation, or suspension of sentence on each count, the sentences to run concurrently. The defendant appealed, alleging that the trial court erred in imposing excessive sentences. In an unpublished opinion, this Court affirmed Haynes' convictions, vacated his sentences, and remanded the case for resentencing. State v. Haynes, 93-2184 (La. App. 4 Cir. 3/15/94).

Prior to the appeal, the state filed a bill of information charging the defendant as a second felony offender, and after a hearing on November 17, 1993, the trial court found the defendant to be a second offender. The sentence as to count one was vacated, and he was sentenced under La. R.S. 15:529.1 to serve forty-nine and one-half years at hard labor, without benefit of parole, probation, or suspension of sentence. The sentence is to run

concurrently with that imposed for count two. The defendant's motion for appeal was granted, but the appeal was never lodged.

Thus, on March 15, 1994, when this Court vacated the original sentence on count one, the sentence had been already been vacated by the district court on November 17, 1993, and a forty-nine and one-half year term imposed. This Court had also vacated the forty-year sentence on count two, and that sentence was not reimposed. On April 22, 1994, the trial court took judicial notice of this Court's order to resentence Haynes and ordered that the sentence of November 17, 1993, remain in effect. There was no mention of the sentence on count two. Haynes filed a writ application (97-K-0140) which was granted in part; in that writ this Court ordered the trial court to resentence the defendant as to count two, and grant him an out of time appeal as to his multiple bill sentence and his sentence as to count two. In a second writ application (97-K-1787), Haynes complained that the trial court had not complied with this Court's orders to resentence him as to count two. However, he had been resentenced prior to this Court's consideration of the writ, and this Court ordered the trial court to grant Haynes an out-of-time appeal.

On September 5, 1997, the trial court resentenced the defendant to forty-nine and one-half years as a second offender on count one and to forty

years without the benefit of parole, probation, or suspension of sentence on count two; the sentences are to run concurrently. Haynes received credit for time already served. He filed a motion to reconsider sentence, which the trial court denied.

STATEMENT OF FACTS

The facts of this case were given in the earlier appeal as follows:

At trial, victim Arnold Frank Leary, Jr., a field account representative for Rentronics, testified that on December 29, 1992, he was working in the Fischer housing development collecting rent payments. After having made a \$70 collection, he left a receipt and began walking down three flights of steps. As he passed the second level, he saw a man waiting there. That man followed him, and meanwhile on the ground level, a second man appeared in front of Leary. The second man held a gun to Leary, told him to get against the wall, and a man Leary identified as Haynes went through Leary's pockets and took his money.

The second victim, Tammy Louise Riggins, testified that she was robbed at gunpoint as she sat in her car at a Circle K, store at 1926 Newton Street on January 20, 1993, at about 2 a.m. She said that she had opened her window to wave to a friend when a man she identified as Haynes walked up to the side of her car, put a gun to her face, and demanded her money. She handed him her purse. Haynes denied having committed both armed robberies.

ASSIGNMENT OF ERROR

In his brief for this appeal, the defendant, through counsel, makes four assignments of error. He argues first, that he was not resentenced in

accordance with this Court's order in his original appeal and that he was not present at resentencing; secondly, that the trial court erred in denying the motion to suppress the identification; thirdly, the evidence was insufficient to support the conviction; and fourthly, the defendant was denied effective assistance of counsel when his counsel failed to file a motion to sever the indictments pursuant to La. C.Cr.P. art. 495.1.

We will only consider the arguments concerning defendant's resentencing. Haynes' convictions were affirmed in his earlier appeal. Thus, we determine only the defendant's first assignment. When the defendant was sentenced in 1993, the Louisiana Sentencing Guidelines were in effect, and according to those guidelines, this Court determined that Haynes' sentences should have been between 210 and 240 months or seventeen and one-half to twenty years. This Court vacated the sentences so that the defendant could be resentenced in accordance with those guidelines. However, when the state filed a multiple bill and proved the defendant to be a second felony offender as to the first count, the minimum mandated sentence he could receive under La. R.S. 15:592.1 and La. R.S. 14:64 was forty-nine and one-half years without benefit of parole, probation or suspension of sentence. This is the exact term of defendant's sentence. Moreover, the Louisiana Sentencing Guidelines were amended in 1995. The

purpose of the amendment was “to delete the prohibition against setting a sentence aside for failure to conform to the sentencing guidelines” and “to return to statutory considerations for imposing a sentence of imprisonment.” Acts 1995, No. 942, §1. The defendant faced a sentence of between five and ninety-nine years on his second count. The trial court could have imposed the sentences to run consecutively because the two armed robberies involved different victims and occurred at separate times and places. Thus, we find defendant’s sentence of forty years, imposed to run concurrently with the multiple offender term, is not excessive.

The defendant also complains that he was not present on April 22, 1994, when his sentence was pronounced. The minute entry of that day states as follows:

This matter was brought before the court on this date to address the sentencing of the defendant as per order of the Fourth Circuit Court of Appeal.

The court took judicial notice that the sentence of this defendant was done under the provisions of R.S. 15:529.1, as a second offender. The court further found that the minimum sentence possible for the defendant to receive is forty-nine and one half years. The court considered the sentencing guidelines in imposition of sentencing.

The court then ordered that the sentence of November 17, 1993, remain in effect. Each count of the defendant is to run concurrently.

The trial court did not sentence the defendant on this date; the court simply

ordered the sentence of November 17, 1993, to remain in effect.

Furthermore, the record indicates that Mark Haynes was present at the hearing on September 5, 1997, when the trial court resentenced him. There is no merit in this assignment.

CONCLUSION

For the foregoing reasons, we find that the trial court did not err in sentencing the defendant on count two to forty years at hard labor, imposed to run concurrently with the multiple offender term. The defendant was present at his resentencing.

Therefore, the defendant's sentences are affirmed.

AFFIRMED.