

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2012 KA 1745

STATE OF LOUISIANA

VERSUS

GARY J. PEREZ

Judgment Rendered: April 26, 2013

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket Number 400883

Honorable William J. Burris, Judge Presiding

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Gary J. Perez
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In Proper Person

BEFORE: GUIDRY, CRAIN, AND THERIOT, JJ.



GUIDRY, J.

The defendant, Gary J. Perez, was charged by bill of information with armed robbery, a violation of La. R.S. 14:64. The defendant entered a plea of not guilty. On May 20, 2008, after a trial by jury, the defendant was found guilty of the responsive offense of first degree robbery, a violation of La. R.S. 14:64.1. On June 12, 2009, the defendant was adjudicated a third-felony habitual offender.¹ The trial court imposed a sentence of seventy years imprisonment at hard labor to be served without the benefit of probation, parole, or suspension of sentence. The defendant appealed, challenging the constitutionality of the sentence and the propriety of the State's closing argument. On February 12, 2010, in an unpublished opinion, this court affirmed the conviction, habitual offender adjudication, and sentence. State v. Perez, 09-1754 (La. App. 1st Cir. 2/12/10), 30 So. 3d 285 (Table), writ denied, 10-0605 (La. 10/8/10), 46 So. 3d 1265.

On January 10, 2011, the defendant filed an application for post conviction relief (PCR), and it was denied by the trial court on January 11, 2011. On June 7, 2011, this court denied the defendant's writ application seeking review of the trial court's denial of the PCR application. State v. Perez, 11-0272 (La. App. 1st Cir. 6/7/11) (unpublished). The Louisiana Supreme Court subsequently denied the defendant's writ application. State ex rel. Perez v. State, 11-1469 (La. 3/30/12), 85 So. 3d 112. On June 6, 2011, the defendant filed a PCR application requesting an out-of-time appeal in order to seek review of his sentence as a multiple offender. On June 30, 2011, the trial court denied the defendant's second application, stating

¹ The defendant's predicate convictions consist of two February 25, 1997 guilty pleas to unauthorized entry of an inhabited dwelling (violations of La. R.S. 14:62.3) under docket numbers 183623 and 188773 in St. Bernard Parish and a May 6, 1999 guilty plea to possession of cocaine (a violation of La. R.S. 40:967) under docket number 397506 in Orleans Parish. In the reasons for the adjudication, the trial court stated that it found the defendant to be a fourth-felony habitual offender. However, in accordance with the minutes and the habitual offender sentencing transcript, the defendant was adjudicated a third-felony habitual offender and sentenced as such.

that the PCR application was repetitive, since a prior application was filed and denied. The trial court further noted that claims of excessive sentence and multiple offender adjudications are not grounds for post conviction relief. On August 29, 2011, the defendant filed a writ application with this court, seeking review of the trial court's denial of his second PCR application. On October 24, 2011, this Court denied the writ application for review of the trial court's ruling on the second PCR. State v. Perez, 11-1594 (La. App. 1st Cir. 10/24/11) (unpublished).

On July 27, 2012, the Louisiana Supreme Court granted the defendant's writ application in part, remanded the case, and ordered the trial court to grant the defendant an out-of-time appeal, citing State v. Counterman, 475 So. 2d 336, 340 (La. 1985). State ex rel. Perez v. State, 11-2537 (La. 7/27/12), 93 So. 3d 583. On appeal, the defendant filed a counseled brief seeking only review pursuant to La. C. Cr. P. art. 920(2) and contending that there are no non-frivolous issues to argue on appeal. The defendant also filed a pro se brief challenging the habitual offender adjudication. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence.

STATEMENT OF FACTS

The facts were set forth in our original decision in this matter.

PRO SE BRIEF

In his pro se brief, the defendant contends that the State's evidence of the two alleged prior convictions from St. Bernard Parish did not meet the burden of proof to enhance the sentence pursuant to La. R.S. 15:529.1. Citing La. R.S. 15:529.1(F), the defendant asserts that the State introduced computer printout sheets that did not have a seal of authenticity and were further not certified as true or correct pursuant to La. C.E. art. 905. The defendant argues that the predicate pleas were unconstitutionally given, that he did not waive his rights, and that he was not afforded representation of counsel. The defendant further asserts that the

trial court allowed Jill Walker, the probation and parole officer who obtained the computer printouts, to present hearsay testimony when referring to the St. Bernard Parish convictions. The defendant asserts that Walker was not present during the predicate guilty pleas, was not the defendant's probation officer for the alleged convictions, and could not testify that she knew for a fact that the convictions belonged to the defendant. The defendant notes that in vacating the habitual offender adjudication and sentence in State v. Smith, 04-0800 (La. App. 1st Cir. 12/17/04), 897 So. 2d 710, this court found inadmissible an exhibit identified by the State as a computer document from the Department of Public Safety and Corrections (DPSC) showing the release date for the predicate conviction of the defendant therein.

Regarding the Orleans Parish predicate conviction, the defendant contends that the arrest register presented by the State in conjunction with the testimony of the fingerprint expert, Sergeant Dawn Powell, was insufficient. The defendant notes that Sergeant Powell was unable to provide the date that the fingerprints on the arrest register were taken and further notes that the habitual offender law is based on prior convictions as opposed to arrests. The defendant contends that the State cannot rely on an arrest register alone to show that he was ultimately convicted. The defendant further argues that the evidence regarding the Orleans Parish conviction did not show that he voluntarily and freely pled guilty or that he was represented by counsel during the plea.

If the defendant denies an allegation of the habitual offender bill of information, the burden is on the State to prove the existence of the prior guilty plea and that the defendant was represented by counsel when the plea was taken. State v. Shelton, 621 So. 2d 769, 779 (La. 1993). If the State meets this burden, the defendant has the burden to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. If

the defendant is able to do this, then the burden of proving the constitutionality of the plea shifts to the State. The State will meet its burden of proof if it introduces a “perfect” transcript of the taking of the guilty plea, one that reflects a colloquy between the judge and the defendant wherein the defendant was informed of and specifically waived his right to trial by jury, his privilege against self-incrimination, and his right to confront his accusers. Shelton, 621 So. 2d at 779-80.

If the State introduces anything less than a perfect transcript, for example, a guilty plea form, a minute entry, an imperfect transcript, or any combination thereof, the judge then must weigh the evidence submitted by the defendant and by the State to determine whether the State has met its burden of proving that the defendant's prior guilty plea was informed and voluntary, and made with an articulated waiver of the three Boykin rights. Shelton, 621 So. 2d at 780; State v. Bickham, 98-1839 (La. App. 1st Cir. 6/25/99), 739 So. 2d 887, 889-90. The purpose of the rule of Shelton is to demarcate sharply the differences between direct review of a conviction resulting from a guilty plea, in which the appellate court may not presume a valid waiver of rights from a silent record, and a collateral attack on a final conviction used in a subsequent recidivist proceeding, as to which a presumption of regularity attaches to promote the interests of finality. See State v. Deville, 04-1401 (La. 7/2/04), 879 So. 2d 689, 691 (per curiam).

In its reasons for adjudicating the defendant a habitual offender, the trial court noted that due to Hurricane Katrina, the bills of information and the Boykin transcripts for the St. Bernard Parish convictions were destroyed. The court noted that the extract minutes of February 25, 1997, and a “Case Print Report” remained available and showed counseled pleas to two separate unauthorized entry of an inhabited dwelling offenses. The trial court noted Walker identified the defendant as the person she supervised in the Orleans Parish case. As further noted, Walker

had previously been assigned to St. Bernard Parish and remembered that the defendant had charges in that parish. The trial court noted that Deputy Powell (of the St. Tammany Parish Sheriff's Office Criminalistics Laboratory) fingerprinted the defendant on May 15, 2009, and identified the defendant as the same person who was convicted in the Orleans Parish case from the fingerprints on the arrest register, as the fingerprints on the bill of information were unusable. The trial court also noted that as evidence of the Orleans Parish predicate conviction, the State introduced minutes showing the defendant to have pled with counsel on May 6, 1999, to possession of cocaine, a waiver of rights and guilty plea form signed by the defendant, and the certified arrest register.

The minutes of the defendant's two February 25, 1997 guilty pleas to unauthorized entry of an inhabited dwelling (violations of La. R.S. 14:62.3) under docket numbers 183623 and 188773 in St. Bernard Parish show that the defendant was represented by counsel and advised of his Boykin rights. Further the "Case Print Report" in S-4 and S-5 reflect that the defendant pled guilty in those cases.

Records from the DPSC also reflected the defendant's prior convictions in Orleans Parish and St. Bernard Parish. As noted by the defendant, in State v. Smith this court found similar evidence inadmissible. However, in that case the document was being presented as evidence that the prior conviction fell within the ten-year cleansing period for purposes of the multiple offender adjudication. This court noted that the habitual offender statute, La. R.S. 15:529.1, in Section F, provides that certain types of certified prison records shall constitute prima facie evidence of the imprisonment and discharge of the defendant. In finding the State's evidence inadmissible in that case, we noted that the evidence was not properly authenticated and that there was no witness in that case with personal knowledge as to how the document was generated or that it was identical to the record retained in the computer. Nor was there any testimony that the document

was made and kept in the course of regularly conducted business activity, or that it was the regular practice of the DPSC to make and to keep the documents. Smith, 897 So. 2d 715-17.

To the contrary, herein Walker testified that in preparation for her testimony she personally accessed and printed out the DPSC records pertaining to the defendant's prior convictions in St. Bernard Parish and Orleans Parish. Walker testified that the records were from the secured statewide computer system maintained by the DPSC as a part of the ordinary course of business and only authorized employees had clearance to input data into the system. This testimony was sufficient to establish the authenticity of the DPSC records under La. C.E. art. 901(B)(1) and (7).

As to the May 6, 1999 guilty plea to possession of cocaine under docket number 397506 in Orleans Parish, the minutes of the guilty plea show that the defendant was represented by counsel at the time of the plea. The waiver of rights and guilty plea form show that he was advised of and waived his Boykin rights. Sergeant Powell, an expert in fingerprint analysis, compared the fingerprints on the arrest register with the fingerprints taken from the defendant on the date of the hearing and found that the fingerprints matched. The arrest register includes the defendant's name, date of birth, and social security number consistent with the bill of information in the instant case.

In State v. Anderson, 99-1407 (La. App. 4th Cir. 1/26/00), 753 So. 2d 321, the defendant argued that because the fingerprints on the bill of information for a forgery conviction were not suitable for identification, the State failed to meet its burden. However, therein the State produced the arrest register for the offense, which contained fingerprints that an officer was able to identify as fingerprints belonging to the defendant. In addition, the State was able to match the arrest register with the certified copy of the forgery conviction through the defendant's

name, date of birth, date of offense, and case number and complainant's name. The defendant's name, date of birth, social security and bureau of identification numbers were the same as the person who pled guilty to the forgery charge. The court found this information was sufficient, and that the State met its burden of proving that the defendant was the same person who pled guilty to the forgery charge. Anderson, 753 So. 2d at 326.

The Louisiana Supreme Court has held that the State need not introduce a “perfect” transcript of a guilty plea to prove a prior conviction. The State may offer “a guilty plea form, a minute entry, an ‘imperfect’ transcript, or any combination thereof,” and this offering shifts the burden of proof to the defendant to show some irregularity. Shelton, 621 So. 2d at 779-80; State v. Carlos, 98-1366 (La. 7/7/99), 738 So. 2d 556, 559. Based on the evidence presented by the State at the habitual offender hearing as to the predicate convictions in St. Bernard Parish and Orleans Parish, we find that the burden shifted in this case, but the defendant offered nothing but speculation to counter the State's showing. We find that the defendant failed to present affirmative evidence of any infringement of his rights or of a procedural irregularity and, therefore, the burden never shifted back to the State to prove the constitutionality of the predicate pleas. On this record, the trial court did not err in finding sufficient proof of the predicate convictions. Therefore, we find no error in the defendant’s adjudication and sentencing as a third-felony habitual offender. The pro se brief assignment of error lacks merit.

ANDERS BRIEF

Defense counsel has filed a brief containing only one assignment of error, alleging that the conviction and/or sentence should be reversed pursuant to La. C. Cr. P. art. 920(2), and a motion to withdraw as counsel. Defense counsel has reviewed the procedural history and record of the case. In her motion to withdraw and brief, referring to the procedures outlined in Anders v. State of California, 386

U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967) and State v. Jyles, 96-2669 (La. 12/12/97), 704 So. 2d 241 (per curiam), counsel indicated that after a conscientious and thorough review of the trial court record she could find no non-frivolous issues to raise on appeal. See also State v. Mouton, 95-0981 (La. 4/28/95), 653 So. 2d 1176, 1177 (per curiam); State v. Benjamin, 573 So. 2d 528 (La. App. 4th Cir. 1990).

The Anders procedure used in Louisiana was discussed in Benjamin, 573 So. 2d at 529-31, sanctioned by the Louisiana Supreme Court in Mouton, 653 So. 2d at 1177, and expanded by the Louisiana Supreme Court in Jyles. According to Anders, 386 U.S. at 744, 87 S. Ct. at 1400, "if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw." To comply with Jyles, appellate counsel must not only review the procedural history of the case and the evidence, but his brief also must contain "a detailed and reviewable assessment for both the defendant and the appellate court of whether the appeal is worth pursuing in the first place." Jyles, 704 So. 2d at 242 (quoting Mouton, 653 So. 2d at 1177). When conducting a review for compliance with Anders, an appellate court must conduct an independent review of the record to determine whether the appeal is wholly frivolous.

In the brief filed on behalf of the defendant, defense counsel has complied with all the requirements necessary to file an Anders brief. Ordinarily, the defendant is not entitled to a second review for error of the record of his underlying conviction. See State v. Taylor, 01-452 (La. App. 5th Cir. 11/14/01), 802 So. 2d 779, 783-84, writ denied, 01-3326 (La. 1/10/03), 834 So. 2d 426. However, due to the Louisiana Supreme Court's ruling granting the defendant a second appeal, the record on appeal has been re-reviewed for error under La. C. Cr. P. art. 920(2). Under La. C. Cr. P. art. 920(2), we are limited in our review to errors discoverable

by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we have found no reversible errors. See State v. Price, 05-2514 (La. App. 1st Cir. 12/28/06), 952 So. 2d 112, 123-25 (en banc), writ denied, 07-0130 (La. 2/22/08), 976 So. 2d 1277. Furthermore, we agree with defense counsel's assertion that there are no non-frivolous issues or trial court rulings that arguably support this appeal. Accordingly, the defendant's conviction, habitual offender adjudication, and sentence are affirmed. Defense counsel's motion to withdraw is granted.

**CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND
SENTENCE AFFIRMED; MOTION TO WITHDRAW GRANTED.**