

STATE OF LOUISIANA

NO. 17-KA-222

VERSUS

FIFTH CIRCUIT

DERRICK GUMMS

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 15-1144, DIVISION "M"
HONORABLE HENRY G. SULLIVAN, JR., JUDGE PRESIDING

November 15, 2017

SUSAN M. CHEHARDY
CHIEF JUDGE

Panel composed of Judges Susan M. Chehardy,
Jude G. Gravois, and Robert A. Chaisson

AFFIRMED.

SMC

JGG

RAC

COUNSEL FOR PLAINTIFF/APPELLEE,
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DEFENDANT/APPELLANT,
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In Proper Person

CHEHARDY, C.J.

On appeal, defendant challenges his adjudication as a second felony offender. For the following reasons, we affirm defendant's underlying convictions and sentences as well as defendant's multiple offender adjudication and enhanced sentence.

Facts and Procedural History

Because defendant pled guilty, the facts were not fully developed at a trial. However, during the guilty plea colloquy, the State provided the following factual basis for the guilty pleas:

Derrick Gumms engaged in conduct that furthered the aims of an Enterprise by engaging in a pattern of racketeering activity and conspired with members of that Enterprise to distribute controlled dangerous substances, including cocaine, heroin, and marijuana.

This conduct, which occurred between 2006 and 2015, included participating in the operation of a narcotics distribution network on the West Bank of Jefferson Parish wherein a violent street gang, named by its members the "Harvey Hustlers," obtained controlled dangerous substances from associates and Enterprise members who transported the drugs into the metropolitan New Orleans area.

The ranking members of the Harvey Hustlers then directed the conversion of these drugs into a saleable form, such as converting powder cocaine to crack cocaine, and provided the drugs to rank and file Harvey Hustlers who sold the drug product on the street for the profit of Enterprise members.

Members of the Enterprise who engaged in this activity on a daily basis, other than when one or more of them were in jail, included Mr. Gumms, multiple individuals named in the indictment, and others not included in the indictment.

This activity included all of them working on the streets of Scotsdale, in sight of each other, selling cocaine, heroin or marijuana.

On February 26, 2015, the Jefferson Parish grand jury indicted Derrick Gumms, defendant herein, and twenty other co-defendants on thirty criminal counts for various acts of racketeering committed in furtherance of a narcotics distribution network in Jefferson Parish, operated by a street gang known as the "Harvey Hustlers." Specifically, defendant was charged with three counts:

racketeering, in violation of La. R.S. 15:1352; conspiracy to distribute cocaine, in violation of La. R.S. 40:979 and La. R.S. 40:967(A); and conspiracy to distribute heroin and marijuana, in violation of La. R.S. 40:979 and La. R.S. 40:966(A). At his arraignment on March 9, 2015, defendant pled not guilty to the charged offenses.

On January 28, 2016, defendant withdrew his prior pleas of not guilty and pled guilty as charged. In accordance with the plea agreement, the court sentenced defendant as follows: for racketeering, twenty years imprisonment at hard labor; for conspiracy to distribute cocaine, fifteen years imprisonment at hard labor; and for conspiracy to distribute heroin,¹ twenty years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The court further ordered that all of defendant's sentences be served concurrently.

Also on January 28, 2016, the State filed a multiple offender bill of information on the conspiracy to distribute cocaine count alleging defendant to be a second felony offender, to which defendant stipulated. The trial court vacated defendant's sentence for conspiracy to distribute cocaine, and resentenced defendant as a second felony offender under La. R.S. 15:529.1, to twenty years imprisonment at hard labor without the benefit of probation or suspension of sentence to run concurrently with his other sentences.

On April 5, 2017, defendant filed an application for post-conviction relief requesting an out-of-time appeal, which was granted by the trial court on April 10, 2017. This appeal follows.

¹ While defendant was charged with one count of conspiracy to distribute heroin and marijuana (along with seventeen other co-defendants) and pled guilty as charged, the trial judge informed him during the colloquy that the Schedule I narcotic drug defendant was pleading guilty to was heroin; thus he was advised of the sentencing range for conspiracy to distribute heroin and he was later sentenced on conspiracy to distribute heroin only.

Discussion

On appeal, defendant raises one counseled and two *pro se* assignments of error: first, in his counseled assignment, defendant alleges that, during the multiple bill hearing, the district court failed to advise defendant of his right to remain silent before advising him of the allegations of the multiple bill, which invalidated his adjudication as a second felony offender; in his first *pro se* assignment, defendant argues that the State improperly enhanced a juvenile conviction in his multiple offender bill of information; and finally, in his second *pro se* assignment, defendant alleges that he received ineffective assistance of counsel at the multiple offender hearing.

In his sole counseled assignment of error, defendant argues the trial court erred in failing to advise him of his right to remain silent before questioning him about the substance of the allegations in the multiple bill, thus, invalidating his adjudication as a second felony offender.

In response, the State concedes that, during the multiple offender proceeding, the trial court did not inform defendant of his right to remain silent prior to questioning defendant about the allegations of the multiple bill. The State asserts that defendant signed a waiver of rights form *prior* to the commencement of the trial court's questioning, which informed him of his privilege against self-incrimination and satisfied the requirement that he be advised of his constitutional rights.

La. R.S. 15:529.1(D)(1)(a) requires that, when the State seeks enhanced sentencing for a multiple offender, the defendant must be advised of the specific allegations contained in the multiple offender bill of information and his right to a formal hearing at which the State must prove its case. Implicit in this requirement is the additional requirement that the defendant must be advised of his constitutional right to remain silent. *State v. Johnson*, 432 So.2d 815, 817 (La.

1983); *State v. Walker*, 01-348 (La. App. 5 Cir. 8/28/01), 795 So.2d 459, 463, *writ denied*, 01-2788 (La. 10/4/02), 826 So.2d 1115.

At the multiple offender hearing, the defendant may admit or deny the allegations of the multiple bill “after being duly cautioned as to his rights... .” La. R.S. 15:529.1(D)(3); *State v. Johnson, supra* (a trial court should, prior to a defendant’s admission, advise defendant “of his right to a formal hearing, to have the [prosecution] prove its case under the multiple offender statute, [and] of his right to remain silent”).

Generally, the failure of the trial court to advise the defendant of his right to a hearing and his right to remain silent is not considered reversible error where the defendant’s multiple offender status is established by competent evidence offered by the State at a hearing rather than by admission of the defendant. *State v. Knight*, 01-881 (La. App. 5 Cir. 2/13/02), 811 So.2d 947, 949. However, when the guilt of the defendant is proven by his own stipulation to the multiple offender bill of information without having been informed of his right to a hearing or his right to remain silent, by either the trial court or his attorney, there may be reversible error. *Id.*

Louisiana jurisprudence further provides that if the record reflects that the defendant was advised of his multiple offender rights by the trial judge and/or his attorney, then the defendant intelligently waived his rights. *State v. Hart*, 10-905 (La. App. 5 Cir. 5/10/11), 66 So.3d 44, 48, *writ denied*, 11-1178 (La. 11/18/11), 75 So.3d 448. Importantly, the requirements of La. R.S. 15:529.1(D)(1)(a) that the court inform a defendant of the allegations in a multiple offender bill of information, and of his right “to be tried as to the truth thereof according to law,” should not serve as technical traps for an unwary but otherwise conscientious judge. *State v. Cook*, 11-2223 (La. 3/23/12), 82 So.3d 1239, 1240.

In *State v. Williams*, 05-582 (La. App. 5 Cir. 2/14/06), 924 So.2d 327, 332-33, this Court recognized on error patent review that the record reflected that the trial judge failed to advise the defendant of his multiple offender rights prior to his stipulation to the multiple bill. This Court found that, although the judge did not advise the defendant in court of his multiple offender rights, the colloquy indicated that defense counsel had advised the defendant of those rights and the record contained a waiver of rights form that listed the multiple offender rights. This Court also noted that the form was dated on the same date that the defendant stipulated to the multiple bill, which was signed by the defendant, his counsel, and the judge. After considering the exchange that took place among the parties and the waiver of rights form, this Court found that the defendant was adequately advised of his rights before he stipulated to the multiple bill and that he knowingly and intelligently waived those rights.²

In this case, before the multiple offender proceeding commenced, the trial court called a recess to allow defense counsel to confer with defendant about the multiple offender waiver of rights form. Once the proceeding commenced, defense counsel informed the court that he had reviewed the multiple bill and multiple offender waiver of rights form with defendant, who had read the form and executed it, agreeing to “plead guilty” to being a second felony offender. Defense counsel then provided the fully-executed multiple offender waiver of rights form, which was signed by defendant, his attorney, and the trial judge, to the trial judge, who asked defendant if he had reviewed the form in its entirety with his attorney. Defendant agreed that he had reviewed the waiver of rights form and acknowledged his signature on the document.

² See also *State v. Oliver*, 14-428, p. 11 (La. App. 5 Cir. 11/25/14), 165 So.3d 970, 976, writ denied, 14-2693 (La. 10/9/15), 178 So.3d 1001, where this Court found that although the trial judge did not advise the defendant of his right to remain silent at the multiple bill proceedings, based on the context of the record, the waiver of rights form was executed prior to the multiple bill stipulation, and the form contained a proper advisal.

The waiver of rights form in question indicated that, by stipulating to the allegations in the multiple offender bill, defendant was giving up his right to “plead not guilty” and to have a hearing on the multiple bill. The form further explained the State’s burden at a multiple bill hearing. The form also indicated that defendant understood he had the right to remain silent throughout the hearing but was waiving this right. Defendant indicated that he was satisfied with the way his attorney and the court had explained his rights and the consequences of his stipulation. He indicated that he was not forced, coerced, or threatened into stipulating to the multiple bill.

After receiving defendant’s waiver of rights form, the court advised defendant of his right to an attorney. The court then asked defendant whether he was the same person who pled guilty to the predicate offense as charged in the multiple bill. Defendant answered affirmatively. The trial court went on to advise defendant of his multiple offender rights, including his right to “plead not guilty,” his right to a hearing, and his right to remain silent at the hearing. Defendant indicated that he understood his rights and that by stipulating to the multiple bill he would be waiving them. Defendant indicated that he was satisfied with the representation of his attorney and the court’s explanation of his rights, and reiterated that he had not been forced, coerced, or threatened into “pleading guilty.” Defendant further indicated that he understood the possible legal consequences of “pleading guilty” and wished to “plead guilty.” The court accepted defendant’s “guilty plea” as a second felony offender as knowingly, intelligently, freely, and voluntarily made.

In the present case, the trial judge did not verbally advise defendant of his right to remain silent on the record until *after* defendant had admitted to his prior felony conviction. However, the well-executed waiver of rights form reflects that defendant was advised in writing of his right to remain silent, and defense counsel

attests that he advised defendant of his rights according to the waiver of rights form before the multiple offender proceeding began.

Noting that the requirements of La. R.S. 15:529.1 “should not serve as technical traps for an unwary but otherwise conscientious judge,” *State v. Cook, supra*, we find that the well-executed waiver of rights form completed before the proceeding constituted a proper rights advisal in advance of defendant’s stipulation to the allegations of the multiple bill. Accordingly, we find no violation of defendant’s constitutional rights and no error in his adjudication. This assignment of error lacks merit.

In his first *pro se* assignment of error, defendant challenges the validity of the multiple offender bill of information used to charge him as a second felony offender. Specifically, defendant claims that the multiple bill seeks to enhance his underlying conviction for conspiracy to distribute cocaine, which he contends he committed as a juvenile. He further contends that he should not have been multiple billed using a 2009 predicate conviction, which occurred *after* his underlying 2005 offense.

First, by stipulating to the multiple bill, defendant waived his right to a hearing and any possible non-jurisdictional defects. An unconditional plea, willingly and knowingly made, waives any and all non-jurisdictional defects and bars a defendant from later asserting on appeal that the State failed to produce sufficient proof at the multiple offender hearing. *State v. Schaefer*, 97-465 (La. App. 5 Cir. 11/25/97), 704 So.2d 300, 304. Accordingly, defendant waived any challenges to the multiple bill.

Even if this challenge had been preserved, it would lack merit. In this case, the multiple offender bill of information alleged defendant was a second felony offender based on defendant’s December 15, 2009 predicate conviction for distribution of marijuana within one thousand feet of a church, in violation of La.

R.S. 40:981.3. The State sought to enhance defendant's underlying conviction of conspiracy to distribute cocaine, which is based on offenses that occurred between 2006 and 2015. Defendant admitted that he committed a series of offenses during this time frame.

Defendant reported his birth date as January 9, 1989, making him a juvenile up until his eighteenth birthday on January 9, 2007. Thus, any offenses that occurred after 2007 occurred after defendant had attained majority.

Further, based on the date range of the underlying offense extending until 2015, defendant's argument that a 2009 conviction could not be used as a predicate in the multiple bill lacks merit because the underlying offense could have been committed at any time between 2009 and 2015, and still fall within the relevant time frame. In sum, this assignment lacks merit.

In his second *pro se* assignment of error, defendant contends that his counsel was ineffective for failing to investigate his prior criminal history, and, as a result, neglected to object to the underlying conviction being enhanced in the multiple offender bill of information. He further asserts that his counsel was ineffective because he permitted defendant to plead guilty to a crime that allegedly occurred on August 29, 2005, during a mandatory hurricane evacuation when defendant was only sixteen years old.

The Sixth Amendment to the United States Constitution and Article I, § 13 of the Louisiana Constitution safeguard a defendant's right to effective assistance of trial counsel. According to the United States Supreme Court's opinion in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a defendant asserting an ineffective assistance claim must show: 1) that defense counsel's performance was deficient; and 2) that the deficiency prejudiced the defendant. The defendant has the burden of showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694.

Generally, an ineffective assistance of counsel claim is most appropriately addressed through an application for post-conviction relief filed in the district court, where a full evidentiary hearing can be conducted, if necessary, rather than by direct appeal. *State v. Taylor*, 04-346 (La. App. 5 Cir. 10/26/04), 887 So.2d 589, 595. When the record contains sufficient evidence to rule on the merits of the claim and the issue is properly raised in an assignment of error on appeal, it may be addressed in the interest of judicial economy. *Id.* Where the record does not contain sufficient evidence to fully explore a claim of ineffective assistance of counsel, the claim should be relegated to post-conviction proceedings under La. C.Cr.P. arts. 924-930.8. *Id.*

We find that the record contains sufficient evidence to rule on the merits of defendant’s claim and, thus, elect to address it in the interest of judicial economy. Defendant’s contention that his counsel was ineffective for failing to investigate is unsupported by the record. As previously noted in our discussion of defendant’s first *pro se* assignment of error, the record reflects that defendant’s underlying conviction, which was enhanced in the multiple bill, was for offenses committed between August 29, 2005 and February 26, 2015, a time frame during which defendant attained majority.

Because our review reveals that this claim is meritless, we find that trial counsel did not render ineffective assistance by “failing to investigate.” Accordingly, we find that defendant is not entitled to relief. This assignment lacks merit.

Errors Patent

According to our routine practice, the record was reviewed for errors patent, according to La. C.Cr.P. art. 920; *State v. Oliveaux*, 312 So.2d 337 (La. 1975); and

State v. Weiland, 556 So.2d 175 (La. App. 5 Cir. 1990). We have found none that require correction.

Conclusion

In conclusion, we affirm defendant's underlying convictions and sentences as well as defendant's multiple offender adjudication and enhanced sentence.

AFFIRMED.

SUSAN M. CHEHARDY
CHIEF JUDGE

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **NOVEMBER 15, 2017** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU
CLERK OF COURT

17-KA-222

E-NOTIFIED

24TH JUDICIAL DISTRICT COURT (CLERK)
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