

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 KA 1361

STATE OF LOUISIANA

VERSUS

JOHN PHILLIPS BROOKS

Judgment Rendered: APR 24 2015

Appealed from the
22nd Judicial District Court
In and for the Parish of Washington, Louisiana
Trial Court Number 11 CR8 114150

Honorable Scott Gardner, Judge

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BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

WELCH, J.

The defendant, John Phillips Brooks, was charged by bill of information with armed robbery, a violation of La. R.S. 14:64 (count 1), and with armed robbery, with the use of a firearm, additional penalty, a violation of La. R.S. 14:64.3 (count 2).¹ He initially pled not guilty on both counts. He moved to quash count 2, but the motion was denied. Thereafter, he withdrew his initial pleas and pled guilty on both counts, reserving his right to seek review of the court's ruling on the motion to quash. See State v. Crosby, 338 So.2d 584 (La. 1976). On count 1, the defendant was sentenced to ten years at hard labor without the benefit of probation, parole, or suspension of sentence to run concurrently with all other sentences he was presently serving. On count 2, he was sentenced to five years at hard labor without the benefit of probation, parole, or suspension of sentence, to run consecutively with count 1 and all other sentences he was presently serving. The State moved for reconsideration of sentence, and the motion was granted. On count 1, the defendant was sentenced to twenty years at hard labor without the benefit of probation, parole, or suspension of sentence. On count 2, he was sentenced to five years at hard labor without the benefit of probation, parole, or suspension of sentence. The court ordered that the sentences be served consecutively with each other, but concurrently with any other sentence the defendant was presently serving. The defendant now appeals, challenging the denial of his motion to quash and the sentences imposed by the district court. For the following reasons, we affirm the convictions and sentences, and remand with instructions.

¹ John Pearson Brooks, Jr., Brian ONeal Jenkins, and Amber Lee Butler were also charged by the same bill of information with the same offenses. John Pearson Brooks, Jr., and Amber Lee Butler separately appealed to this Court. See State v. Brooks, 2012-2126 (La. App. 1st Cir. 9/13/13) (unpublished); State v. Butler, 2012-1815 (La. App. 1st Cir. 1/23/14), 2014 WL 265833, writ denied, 2014-0414 (La. 9/19/14), 148 So.3d 952.

FACTS

Due to the defendant's guilty pleas, there was no trial, and thus, no trial testimony concerning the offenses. Additionally, in connection with the guilty pleas, the State and the defense stipulated that there was a factual basis for the charges. The bill of information charged the offenses were committed on November 24, 2010.

COMPLIANCE WITH PLEA AGREEMENT

In his first counseled and second pro se assignments of error, the defendant argues that the sentence originally imposed was based on his plea agreement, and without a written plea agreement, "it is difficult for this Court to uphold the district court's decision to grant the motion to reconsider sentence."

Contrary to the defendant's assertions, the record indicates that on the same day the original sentence was imposed, the district court noted its sentencing error.

The minute entry for that day states:

Later in the day, the Court noted for the record that the sentences imposed above were not the agreed upon sentences previously discussed by the Court and Counsel. The Court further indicated that the State would be filing a Motion to Reconsider Sentence in this matter which would likely be granted by the Court.

The State filed a motion to reconsider sentence shortly thereafter stating that the defendant entered into a plea agreement wherein he would be sentenced to twenty years on count 1 and five years on count 2, to run consecutively, and the State would not file a multiple offender bill of information. The motion further stated that despite the negotiated sentences, the district court erroneously imposed a different sentence. At the hearing on the motion, the court stated that it "obviously made a mistake in sentencing." Stand-in counsel for the defendant indicated that he did not oppose the motion. After the court granted the motion, it stated that the sentence originally agreed upon was twenty years on count 1 and

five years on count 2, to be served consecutively. Counsel consulted with the defendant and stated that the defendant desired to go forward with the originally agreed upon sentence.

The defendant subsequently filed an application for postconviction relief, which was denied by the district court. In its reasons for judgment, the court noted that the original sentence was mistakenly imposed and was not the sentence discussed with defense counsel and the State. Thus, the record indicates that the defendant's sentence is in conformance with the plea agreement. The defendant failed to meet his burden of proving that the original plea agreement was breached. See State v. Givens, 99-3518 (La. 1/17/01), 776 So.2d 443, 455-56. Accordingly, this assignment of error is without merit.

MOTION TO QUASH

In his second counseled assignment of error, the defendant challenges the denial of his motion to quash and argues that the sentence imposed on count 2 is excessive because La. R.S. 14:64.3 requires use of a "firearm," and he used a BB gun.

The motion to quash is essentially a mechanism by which to raise pretrial pleas of defense, *i.e.*, those matters that do not go to the merits of the charge. See La. C.Cr.P. arts. 531-534. It is treated much like a peremptory exception of raising the objection of no cause of action in a civil suit. **State v. Beauchamp**, 510 So.2d 22, 25 (La. App. 1st Cir.), writ denied, 512 So.2d 1176 (La. 1987).

In considering a motion to quash, a court must accept as true the facts contained in the bill of information and in the bills of particulars and determine, as a matter of law and from the face of the pleadings, whether a crime has been charged. While evidence may be adduced, it may not include a defense on the merits. The question of factual guilt or innocence of the offense charged is not

raised by the motion to quash. **Beauchamp**, 510 So.2d at 25.

The motion to quash argued that the indictment charged an offense that is not punishable under a valid statute because “[t]he State is attempting to qualify a dangerous weapon already addressed in the primary charge [as] a ‘firearm’ to tack on additional charges against the defendant.” The bill of information set forth the charges as follows:

COUNT 1

R.S. 14:64 ARMED ROBBERY, by the intentional taking of property having value from the person of another or which is in the immediate control of another, namely Bernaldo Santos and Gabriel Alonzo, by use of force or intimidation while armed with a dangerous weapon, to-wit: gun.

COUNT 2

R.S. 14:64.3 ARMED ROBBERY; USE OF FIREARM; ADDITIONAL PENALTY, by committing an armed robbery when the dangerous weapon used in the commission of the crime of armed robbery is a firearm.

Because the defendant’s claim was a defense on the merits, it could not be properly raised by a motion to quash. See State v. Rembert, 312 So.2d 282, 284 (La. 1975). Therefore, this assignment of error is without merit.

FAILURE TO VACATE ORIGINAL SENTENCE

In his first pro se assignment of error, the defendant argues that the district court failed to vacate the sentence it originally imposed prior to its grant of the State’s motion to reconsider sentence.

The district court originally sentenced the defendant on count 1 to ten years at hard labor without the benefit of probation, parole, or suspension of sentence to run concurrently with all other sentences he was presently serving, and on count 2, the defendant was sentenced to five years at hard labor without the benefit of probation, parole, or suspension of sentence, to run consecutively with count 1 and all other sentences he was presently serving. After the State’s motion for reconsideration of sentence was granted, the district court resentenced the

defendant on count 1 to twenty years at hard labor without the benefit of probation, parole, or suspension of sentence, and on count 2, the defendant was sentenced to five years at hard labor without the benefit of probation, parole, or suspension of sentence. The court ordered that the sentences be served consecutively with each other, but concurrently with any other sentence the defendant was presently serving. The defendant argues that the district court's failure to vacate the original fifteen-year sentence prior to imposing the new twenty-five year sentence exposed him to a term of forty years.

The defendant is correct that the district court failed to vacate his original sentence at the resentencing hearing. However, it is apparent that the district court intended to vacate the original sentence. Thus, out of an abundance of caution, we vacate the original ten-year sentence on count 1 and the original five-year sentence on count 2. See State v. Meneses, 98-0699 (La. App. 1st Cir. 2/23/99), 731 So.2d 375, 376 n.1. We remand for correction of the minutes and, if necessary, the commitment order.

Accordingly, the defendant's convictions and sentences are affirmed, and we remand this matter with instructions.

CONVICTIONS AND SENTENCES AFFIRMED; REMANDED WITH INSTRUCTIONS.