NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 KA 2336

STATE OF LOUISIANA

VERSUS

JOHN H. COOK

Judgment Rendered: June 8, 2012

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 504,777

Honorable, Allison H. Penzato, Judge

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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

WELCH, J.

Defendant, John Harley Cook, was charged by bill of information with one count of creation or operation of a clandestine laboratory (methamphetamine), a violation of La. R.S. 40:983 (count one), and one count of possession of a Schedule III controlled dangerous substance (hydrocodone), a violation of La. R.S. 40:968(C) (count two). Defendant pled not guilty to both charges. The state nol-prossed count two and proceeded to trial on count one only. After a trial by jury, defendant was found guilty as charged on count one. Defendant filed motions for new trial and postverdict judgment acquittal, but these motions were denied by the trial court. Defendant also filed a motion for reconsideration of sentence, but the trial court dismissed this motion as premature because defendant had not been sentenced at the time of its filing. Defendant was subsequently adjudicated a second-felony habitual offender[1] and sentenced to a term of ten years at hard labor, without benefit of probation or suspension of sentence. On appeal, defendant asserts one assignment of error. For the following reasons, we affirm defendant's conviction, habitual offender adjudication, and sentence.

FACTS

On March 23, 2011, James Planche, Jr., contacted a friend in hopes of purchasing painkillers. Planche's friend asked him to meet defendant at the Wal-Mart on Gause Boulevard in Slidell, and to buy a box of Sudafed for defendant in exchange for four hydrocodone pills. Upon his arrival at Wal-Mart, Planche met defendant in the electronics section, and defendant gave him $5.00 in cash, a card used to purchase Sudafed from the pharmacy counter, and an empty cigarette pack containing four hydrocodone pills.

[1] The predicate convictions set forth in defendant's habitual offender bill of information were a May 27, 1997 conviction for possession of a Schedule I controlled dangerous substance (marijuana) – second offense, and a May 16, 2005 conviction for possession of a Schedule I controlled dangerous substance (marijuana) – third offense. However, in exchange for defendant's stipulation to the contents of the habitual offender bill of information, the state agreed to nol-prosse defendant's May 27, 1997 predicate conviction, and defendant was adjudicated a second-felony habitual offender.

Brandon Brown, the loss prevention officer for the Slidell Wal-Mart, observed defendant in the electronics section prior to Planche's arrival at the store. Brown recognized defendant as a person who he had previously seen in the store buying Sudafed and other precursors to the manufacture of methamphetamine. Brown observed as defendant spoke to someone on his cell phone, retrieved cash from his wallet, and met with Planche. Defendant and Planche walked together to the pharmacy area, but defendant continued walking, and he exited the store before Planche bought a box of Sudafed. Brown telephoned Officer Bradley Hoopes of the Slidell Police Department to inform him that he suspected Planche's purchase of Sudafed was related to methamphetamine production. Officer Hoopes received Brown's call as he was pulling into the Wal-Mart parking lot to begin his detail assignment at the store.

After Planche purchased the Sudafed, he exited the store and began looking for defendant. Planche entered his vehicle, started to drive around the parking lot, and called defendant to let him know that he had bought the Sudafed. Planche spotted defendant and pulled into a parking space near the front of the store.

As defendant approached the driver's side of Planche's vehicle, Officer Hoopes parked his vehicle behind Planche's, and he observed Planche handing defendant a Wal-Mart bag. Upon seeing Officer Hoopes, Planche threw the hydrocodone pills into his back seat. Officer Hoopes exited his vehicle and instructed defendant and Planche to show him their hands. Defendant showed his hands to be empty. Officer Hoopes observed Planche begin to reach behind the front passenger's seat. He asked again to see Planche's hands, and Planche complied, showing Officer Hoopes that they were empty. Officer Hoopes asked the men where the box of Sudafed was located, and while Planche immediately admitted that he had purchased it for and had given it to defendant, defendant immediately denied any knowledge of the Sudafed and allowed Officer Hoopes to

pat him down. During defendant's pat down, Planche again reached into his backseat area, and Officer Hoopes again asked to see Planche's hands. Planche opened up his hand to reveal at least three hydrocodone pills. When Officer Hoopes had Planche exit his vehicle, the Wal-Mart bag containing Sudafed fell out onto the ground. Officer Hoopes placed both men under arrest. After defendant was read his **Miranda**[2] rights, he admitted that he had given Planche cash to purchase Sudafed because he was over his thirty-day personal limit, and he stated that the Sudafed was going to be used to manufacture methamphetamine.

ASSIGNMENT OF ERROR

In his sole assignment of error, defendant argues that his habitual offender sentence of ten years at hard labor, without benefit of probation or suspension of sentence, is constitutionally excessive.

Herein, defendant was sentenced as a habitual offender on September 29, 2011.[3] A thorough review of the record shows the defendant did not make or file a timely oral or written motion to reconsider sentence pursuant to La. C.Cr.P. art. 881.1 subsequent to his sentencing. Instead, after he was sentenced, defendant filed a motion to reconsider sentence on August 30, 2011. At defendant's September 6, 2011 arraignment on his habitual offender bill of information, the trial judge denied the motion as premature because defendant had not yet been sentenced, and she specifically noted that this motion could be refiled at a later date. Article 881.1(A)(1) of the Code of Criminal Procedure provides: "In felony cases, within thirty days *following* the imposition of sentence or within such longer period as the trial court may set at sentence, the state or the defendant may make or file a motion to reconsider sentence." (Emphasis added.) An objection to a sentence or a motion to reconsider sentence filed before the sentence is imposed is

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

[3] We note that defendant was never sentenced for his underlying conviction in this case, but prior sentencing on the underlying conviction is not required where a defendant is subsequently adjudicated to be and sentenced as a habitual offender. See La. R.S. 15:529.1(D)(3).

premature. Under the clear language of La. C.Cr.P. art. 881.1(E), a failure to make or file a motion to reconsider sentence precludes a defendant from raising an objection to the sentence on appeal. One purpose of the motion to reconsider sentence is to allow the defendant to raise any errors that may have occurred during sentencing while the trial judge still has the jurisdiction to change or correct the sentence. The defendant may point out such errors or deficiencies, or may present argument or evidence not considered in the original sentencing, thereby preventing the necessity of a remand for resentencing. **State v. Mims**, 619 So.2d 1059 (La. 1993) (*per curiam*).

Defendant's failure to timely make or file a motion to reconsider sentence precludes him from arguing that his sentence was excessive for the first time on appeal. Thus, defendant is procedurally barred from having the sole assignment of error reviewed. See **State v. Felder**, 2000–2887 (La. App. 1st Cir. 9/28/01), 809 So.2d 360, 369, writ denied, 2001–3027 (La. 10/25/02), 827 So.2d 1173.

Even if we consider defendant's prematurely filed motion to reconsider sentence sufficient to preserve this issue for review, we would still find that defendant's sentence is not excessive. For a first-offense conviction of creation or operation of a clandestine laboratory, defendant could have received a sentence of not less than five nor more than fifteen years at hard labor. See La. R.S. 40:983(C). Having been adjudicated a second-felony habitual offender on this conviction, defendant was exposed to a sentencing range of not less than seven and one-half years to thirty years at hard labor, without benefit of probation or suspension of sentence. See La. R.S. 15:529.1(A)(1) & (G). Thus, defendant's sentence of ten years at hard labor, without benefit of probation or suspension of sentence, was near the lower end of the potential sentencing range. At defendant's sentencing, the trial judge articulated that she had considered any aggravating and mitigating circumstances under La.C.Cr.P. art. 894.1, and she found that defendant

presented an undue risk of future criminal activity and that a lesser sentence would depreciate the seriousness of defendant's crime. On the record before us, we cannot say that the trial court abused its discretion or that defendant's habitual offender sentence is constitutionally excessive.

CONCLUSION

For the foregoing reasons, the defendant's conviction, habitual offender adjudication, and sentence are affirmed.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.