

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 0123

STATE OF LOUISIANA

VERSUS

NICHOLAS A. WEATHERMAN

*J.E.K.
by J.P.P.
P.20.
TMA*
DATE OF JUDGMENT: JUN 10 2011

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 489,293, DIVISION B, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE AUGUST J. HAND, JUDGE

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

Counsel for Appellee
State of Louisiana

Gwendolyn K. Brown
Baton Rouge, Louisiana

Counsel for Defendant-Appellant
Nicholas A. Weatherman

BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

**Disposition: DENIAL OF DEFENDANT'S MOTION TO QUASH REVERSED; GUILTY PLEA
CONVICTIONS AND SENTENCES VACATED; MATTER REMANDED FOR FURTHER
PROCEEDINGS.**

KUHN, J.

Defendant, Nicholas A. Weatherman was charged by bill of information with two counts of possession of a Schedule I controlled dangerous substance, marijuana, second offense, violations of La. R.S. 40:966C. See also La. R.S. 40:966E(2). Defendant pled not guilty, and filed a motion to quash the bill of information on the ground that the guilty plea resulting in the predicate conviction was not knowingly and intelligently entered. Subsequently, at the beginning of the **Boykin** hearing conducted by the trial court on the instant offenses, defense counsel also filed an oral motion to quash on the basis that the predicate conviction relied upon by the state occurred after the commission of the instant offenses.¹ The trial court denied both motions to quash. Thereafter, defendant withdrew his prior not guilty pleas and entered pleas of guilty as charged on both counts, reserving the right to appeal the trial court's ruling on his motions to quash pursuant to **State v. Crosby**, 338 So.2d 584 (La. 1976). In accordance with Louisiana Code of Criminal Procedure article 893E(1)(a), the trial court deferred the imposition of sentence, and placed defendant on probation for five years for each of the two convictions, with special conditions.² The trial court also imposed a fine of \$250.00 on each count. Defendant now appeals, alleging as his sole assignment of error that the trial court erred in denying his oral motion to quash.

¹ At the time that the oral motion was made, defense counsel requested leave to file a written motion to quash on this ground. Following entry of defendant's guilty pleas, defense counsel filed a written motion to quash on this basis.

² The trial court initially had sentenced defendant on each conviction to five years at hard labor, with the sentences to be suspended and defendant placed on probation on each count for five years. However, upon defense counsel pointing out that these convictions were defendant's first felony convictions, the trial court vacated the sentences imposed and deferred sentencing as noted above.

For the following reasons, we reverse the trial court's denial of the motion to quash, vacate the convictions and sentences, and remand this matter for further proceedings.

PROCEDURAL BACKGROUND

The facts surrounding the instant offenses were not developed in this case because defendant pled guilty to the charged offenses and defense counsel stipulated that a factual basis existed for the guilty pleas. However, the record reveals that the bill of information charging defendant with the instant offenses of possession of marijuana was filed by the state on June 7, 2010. According to the bill of information, the offense comprising count one occurred on January 8, 2008, and the offense comprising count two occurred on March 9, 2008. It is further alleged in the bill of information that the offenses are second offenses, since defendant was convicted on March 9, 2010, in the Twenty-second Judicial District Court of a prior offense of possession of marijuana.

ASSIGNMENT OF ERROR

In his sole assignment of error, defendant argues the trial court erred in denying his motion to quash the bill of information. Specifically, he contends the instant charges for possession of marijuana cannot be prosecuted as second offenses because these offenses occurred before he was convicted of the predicate offense.

Defendant's contention has merit. According to the allegations of the bill of information, the instant offenses were committed in 2008, prior to defendant's

conviction of the predicate offense in 2010. At the time that the instant offenses were committed, La. R.S. 40:966E(2) provided as follows:

Except as provided in Subsection F or G of this Section, on a second conviction for violation of Subsection C of this Section with regard to marijuana, tetrahydrocannabinol or chemical derivatives thereof, the offender shall be fined not more than two thousand dollars, imprisoned with or without hard labor for not more than five years, or both.

Thus, the issue presented herein is whether a defendant can be convicted under this provision for second-offense possession of marijuana when the crime was committed prior to the defendant's conviction for first-offense possession of marijuana.

This court was recently confronted with this identical issue in **State v. Harris**, 2010-0643, p. 3 (La. App. 1st Cir. 3/25/11), ___ So.3d ___, in which we held that a defendant "cannot be guilty of the crime of possession of marijuana, second offense, unless such crime is committed after the first conviction for this offense." In reaching this holding, we explained:

A common legislative purpose of repeater offense statutes is to serve as a warning to first offenders and to afford them an opportunity to reform. See State v. Neal, 347 So.2d 1139, 1141[-]42 (La. 1977). The consistent application of repeater offense statutes over the years has been that prior convictions, in order to be available for imposition of a greater punishment as a subsequent offender, must precede the commission of the principal offense, that is, the latest prosecution in point of time. See Neal, 347 So.2d at 1141. This has been the greatly preponderant interpretation of similar statutes throughout the nation, regardless of the phraseology of the statute (or whether it specifies that the earlier conviction(s) must precede the latest offense), whenever enhanced penalties are provided for a subsequent offense. Id. If, therefore, the prior conviction is an essential allegation for conviction of the second-offense crime, an accused cannot be charged with the latter crime when arrested for the second incident if, at that time, he had not been previously convicted of a first offense. Id.

Id., 2010-0643 at p. 2, ___ So.3d ___.

Accordingly, since the instant offenses of second-offense possession of marijuana occurred prior to the predicate conviction relied upon by the state for enhancement purposes, the trial court erred in denying defendant's motion to quash on this ground. Hence, we reverse the trial court's ruling, grant the motion to quash, vacate the instant convictions and sentences, and remand this matter for further proceedings in accordance with law.

**DENIAL OF DEFENDANT'S MOTION TO QUASH REVERSED;
GUILTY PLEA CONVICTIONS AND SENTENCES VACATED; MATTER
REMANDED FOR FURTHER PROCEEDINGS.**