

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 KA 1435

STATE OF LOUISIANA

VERSUS

ANTHONY ROGERS

DATE OF JUDGMENT: JUN 05 2015



ON APPEAL FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT
NUMBER 1302676, DIVISION F, PARISH OF TANGIPAHOA
STATE OF LOUISIANA

HONORABLE ELIZABETH P. WOLFE, JUDGE

* * * * *

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BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

Disposition: RULING GRANTING DEFENDANT'S MOTION TO QUASH THE BILL OF INFORMATION REVERSED. REMANDED.

CHUTZ, J.

Defendant, Anthony Francis Rogers, was charged by bill of information with possession of a firearm or carrying a concealed weapon by a convicted felon, a violation of La. R.S. 14:95.1, and pled not guilty. After a hearing, the trial court granted his motion to quash the bill of information. The State appeals. We reverse and remand.

STATEMENT OF FACTS

Because the trial court granted defendant's pretrial motion to quash the bill of information, the facts of this case were not fully developed. It is undisputed that defendant had previously been convicted of simple burglary by a nolo contendere plea on October 9, 2007, in Tangipahoa Parish for which he had been sentenced to five years imprisonment.¹ According to the September 12, 2013 bill of information and the Tangipahoa Parish Sheriff's Office incident report, the investigation in this case began on July 8, 2013, when Detectives Thomas Wheeler and Walter Fleming responded to a report of the burglary of several units at Robert Mini Storage located on Louisiana Highway 445 in Robert, Louisiana. Several items had been stolen, including a black Liberty gun safe from a unit that was rented by Sean Fleming, who is Detective Fleming's brother. The safe contained numerous firearms.

On July 9, 2013, the police discovered that some of the stolen firearms had been pawned by defendant and Bradley Williams at Bayou Pawn Shop.² On July 10, 2013, defendant and Williams were arrested. During taped interviews conducted after their arrests, both denied any involvement with the burglary. After

¹ While the bill of information included only defendant's prior simple burglary conviction, based on our review of the bill of information and the minutes in the prior case, on October 9, 2007, defendant also pled nolo contendere to the charge of simple arson. The bill of information in that case further indicates that both of the prior felony offenses were committed on or about July 2, 2007. Defendant was sentenced to five years imprisonment at hard labor on both counts which were ordered to be served concurrently.

² Detective Wheeler reviewed the transaction ticket and recognized Williams as the seller. Additionally, surveillance footage of the transaction showed defendant and Williams pawning the firearms.

learning that defendant and Williams were living with Caleb Prince in Hammond, Louisiana, the police obtained Prince's verbal consent to search their residence and located the gun safe in the backyard.

On July 15, 2013, during another taped interview, Williams admitted his involvement in the burglary. He advised that Prince was also involved in the burglary and in possession of some of the firearms taken from the safe. Williams further admitted he pawned some of the firearms at Bayou Pawn Shop and sold others to Mathew Guillot. After obtaining Prince's written consent to search the residence, the police recovered several other stolen items. During a subsequent taped interview, Prince admitted that along with defendant and Williams, he had burglarized the units and pawned stolen items. The detectives recovered additional firearms while executing a search warrant at Guillot's residence.

PROPRIETY OF THE RULING ON THE MOTION TO QUASH

In his motion to quash the bill of information, defendant acknowledged that at the time of his arrest for the instant offense he was on probation for possession of marijuana. In rendering its ruling granting the motion to quash, the trial court determined that La. R.S. 14:95.1 was unconstitutional as applied to defendant. In reaching this conclusion, the trial court found that *State v. Draughter*, 2013-0914 (La. 12/10/13), 130 So.3d 855, 866-68 -- holding that the State has a compelling interest in regulating convicted felons still under the State's supervision and that La. R.S. 14:95.1 was narrowly tailored to achieve that interest -- did not apply to defendant since he was on a misdemeanor probation rather than a felony parole or probation. On appeal, the State asserts that the trial court's ruling must be reversed in light of recent jurisprudence. And defendant has conceded in his brief that the trial court erred in granting his motion to quash.

Initially, we note that this court, rather than the Louisiana Supreme Court, has jurisdiction over this matter because the trial court did not find La. R.S.

14:95.1 unconstitutional on its face but only as applied to the defendant. *See State v. Trosclair*, 2011-2302 (La. 5/8/12), 89 So.3d 340, 344; *State in Int. of A.S.*, 97-0806 (La. 9/26/97), 701 So.2d 965.

La. R.S. art. 14:95.1 presently provides in pertinent part:

A. It is unlawful for any person who has been convicted of a crime of violence as defined in R.S. 14:2(B) which is a felony or simple burglary, burglary of a pharmacy, burglary of an inhabited dwelling, unauthorized entry of an inhabited dwelling, felony illegal use of weapons or dangerous instrumentalities, manufacture or possession of a delayed action incendiary device, manufacture or possession of a bomb, or possession of a firearm while in the possession of or during the sale or distribution of a controlled dangerous substance, or any violation of the Uniform Controlled Dangerous Substances Law which is a felony, or any crime which is defined as a sex offense in R.S. 15:541, or any crime defined as an attempt to commit one of the above-enumerated offenses under the laws of this state, or who has been convicted under the laws of any other state or of the United States or of any foreign government or country of a crime which, if committed in this state, would be one of the above-enumerated crimes, to possess a firearm or carry a concealed weapon....

C. The provisions of this Section prohibiting the possession of firearms and carrying concealed weapons by persons who have been convicted of certain felonies shall not apply to any person who has not been convicted of any felony for a period of ten years from the date of completion of sentence, probation, parole, or suspension of sentence.

D. For the purposes of this Section, "firearm" means any pistol, revolver, rifle, shotgun, machine gun, submachine gun, black powder weapon, or assault rifle which is designed to fire or is capable of firing fixed cartridge ammunition or from which a shot or projectile is discharged by an explosive. (Footnote omitted.)

Subsequent to the trial court's ruling, the Louisiana Supreme Court held that where a defendant, charged with possession of a firearm or carrying a concealed weapon by a convicted felon, had completed all aspects of his prior felony conviction sentence and was no longer under State supervision, the application of La. R.S. 14:95.1 was constitutional. *State v. Eberhardt*, 2013-2306 (La. 7/1/14), 145 So.3d 377, 383. The court specifically held that La. R.S. 14:95.1 served a compelling governmental interest, i.e., to protect the safety of the general public from felons convicted of specified serious crimes who have demonstrated a

dangerous disregard for the law and the safety of others and presented a potential threat of further or future criminal activity. *Eberhardt*, 145 So.3d at 385; accord *State v. Zeno*, 2014-0325 (La. App. 1st Cir. 9/19/14), 155 So.3d 4, 14.

It is undisputed that defendant had been convicted of simple burglary (an enumerated offense under La. R.S. 14:95.1A) on October 9, 2007, and sentenced to five years imprisonment. Because a period of ten years from the date of the completion of his sentence, probation, parole, or suspension of sentence for that 2007 conviction had not passed when he was charged with the instant offense on September 12, 2013, the application of La. R.S. 14:95.1C was constitutional. See *Eberhardt*, 145 So.3d at 383; *Zeno*, 155 So.3d at 14. Accordingly, the trial court erred in granting the motion to quash and finding that La. R.S. 14:95.1 was unconstitutional as applied to defendant.³

DECREE

For these reasons, we reverse the trial court's ruling, which granted defendant's motion to quash the bill of information, based on its finding that La. R.S. 14:95.1 was unconstitutional as applied to defendant. The matter is remanded to the trial court for further proceedings.

RULING GRANTING DEFENDANT'S MOTION TO QUASH THE BILL OF INFORMATION REVERSED. REMANDED.

³ In a second assignment of error, although the State asserts that the trial court violated La. C.C.P. art. 1880, because it failed to notify the Attorney General's Office before finding La. R.S. 14:95.1 unconstitutional, it concedes that the Attorney General's Office was notified after the trial court's ruling and has filed a joint brief with the State in this case on appeal. The State has correctly pointed out that, in the proceedings below, the Attorney General should have below been served notice and/or a copy of the defendant's pleading; and, at his discretion, should have been allowed to be heard and to represent or supervise the representation of the interests of the State. La. R.S. 49:257(C); see also La. C.C.P. art. 1880; La. R.S. 13:4448; *State v. Schoening*, 2000-0903 (La. 10/17/00), 770 So.2d 762, 766. Thus, the trial court's failure to include the Attorney General's representation in the motion to quash proceeding was procedural error. But because we have found merit in the State's argument challenging the propriety of the grant of the motion to quash, we reverse the trial court's ruling on that basis instead.