**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2014 KA 0451**

**STATE OF LOUISIANA**

**VERSUS**

**KING VAN NGUYEN**

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**On Appeal from the 22nd Judicial District Court**
**Parish of St. Tammany, Louisiana**
**Docket No. 417,787, Division "B"**
**Honorable Elaine W. DiMiceli, Judge Presiding**

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**Walter P. Reed**
**District Attorney**
**Covington, LA**

**and**

**Kathryn Landry**
**Special Appeals Counsel**
**Baton Rouge, LA**

**Attorneys for Appellee**
**State of Louisiana**

**Cynthia K. Meyer**
**Louisiana Appellate Project**
**New Orleans, LA**

**Attorney for**
**Defendant-Appellant**
**King Van Nguyen**

**BEFORE: PARRO, McDONALD, AND CRAIN, JJ.**

**Judgment rendered** DEC 10 2014

**PARRO, J.**

The defendant, King Van Nguyen, was charged by bill of information with possession with intent to distribute MDMA (methylenedioxymethamphetamine), a violation of LSA-R.S. 40:966(A)(1). The defendant pled not guilty. However, he subsequently withdrew his not guilty plea, and on May 14, 2007, at a **Boykin**[1] hearing, pled guilty to the instant offense in exchange for a favorable sentence. At that time, the state filed a habitual offender bill of information, and the defendant admitted to the allegations of the habitual offender bill of information. He was adjudicated a third-felony habitual offender[2] and received an enhanced sentence of twenty years of imprisonment at hard labor, with five years of the sentence to be served without benefit of parole, probation, or suspension of sentence. The defendant now appeals,[3] designating two assignments of error. We affirm the conviction, habitual offender adjudication, and sentence.

## FACTS

Because the defendant pled guilty, the facts of the case were not developed. The factual basis for the guilty plea, provided by the **Boykin** hearing and bill of information, was that on June 29, 2006, the defendant was in the possession of MDMA, with the intent to distribute.

## ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues that his "guilty plea" entered for the habitual offender bill of information is invalid. Specifically, the defendant contends that at his habitual offender arraignment, he was not advised of his right to remain silent at the habitual offender hearing.

At the May 14, 2007 **Boykin** hearing, the defendant entered into a plea agreement. In exchange for pleading guilty to the instant offense of possession of MDMA with the intent to distribute, and further for admitting to his status as a third-

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[1] **Boykin v. Alabama**, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

[2] The habitual offender bill of information was based on a conviction of possession of stolen property in case number 15454 of the Twenty-fourth Judicial District Court and a conviction of unauthorized use of a motor vehicle in case number 78525 of the Jefferson County Texas District Court.

[3] The defendant was granted an out-of-time appeal.

felony habitual offender, the court would sentence him to twenty years of imprisonment at hard labor, with five years of the sentence to be served without benefit of parole, probation, or suspension of sentence. Following the defendant's waiver of the reading of the habitual offender bill of information, the following colloquy between the court and the defendant took place:

> The Court: Mr. Nguyen, in response to this you have three options, you ca[n] admit the allegations of the multiple offender Bill of Information, you can deny the allegations or you can stand silent. If you deny the allegations or you stand silent, the court will have to have a hearing, at which the District Attorney's Office will have to prove the allegation[s] in the multiple offender Bill of Information. At that hearing you have the right to be represented by an attorney. And if you could not afford an attorney, the court would appoint one to represent you.
>
> So at this time I'm going to ask you to either admit or deny the allegations of the multiple offender Bill of Information, or to stand silent.
>
> Mr. Nguyen: I'm going to admit to it.
>
> The Court: Then the court will accept the admission. So do you understand the sentence that I just explained to you?
>
> Mr. Nguyen: Yes, ma'am.
>
> The Court: And do you understand the sentence that you will be given if you continue to offer a guilty plea to this charge?
>
> Mr. Nguyen: Yes, ma'am.

The defendant asserts in brief that, while the court informed him of his right to a hearing, he was not informed of his right to remain silent at that hearing. The assertion is baseless. It is clear from the above exchange that the defendant was fully advised of his rights at the arraignment on the habitual offender bill, including the right to remain silent. The defendant was sufficiently advised of his rights at his arraignment and that advice of rights was sufficient to comply with the requirements of LSA-R.S. 15:529.1(D)(1)(a) and (D)(3). The defendant, who was represented by counsel, clearly understood those rights by choosing to waive his right to remain silent and admit to the allegations in the habitual offender bill of information in exchange for a favorable sentence. There is no express requirement in the law that the court must inform the defendant of his rights at each phase of the habitual offender proceeding. The law requires only that the record demonstrate the proceedings as a whole were fundamentally fair and accorded the defendant due process of law. See **State v.**

**Gonsoulin**, 03-2473 (La. App. 1st Cir. 6/25/04), 886 So.2d 499, 500-02 (en banc), writ denied, 04-1917 (La. 12/10/04), 888 So.2d 835. Accordingly, the court did not err in failing to advise the defendant that he had the right to remain silent at a hearing that, given the very plea agreement before them, would never take place. See **State v. Harris**, 95-0900 (La. 5/19/95), 654 So.2d 680 (per curiam).

This assignment of error is without merit.

**ASSIGNMENT OF ERROR NO. 2**

In his second assignment of error, the defendant argues that the habitual offender bill of information was defective. Specifically, the defendant contends that the state listed the defendant's predicate conviction of "possession of stolen property" in the bill, without reference to the grade of the offense; and as such, the state did not prove this predicate conviction was a felony, rather than a misdemeanor.

The habitual offender bill of information filed on May 14, 2007, provided, in pertinent part:

> And now the said District Attorney gives this court to understand and be informed that the said defendant was duly charged in case number 15454 of the 24th Judicial District Court, with the crime of violating Louisiana Revised Statutes relative to Possession of Stolen Property, and that afterward, the said accused was convicted.

At that time, the crime of illegal possession of stolen things was comprised of two felony grades of the offense (value of five hundred dollars or more, and value of three hundred dollars or more but less than five hundred dollars) and one misdemeanor grade, which provided that when the value of the stolen things is less than three hundred dollars, the offender shall be imprisoned for not more than six months, or may be fined not more than one thousand dollars, or both. See LSA-R.S. 14:69(B)(1), (2), and (3) (prior to amendment by 2010 La. Acts, No. 585, § 1), LSA-R.S. 14:2(A)(4), and LSA-R.S. 14:2(A)(6). The defendant argues in brief that the habitual offender bill of information is invalid, because it is void of any information as to the grade of the offense and, as such, failed to contain all the elements of the predicate crime. In support of his argument, the defendant cites **State v. Galindo**, 06-1090 (La. App. 4th Cir. 10/3/07), 968 So.2d 1102, writ denied, 07-2145 (La. 3/24/08), 977 So.2d 952.

This claim is also baseless. The defendant appears to have conflated two distinct types of bills of information, particularly in light of his reliance on **Galindo**, in which the court addressed the bill of information or indictment, which is the written accusation of crime used to initiate criminal prosecution. See **Galindo**, 968 So.2d at 1111-12; LSA-C.Cr.P. arts. 383 and 384. A habitual offender bill of information charging that a defendant has previously been convicted of one or more felonies does not charge a substantive crime. Such a proceeding is merely part of sentencing and allows enhanced penalties for repeat offenders. See **State v. Langendorfer**, 389 So.2d 1271, 1276-77 (La. 1980). Louisiana Revised Statute 15:529.1(D)(1) provides that a district attorney may file a bill of information charging a defendant as a multiple offender following his conviction for the instant crime, if that defendant has prior convictions. However, this additional bill of information is merely a method of informing the court of the circumstances and of requesting an enhancement of the penalty to be imposed. **State v. Banks**, 612 So.2d 822, 825 (La. App. 1st Cir. 1992), writ denied, 614 So.2d 1254 (La. 1993); **State v. Walker**, 416 So.2d 534, 535-36 (La. 1982). See **State v. Rowell**, 306 So.2d 671, 675 (La. 1975).

Moreover, the defendant waived the reading of the habitual offender bill of information and admitted in open court to the allegations of the habitual offender bill, thereby foregoing a habitual offender hearing and requiring the state to prove the defendant's predicate convictions. The defendant made no objection to the habitual offender bill of information when admitting to his status as a third-felony habitual offender, and is therefore precluded from raising any objection on appeal. See LSA-C.Cr.P. art. 841(A); **State v. Bernard**, 94-2052 (La. App. 4th Cir. 11/16/95), 665 So.2d 106, 108, writ denied, 95-2992 (La. 3/15/96), 669 So.2d 426 (where, despite the habitual offender bill of information confusing the predicate offense and the substantive offense, the fourth circuit found that the defendant and his counsel were aware of the facts of the predicate offense being used to enhance his sentence, and further that the defendant was precluded from raising the issue on appeal because he did not object to the alleged defect in the multiple bill at the multiple bill hearing). See also **State v. Biglane**, 99-111 (La. App. 5th Cir. 5/19/99), 738 So.2d 630, 637-39.

Finally, we note that the defendant, himself, has indicated that his prior conviction for illegal possession of stolen things was a felony. In a post-sentence pro se motion seeking clarification/modification of sentence, the defendant stated: "Movant was sentenced to serve two year[s] (2) at hard labor with the Department of Corrections on Docket No. 15454, for the charges of illegal possession of stolen thing[s], and theft of goods, each. The sentencing Judge was mute as to these sentences being served concurrently or consecutively also."

Based on the foregoing, this assignment of error is without merit.

**CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.**