

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 KA 1368

JAW

STATE OF LOUISIANA

VERSUS

ZACHARY A. MARTIN

Ⓢ

✓ AW by Ⓢ

Judgment Rendered: December 23, 2009

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 452,773

Honorable Richard A. Swartz, Judge

Walter P. Reed, District Attorney
Covington, LA
and
Kathryn W. Landry
Baton Rouge, LA

Attorneys for
State – Appellee

Mary E. Roper
Baton Rouge, LA

Attorney for
Defendant – Appellant
Zachary A. Martin

BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

WELCH, J.

The defendant, Zachary A. Martin, was charged by bill of information with aggravated flight from an officer, a violation of La. R.S. 14:108.1(C). The defendant pled not guilty and, following a jury trial, was found guilty as charged. The State subsequently filed a multiple offender bill of information. The defendant was adjudicated a second-felony habitual offender and sentenced to four years at hard labor without benefit of probation, parole, or suspension of sentence. The defendant now appeals, designating one assignment of error. We affirm the conviction and habitual offender adjudication. We amend the sentence and affirm as amended.

FACTS

On June 30, 2008, Detectives Gordon Summerlin and Brett Hardaker, both with the St. Tammany Parish Sheriff's Office, were on patrol in Detective Summerlin's stationary police unit on Louisiana Highway 36 between Claiborne Hill and Abita Springs. They observed the defendant drive past them in a Lincoln Town Car with a temporary license tag. The defendant had a male passenger in his vehicle. The detectives were unable to clearly see the expiration date on the tag. As a result of this traffic violation, Detective Summerlin pulled behind the defendant and followed him. When the defendant turned onto Third Street, Detective Summerlin activated his siren and traffic emergency lights. The defendant did not stop, but accelerated. Detective Summerlin pursued the defendant.

The defendant traveled down the middle of the road, then turned onto a gravel road. He fishtailed and drove erratically. The defendant continued to drive on and off the roads and, at times, drove against traffic. At one point, the defendant was driving about 70 m.p.h. in a 25 m.p.h. traffic zone. He drove down Arthur Street, causing people on either side of the street to scatter off of the

roadway. Finally, the defendant drove onto Bogue Falaya Avenue. About midway down the block, the defendant slammed on his brakes. Detective Summerlin's unit collided into the rear of the defendant's vehicle. The defendant jumped from his vehicle, without putting it into park, and fled. As the defendant was exiting his vehicle, Detective Summerlin observed a cellophane bag containing marijuana fall to the pavement from somewhere around the defendant's waistline. The passenger in the defendant's vehicle also ran, but after a very short pursuit by Detective Summerlin, the passenger threw up his hands and stopped. Detective Summerlin stayed with the passenger and seized the bag, which contained .73 grams of marijuana. Detective Hardaker gave chase to the defendant, but was unable to apprehend him.

Two witnesses for the defense testified at trial. They testified that they were friends of the defendant. They stated that they were outside when they saw the defendant and the police drive past them. According to these witnesses, the defendant was traveling only at about 25 m.p.h.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues that he was convicted by an 11-1 non-unanimous verdict, in violation of the United States and Louisiana Constitutions. Specifically, the defendant contends that La. C.Cr.P. art. 782(A) violates the Sixth Amendment right to a jury trial since it must be considered in light of the Fourteenth Amendment right to due process of law.

The punishment for conviction of aggravated flight from an officer is confinement at hard labor. La. R.S. 14:108.1(E). Louisiana Constitution article I, § 17(A) and Louisiana Code of Criminal Procedure article 782(A) provide that in cases where punishment is necessarily at hard labor, the case shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Under both state and federal jurisprudence, a criminal conviction by a less than

unanimous jury does not violate a defendant's right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. See Apodaca v. Oregon, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972); State v. Belgard, 410 So.2d 720, 726 (La. 1982); State v. Shanks, 97-1885, pp. 15-16 (La. App. 1st Cir. 6/29/98), 715 So.2d 157, 164-65.

The defendant suggests that Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); and Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), which emphasize the necessity of a unanimous verdict, "implicitly overrule the prior anomalous holding in Apodaca, and must be taken account of by this Court." This argument has been repeatedly rejected by this court. See State v. Smith, 2006-0820, pp. 23-24 (La. App. 1st Cir. 12/28/06), 952 So.2d 1, 15-16, writ denied, 2007-0211 (La. 9/28/07), 964 So.2d 352; State v. Caples, 2005-2517, pp. 15-16 (La. App. 1st Cir. 6/9/06), 938 So.2d 147, 156-57, writ denied, 2006-2466 (La. 4/27/07), 955 So.2d 684. Moreover, our supreme court has recently affirmed the constitutionality of Article 782. See State v. Bertrand, 2008-2215 (La. 3/17/09), 6 So.3d 738. The Bertrand court specifically found that a non-unanimous 12-person jury verdict is constitutional and that Article 782 does not violate the Fifth, Sixth, and Fourteenth Amendments. Bertrand, 2008-2215 at p. 8, 6 So.3d at 743.

The assignment of error is without merit.

REVIEW FOR ERROR

Under La. Code Crim. P. art. 920(2), which limits our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence, we have discovered a sentencing error. In sentencing the defendant to four years at hard labor as a habitual offender, the trial court

denied him the benefit of parole.¹ The sentence for an aggravated flight from an officer conviction, the enhanced underlying felony, contains no parole prohibition. See La. R.S. 14:108.1(E). Thus, the denial of parole eligibility on the defendant's habitual offender sentence is unlawful. Accordingly, we amend the defendant's sentence by deleting the parole prohibition. Resentencing is not required. Because the trial court sentenced the defendant to the maximum possible period of imprisonment, it is not necessary for us to remand for resentencing after removing the parole prohibition. See La. R.S. 15:529.1(A)(1)(a) & (G); La. R.S. 14:108.1(E); **State v. Benedict**, 607 So.2d 817, 823 (La. App. 1st Cir. 1992). See also **State v. Miller**, 96-2040, p. 3 (La. App. 1st Cir. 11/7/97), 703 So.2d 698, 700-701, writ denied, 98-0039 (La. 5/15/98), 719 So.2d 459.

CONCLUSION

Accordingly, the defendant's convictions and habitual offender adjudication are affirmed; the defendant's sentence is amended to delete parole restriction and is amended. The trial court is instructed to amend the commitment order in accordance with the views expressed herein.

CONVICTION AND HABITUAL OFFENDER ADJUDICATION AFFIRMED; SENTENCE AMENDED TO DELETE PAROLE RESTRICTION, AND AFFIRMED AS AMENDED. COMMITMENT ORDER TO BE AMENDED TO DELETE PAROLE RESTRICTION.

¹ The minutes reflect that the sentence contained no parole restriction. When there is a discrepancy between the minutes and the transcript, the transcript prevails. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).