

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2015-KA-1325**
VERSUS *
JOSEPH A. DAVIS * **COURT OF APPEAL**
* **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 502-050, SECTION "D"
Honorable Calvin Johnson, Judge

* * * * *

Judge Dennis R. Bagneris, Sr.

* * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Edwin A. Lombard,
Judge Madeleine M. Landrieu)

LANDRIEU J., CONCURS WITH REASONS

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**CONVICTIONS AFFIRMED; SENTENCES
AFFIRMED AND CLARIFIED IN PART;
AND REMANDED; MOTION TO
WITHDRAW GRANTED**

OCTOBER 05, 2016

The defendant, Joseph Davis, appeals his convictions and sentences arising from his guilty pleas to possession of a firearm by a convicted felon, a violation of La. R.S. 14:95.1, and possession of heroin, a violation of La. R.S. 40:966. Appointed appellate counsel raises no assignments of error and has filed a motion to withdraw. For the reasons that follow, we affirm the convictions and grant appellate counsel's motion to withdraw. With reference to the sentences, we affirm the fifteen-year sentence at hard labor imposed arising out of defendant's conviction on possession of heroin charges and his multiple offender adjudication and clarify that the sentence is to be served without the benefit of parole, probation, or suspension of sentence. We also affirm the fifteen-year sentence at hard labor assessed for defendant's conviction on possession of a firearm by a convicted felon; however, we remand to the trial court with instructions to add to that sentence a mandatory fine and denial of eligibility for parole, probation, and suspension of sentence as required by La. R.S. 14:95.1(B).¹

¹ La. R.S. 14:95.1 (B) provides in part that: "Whoever is found guilty of violating the provisions of this Section shall be imprisoned at hard labor for not less than ten nor more than twenty years

STATEMENT OF THE CASE

On November 18, 2010, the State filed a bill of information charging the defendant with one count of violating La. R.S. 14:95.1, relative to possession of a firearm by a convicted felon, and one count of violating La. R.S. 40:966(A), relative to possession of heroin with the intent to distribute. The defendant pled not guilty. The trial court denied defendant's motion to suppress and found probable cause to sustain the charges.

On September 21, 2011, the date of defendant's scheduled trial, the trial court denied defendant's motion to suppress a confession. After the motion was denied, the State amended the bill of information as to count two to charge the defendant with simple possession of heroin. Thereafter, defendant withdrew his prior not guilty pleas and entered guilty pleas to both charges. The State then filed a multiple bill charging the defendant as a second offender as to the possession of heroin count only. The defendant pled guilty to the multiple offender charge and waived any sentencing delays. Pursuant to a plea bargain agreement, the trial court sentenced defendant to serve fifteen years at hard labor on each count, the sentences to run concurrently.

After a finding by this Court that the defendant was entitled to a hearing to determine whether he was entitled to an out-of-time appeal,² the trial court granted the present appeal.

without the benefit of probation, parole, or suspension of sentence and be fined not less than one thousand dollars nor more than five thousand dollars.”

STATEMENT OF THE FACTS

Testimony taken from the preliminary and motion hearings of January 24, 2011 and September 21, 2011 established the following facts.

The only witness at the January 24, 2011 hearing was Daniel Hunter, a New Orleans Police Department detective assigned to the Sixth District Narcotics Unit. He testified that he arrested the defendant on September 24, 2010 at the instruction of Det. Daniel Black of the Sixth District Narcotics Unit. He stated that Det. Black had set up a surveillance of the intersection of LaSalle Street and Washington Avenue, an area adjacent to Al Davis Park, where the police had received tips of regular narcotics activities. During the surveillance, Det. Black stayed in constant radio communication with Det. Hunter and relayed all of his observations to Det. Hunter.

According to Det. Hunter, Det. Black saw the defendant talk to and receive U.S. currency from an unknown black male; access what appeared to be a stash of narcotics in a bag; remove the object from the bag and place the bag in his waistband. The unknown object was placed onto steps adjacent to 2717 La Salle Street and picked up by the unknown black male. Det. Hunter also testified that Det. Black observed a cyclist give the defendant money and in turn, the defendant gave the cyclist an object which the cyclist placed into his mouth. Approximately fifteen minutes later, Det. Black saw a truck driver give the defendant money and the defendant give the driver an object from his waistband.

Det. Hunter testified that Det. Black saw the defendant remove a firearm from the back of his waistband and place it under the La Salle Street house and also watched the defendant remove the bag from the front of his waistband and place it under a broken piece of siding under the house.

Based on the defendant's possession of the firearm, for safety reasons, Det. Black asked Det. Hunter to come to the scene to secure the defendant and the gun. Upon his arrival, Det. Hunter detained the defendant by placing him in handcuffs and putting him in the back of the police car. Next, Det. Hunter found the firearm hidden under the residence based on Det. Black's detailed instructions as to where to look. Shortly thereafter, Det. Black arrived at the scene and identified the defendant as the person he saw hide the firearm and engage in three apparent drug transactions. Det. Hunter said that Det. Black then retrieved the bag which he had seen the defendant hide under a broken piece of siding. There were two other bags within the bag. One contained twenty-two foils of a substance which subsequently tested positive for heroin. The other contained an unwrapped substance which also tested positive for heroin.

At the motion hearing on September 21, 2011, ATF Agent Tony Pierce testified that he interviewed the defendant following his arrest and transport to the Sixth District. Agent Pierce asserted that he provided the defendant with his Miranda rights from a card which he carried. The defendant signed the card. He indicated he understood his rights and wished to waive them in order to give a statement. The defendant then told Agent Pierce that he had recently returned to the New Orleans area from Dallas and had sold heroin three or four times a week for the preceding two weeks. A couple of days before his arrest, the defendant had purchased over \$400 dollars of heroin to sell. The defendant admitted to Agent

Pierce that he had sold heroin in front of 2717 LaSalle Street on the morning of the arrest. He also told Agent Pierce that he had stashed the heroin in the same place where Det. Black had retrieved it.

ERRORS PATENT

A review of the record for errors patent reveals three errors arising out of the imposition of illegally lenient sentences.

As to count one, possession of a firearm by a convicted felon, the trial court sentenced the defendant to fifteen years at hard labor. However, it did not impose the restrictions mandated by La. R.S. 14.95.1, which requires the sentence be served without the benefit of parole, probation, or suspension of sentence.

As to count two, the simple possession of heroin charge, the trial court sentenced the defendant to fifteen years at hard labor pursuant to defendant's adjudication as a second felony offender. Again, however, the trial court failed to include certain statutory prohibitions as part of the sentence. Specifically, the trial court failed to state that the sentence should be served "without benefit of probation or suspension of sentence" as mandated by La. R.S. 15:529.1(G) for sentences imposed under the Habitual Offender Statute.

Although the trial court failed to impose these statutory sentencing restrictions, this Court need not take any corrective action to give effect to the restrictions. La. R.S. 15:301.1(A) and (C) provide that the statutory restrictions are included in the sentence given, regardless of whether or not they are specifically imposed by the sentencing court.³ Moreover, our established

³ La. R.S. 15:301.1 provides in relevant part:

A. When a criminal statute requires that all or a portion of a sentence imposed for a violation of that statute be served without benefit of probation, parole, or suspension of sentence, each sentence which is imposed under the provisions of

jurisprudence holds that Paragraphs A and C of La. R.S. 15:301.1 “do not call for amendment as no correction is required. Rather, that which was legislatively mandated at the time of sentencing is recognized as having existed statutorily without pronouncement being necessary.” See State v. Williams, 2000-1725, pp. 14-15 (La. 11/28/01), 800 So. 2d 790, 801. Therefore, although we clarify that defendant’s sentences are to be served with the necessary statutory prohibitions noted herein, this Court need not take any corrective action to impose the restrictions that the trial court failed to assess. State v. Breaux, 2012-0555, pp. 2-3 (La. App. 4 Cir. 2/27/13), 110 So. 3d 281, 283. Notwithstanding, for the reasons more fully expressed herein below, as regards the trial court’s failure to specifically provide that the defendant’s sentence for his firearm possession conviction should be served without benefit of probation, parole, or suspension of sentence, we remand the matter to the trial court to correct the sentence.

The third error patent pertains to defendant’s guilty plea to his charge of being a convicted felon in possession of a firearm. In addition to requiring that any sentence be served without the benefit of parole, probation, or suspension of

that statute shall be deemed to contain the provisions relating to the service of that sentence without benefit of probation, parole, or suspension of sentence. The failure of a sentencing court to specifically state that all or a portion of the sentence is to be served without benefit of probation, parole, or suspension of sentence shall not in any way affect the statutory requirement that all or a portion of the sentence be served without benefit of probation, parole, or suspension of sentence.

C. The provisions of this Section shall apply to each provision of law which requires all or a portion of a criminal sentence to be served without benefit of probation, parole, or suspension of sentence, or of any one of them, any combination thereof, or any substantially similar provision or combination of substantially similar provisions.

Because La. R.S. 15:529.1(G) only restricts probation or suspension of sentence, and does not include a restriction on parole, Paragraph C is applicable to this matter.

sentence, La. R.S. 14:95.1(B) also requires the imposition of a fine of not less than one thousand dollars nor more than five thousand dollars. In the present matter, the trial court did not impose the mandatory fine. Because the amount of the fine assessed falls within a discretionary range, we remand this part of the defendant's sentence to the trial court to impose an appropriate fine pursuant to La. R.S. 14:95.1(B). See State v. Simms, 2013-0575 (La. App. 4 Cir. 6/18/14), 143 So.3d 1258.

As noted herein above, the trial court's failure to state that this sentence should be served without the benefit of parole, probation, or suspension of sentence requires no corrective action by this Court. However, inasmuch as a remand is needed for the imposition of a mandatory fine, we also instruct the trial court to correct the sentence to expressly state that it should be served without the benefit of parole, probation, or suspension of sentence.

ASSIGNMENTS OF ERROR

Defendant raises seven pro se assignments of error. However, appointed appellate counsel raises no assignments of error. Instead, counsel represents that upon review, there are no non-frivolous issues for appeal, and as such, requests that he be allowed to withdraw as counsel. This Court shall first consider the pro se assignments of error raised by the defendant; and thereafter, review appellate counsel's motion to withdraw.

Defendant's Pro Se Assignments of Error No. 1-6

The first six pro se assignments of error asserted by the defendant address trial court rulings made at the preliminary hearing and the motions to suppress the physical evidence and the confession. They include 1) whether police had probable cause to arrest defendant based on information received via radio

transmission; 2) whether police had probable cause to search property without a search warrant or consent after defendant was arrested, handcuffed, and placed inside a patrol car; 3) whether defendant's confession to a federal ATF agent was intelligently, voluntarily, and knowingly made even though he was not advised that any statement could be used in state court proceedings; 4) whether the State's introduction of crime laboratory test results at the preliminary hearing violated due process and sixth amendment rights; 5) whether the State's use of un-objected to hearsay testimony at the motion to suppress evidence hearing violated due process and sixth amendment rights; and 6) whether hearsay testimony at the preliminary hearing provided probable cause for arrest.

Generally, a valid, unqualified plea of guilty waives all non-jurisdictional defects in the proceedings prior to the plea. State v. Crosby, 338 So. 2d 584 (La. 1976). A validly entered guilty plea waives any right a defendant might have had to question the merits of the state's case and the factual basis underlying the conviction. State v. Bourgeois, 406 So. 2d 550 (La. 1981). A validly entered guilty plea also dispenses with any appellate review of the state's case against the defendant. State v. Shaw, 49,876, pp. 5-6 (La. App. 2 Cir. 5/20/15), 166 So.3d 1185, 1189, writ den. 2015-1247 (La. 6/3/16), ___ So. 3d ___, 2016 WL 3501353. A defendant may be allowed appellate review if, at the time he enters a plea of guilty, he expressly stipulates that he does not waive his right to appeal a previous adverse ruling in the case. Crosby; State v. Cambrice, 2004-0827 (La. App. 4 Cir. 9/8/04), 884 So.2d 628.

Here, a review of the transcript of the defendant's guilty plea reveals he did not reserve his right to appellate review of any of the trial court's pre-trial rulings. Accordingly, defendant is not entitled to appellate review of these alleged errors.

Pro Se Assignment of Error No. 7- Ineffective Assistance of Counsel

Defendant's seventh and last assignment of error maintains his trial attorneys were ineffective for not perfecting his first six claims for appellate review.

Generally, claims of ineffective assistance of counsel are more properly raised by application for post-conviction relief in the trial court where an evidentiary hearing can be conducted if necessary. State v. Quezada, 2013-1318 (La. App. 4 Cir. 5/21/14), 141 So.3d 906, writ den., 2014-1328 (La. 1/23/15), 159 So.3d 1057. However, if the record is sufficient, the claims may be addressed on appeal. Id.

In the instant matter, the record contains all of the transcripts necessary for a review of the errors the defendant alleges in his ineffective assistance of counsel claim. We acknowledge that such a review would necessarily entail consideration of the merits of the six assignments of error that this Court has noted the defendant failed to preserve for appellate review. However, in light of the fact that appellate counsel alleges there are no non-frivolous errors ripe for appeal and appellate counsel did not represent the defendant at trial, this Court elects to review defendant's ineffective assistance of counsel assignment of error.

The law regarding the standard for proving an ineffective assistance of counsel claim is well-settled. Such claims are reviewed under the two-part test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); State v. Brooks, 94-2438, p. 6 (La. 10/16/95), 661 So. 2d 1333, 1337 (on rehearing); State v.

Robinson, 98-1606, p. 10 (La. App. 4 Cir. 8/11/99), 744 So.2d 119, 126. In order to prevail, the defendant must show both that: (1) counsel's performance was deficient; and (2) he was prejudiced by the deficiency. Brooks; State v. Jackson, 97-2220, p. 8 (La. App. 4 Cir. 5/12/99), 733 So.2d 736, 741. Counsel's performance is ineffective when it is shown that he made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 686, 104 S.Ct. at 2064; State v. Ash, 97-2061, p. 9 (La. App. 4 Cir. 2/10/99), 729 So.2d 664, 669. Counsel's deficient performance will have prejudiced the defendant if he shows that the errors were so serious as to deprive him of a fair trial. To carry his burden, the defendant must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different; "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 693, 104 S.Ct. at 2068; State v. Guy, 97-1387, p. 7 (La. App. 4 Cir. 5/19/99), 737 So.2d 231, 236.

In the matter before us, the defendant's allegations of ineffective assistance of counsel relate back to the six assignments of error he alleges his counsel failed to preserve for review. As previously referenced, we shall conduct a substantive review of these alleged errors to determine the merits of defendant's ineffective assistance of counsel claim.

Probable Cause To Arrest

This error argues there was no probable cause to arrest the defendant based solely on information Det. Hunter received over the radio from Det. Black. This argument suggests that defendant was illegally detained and de facto arrested when

Det. Hunter handcuffed the defendant and placed him in the police car before the retrieval of the hidden gun.

This alleged error lacks merit for two reasons. First of all, the information provided to Det. Hunter by Det. Black, wherein Det. Black reported the defendant had engaged in three apparent illegal drug deals and had concealed a weapon, provided ample grounds for an investigatory stop of the defendant, if not probable cause for an arrest. See State v. Lazard, 2008-0677 (La. App. 4 Cir. 12/10/08), 2 So.3d 492.

This argument also fails because the fact that defendant was handcuffed and placed in the back of the police car did not necessarily equate his detention to an arrest for purposes of triggering any due process considerations owed defendant pursuant to an arrest. Our jurisprudence allows officers to handcuff and otherwise use objectively reasonable force to detain suspects without converting a legal investigatory stop into an illegal, de facto arrest. State v. Adams, 2001-3231, pp. 4-5 (La. 1/14/03), 836 So.2d 9, 12. In Lazard, this Court also concluded that the decision to handcuff the defendant pending the arrival of a canine unit did not convert an investigatory stop to an arrest. The decision highlighted that the defendant was handcuffed for only a brief time until he was formally arrested and that the defendant might have been a flight risk. Lazard, p. 9, 2 So. 3d at 498.

Here, Det. Hunter was alone when he arrived at the scene. He was armed with Det. Black's observations that the defendant had engaged in three apparent narcotics sales and had concealed a firearm and a bag which contained narcotics. Det. Hunter had limited options available to him to take control of the situation and to prevent the defendant from fleeing while the gun was retrieved. Based on the circumstances as perceived by Det. Hunter, we find the decision to handcuff the

defendant and place him in a police car was reasonable and did not constitute an illegal, de facto arrest that resulted in any violation of defendant's right to due process. Accordingly, counsel's failure to preserve this issue for appellate review did not prejudice the defendant.

Search Warrant/Consent To Search

In his second assignment of error, the defendant argues that the seizure of the physical evidence was illegal because the detectives lacked a search warrant or consent.

The State has the burden of proving the admissibility of all evidence seized without a warrant. La. C.Cr.P. art. 703(D). The standard of review of a trial court's ruling on a motion to suppress was set out in State v. Anderson, 2006-1031 (La. App. 4 Cir. 1/17/07), 949 So. 2d 544, as follows:

Trial courts are vested with great discretion when ruling on a motion to suppress and, consequently, the ruling of a trial judge on a motion to suppress will not be disturbed absent an abuse of that discretion. State v. Long, 2003-2592, p. 5 (La.9/9/04), 884 So.2d 1176, 1179 (citations omitted); State v. Oliver, 99-1585, p. 4 (La. App. 4 Cir. 9/22/99), 752 So.2d 911, 914 (trial court vested with great discretion when ruling on a motion to suppress). The district court's findings of fact on a motion to suppress are reviewed under a clearly erroneous standard and the district court's ultimate determination of Fourth Amendment reasonableness is reviewed de novo. State v. Pham, 2001-2199 (La.App.1/22/03), 839 So.2d 214, 218. Accordingly, "on mixed questions of law and fact, the appellate court reviews the underlying facts on an abuse of discretion standard, but reviews conclusions to be drawn from those facts de novo." Id. (citation omitted). "Where the facts are not in dispute, the reviewing court must consider whether the trial court came to the proper legal determination under the undisputed facts." Id. (citation omitted).

Anderson, p. 2, 949 So. 2d at 546.

Here, the defendant maintains that the State violated the Fourth Amendment's prohibition against unreasonable searches and seizures, suggesting that he had a reasonable expectation of privacy in the La Salle Street property

where the narcotics and the firearm were seized. We find no merit to this argument.

Defendant's expectation of privacy, in which he claims entitlement to place illegal contraband onto the property of another without government intrusion, is not recognized by society as reasonable. See State v. Campbell, 93-1959 (La. App. 4 Cir. 5/26/94), 640 So.2d. 627. The record indicated Det. Black clearly observed the defendant place the firearm under the residence at 2717 LaSalle Street and the bag of narcotics under a piece of broken siding on the house. The defendant was not concealed from the view of any person who happened to be on the sidewalk or in the street. Det. Hunter's testimony also established that the defendant did not live at 2717 LaSalle Street; and as such, had no reasonable expectation of privacy at that location.

Where the accused has no reasonable expectation of privacy in the area invaded, neither a warrant nor an exception to the warrant requirement is needed for the evidence to be admitted. State v. Ford , 39 So.2d 729 (La. 1980). In this case, the State proved the admissibility of the evidence. Considering established jurisprudence, the trial court correctly refused to suppress the physical evidence seized by the two detectives. Therefore, defense counsel was not ineffective in failing to preserve the defendant's right to review the denial of the motion to suppress the physical evidence.

Suppression of the Confession

Defendant's third assignment of error asserts that his confession to ATF Agent Pierce should have been suppressed. Defendant makes a two-fold argument in support. He contends that the trial court should have suppressed the confession because there were no witnesses nor was a video/audio recording made. He also

avers that the confession was unknowingly made because Agent Pierce did not advise him that any statement could be used in the state court proceeding. We find no merit in either claim.

This Court set forth the applicable law on the admissibility of inculpatory statements in State v. Butler, 2004-0880 (La. App. 4 Cir. 1/12/05), 894 So. 2d 415, as follows:

It is well settled that before the state may introduce an inculpatory statement or confession into evidence, it must affirmatively show that the statement was free and voluntary and not the result of fear, duress, intimidation, menace, threats, inducements, or promises. La. R.S. 15:451; La. C.Cr.P. art. 703(D); State v. Gradley, 97-0641 (La. 5/19/98), 745 So. 2d 1160, 1166. The State must prove that the accused was advised of his Miranda⁴ rights and voluntarily waived these rights in order to establish the admissibility of a statement made during custodial interrogation. State v. Green, 94-0887, pp. 9-10 (La.5/22/95), 655 So.2d 272, 280; State v. Labostrie, 96-2003, p. 5 (La. App. 4 Cir. 11/19/97), 702 So.2d 1194, 1197. A court must look to the totality of the circumstances surrounding the confession to determine its voluntariness. State v. Lavalais, 95-0320, p. 6 (La. 11/25/96), 685 So. 2d 1048, 1053. The testimony of police officers alone can be sufficient to prove the defendant's statements were freely and voluntarily given. State v. Jones, 97-2217, p. 11 (La. App. 4 Cir. 2/24/99), 731 So. 2d 389, 396.

Butler, p. 4, 894 So. 2d at 418.

As to defendant's claim that his confession should have been excluded because it was not witnessed or recorded, the defendant references no jurisprudence which suggests that a waiver of rights must be recorded or witnessed by a third person in order to be valid. Furthermore, he cites no jurisprudence which suggests that Agent Pierce was required to specifically inform him that his statement could be used in both federal court and state court. However, even if the defendant labored under a misconception as to where he would be prosecuted, Agent Pierce advised him that any statement could be used in a court; and

notwithstanding that advice, the defendant chose to waive his right to remain silent and voluntarily provided the inculpatory statement.

The record supports that the trial court accepted Agent Pierce's testimony that he advised the defendant of his Miranda rights from the waiver of rights form⁵ and that the defendant voluntarily provided a statement. As credibility decisions rest with the trial court as the trier of fact, this Court is compelled to accept as true Agent Pierce's factual assertions, absent a finding the trial court abused its discretion in accepting the testimony. State v. Goodman, 99-2352, pp. 3-4 (La. App. 4 Cir. 10/13/99), 746 So. 2d 693, 695; State v. Perez, 99-2063 (La. App. 4 Cir. 9/15/99), 744 So. 2d 173.

Neither of the defendant's arguments supports error on the part of the trial court in denying the motion to suppress the confession. As such, counsel was not ineffective for failing to preserve this alleged error for review.

Due Process/ Sixth Amendment Confrontation Clause

In the defendant's fourth, fifth, and sixth assignments of error, he argues that his right to confront witnesses against him was violated at the combined pretrial motion to suppress physical evidence and preliminary hearing. In assignment of error number four, he argues that the State's introduction of the crime lab report violated his right to confrontation. In assignments of error five and six, he argues

⁴ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

⁵ Agent Pierce read into the record the specific rights set out on the form. Those rights were the right to remain silent; that anything you say can be used against you in court; that you have the right to talk to a lawyer and to have a lawyer with you during questioning; if you cannot afford a lawyer one will be appointed for you if you wish before any questioning begins; and if you decide to answer questions now without a lawyer, you have the right to stop answering at any time.

that the admission of hearsay testimony at the combined hearing violated his right to confrontation.

We find no merit in any of these assignments of error. First, hearsay is permitted at a preliminary examination hearing under the Louisiana Code of Evidence. See La. C.E. art. 1101(B)(4), which provides that, in preliminary examinations in criminal cases, “the court may consider evidence that would otherwise be barred by the hearsay rule.”

The Louisiana Supreme Court also opined in State v. Weathersby, 2009-2407, p. 3 (La. 3/12/10), 29 So. 3d 499, 501, that the “defendant’s constitutionally guaranteed right to confront witnesses and to have compulsory process for obtaining them is only secured at trial and not during a pre-trial hearing,” citing State v. Harris, 2008-2117 (La. 12/19/08), 998 So. 2d 55. See also State v. Shirley, 2008-2106 (La. 5/5/09), 10 So. 3d 224, in which the Court specifically addressed the admissibility of hearsay testimony at a pretrial motion to suppress hearing and concluded that such evidence is admissible. Hence, the trial court in the present matter did not err in allowing hearsay and the introduction of the crime lab report into evidence at the preliminary hearing.

Because the defendant’s fourth, fifth, and sixth assignments of error lack merit, defendant’s counsel was not ineffective in failing to preserve these issues for appellate review.

Plea Agreement

Our review of the record also supports that defendant’s claims of ineffective assistance of counsel lack merit based upon the favorable plea agreement negotiated by defendant’s trial counsel. As part of the plea agreement negotiated by his attorneys, the State amended the original charge of possession of heroin

with the intent to distribute, a violation of La. 40:966(A), to the lesser charge of possession of heroin, a violation of La. R.S. 40:966(C). The original charge exposed the defendant to a maximum sentence of fifty years pursuant to La. R.S. 40:966(B), whereas the maximum sentence for possession of heroin is ten years. Moreover, the plea deal encompassed the State's agreement to charge the defendant only as a second offender on the simple possession of heroin count, instead of a predicate offense for possession of heroin with the intent to distribute with a prior conviction for first degree robbery.⁶ If the defendant had been convicted on the possession of heroin with intent to distribute offense, he could have been charged as a third offender for violating La. R.S. 40:966(A). One of the defendant's prior felony convictions was for a crime of violence and the other a violation of the Uniform Controlled Dangerous Substances Law, which is punishable by imprisonment for ten years or more; therefore, absent the plea agreement, which reduced the heroin charge to simple possession, the defendant could have faced a mandatory life sentence without the benefit of parole, probation, or suspension of sentence pursuant to La. R.S. 15:529.1(A)(3)(b).

Clearly, the terms of the plea agreement under which the defendant received only a fifteen-year sentence on each count to run concurrently were highly favorable to him. There is nothing in the record to indicate that the State would have agreed to the plea bargain if the defendant had sought to preserve his rights to appellate review of the pretrial rulings pursuant to Crosby.

Upon review, the defendant's ineffective assistance of counsel error fails because there is no merit to his underlying claims that he was prejudiced by trial

⁶ This conviction formed the basis for the charge of being a convicted felon in possession of a firearm.

counsel's failure to preserve the above referenced errors for appellate review. Moreover, based on the fifteen-year sentence imposed as a result of the plea agreement in lieu of a potential mandatory sentence of life imprisonment, defendant failed to show that counsel's performance was deficient and/or that he was prejudiced by any deficiency. See Strickland v. Washington, *infra*.

APPOINTED COUNSEL'S MOTION TO WITHDRAW

Appointed counsel has raised no assignments of error. Instead, counsel has 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. 4 Cir. 1990) and has filed a motion to withdraw. See also State v. Jyles, 96-2669 (La. 12/12/97), 704 So.2d 241.

This Court's review of the record supports that appellate counsel has done a detailed review of the procedural history of the case and that after a conscientious review of the record, the motion to withdraw is premised on his good-faith belief that there are no non-frivolous issues for appeal. In particular, appellate counsel's review of the record notes that the defendant tendered a facially valid guilty plea, and thereby, waived review of all errors except for non-jurisdictional ones-which have not been found in the record.

As per State v. Benjamin, this Court has also reviewed the pleadings, minute entries, and the bill of information contained in the appeal record. The record supports that the defendant was properly charged with one count of violating La. R.S. 14:95.1 and one count of violating La. R.S. 40:966. The record also shows the bill of information was signed by an assistant district attorney, the defendant was present with counsel at arraignment at all pretrial motion and preliminary

hearings, as well as at the entry of his guilty pleas and at sentencing. The record also documents the defendant waived delays between the entry of his guilty pleas and his sentencing. As referenced herein, the defendant's sentences contain errors patent. However, because the sentencing errors rendered the sentences illegally lenient, appellate counsel properly did not raise these errors. Accordingly, we grant appellate counsel's motion to withdraw.

CONCLUSION

Wherefore, for the reasons outlined hereinabove, we affirm the defendant's convictions and affirm in part the sentences imposed. We remand only as to defendant's sentence arising out of his conviction for being a felon in possession of a firearm for imposition of a mandatory fine and language denying eligibility for parole, probation, or suspension of sentence. Further, we grant appellate counsel's motion to withdraw.

**CONVICTIONS AFFIRMED;
SENTENCES AFFIRMED AND
CLARIFIED IN PART; AND
REMANDED; MOTION TO
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