NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 KA 1737

STATE OF LOUISIANA

VERSUS

LEEROY ALLEN

Judgment Rendered: SEP 21 2018

* * * * * * *

On Appeal from the 17th Judicial District Court
In and for the Parish of Lafourche
State of Louisiana
No. 545989

Honorable Christopher J. Boudreaux, Judge Presiding

* * * * * * *

Kristine Russell
District Attorney
Joseph S. Soignet
Assistant District Attorney
Thibodaux, Louisiana

Attorneys for Appellee,
State of Louisiana

Bruce G. Whittaker
Louisiana Appellate Project
New Orleans, Louisiana

Attorney for Defendant/Appellant,
Leeroy Allen

BEFORE: GUIDRY, THERIOT, AND PENZATO, JJ.

Theriot, J concurs with reasons

PENZATO, J.

The defendant, Leeroy Allen, was charged by bill of information with simple burglary of an inhabited dwelling, a violation of La. R.S. 14:62.2, and pled not guilty in trial court docket number 545989 ("simple burglary proceeding"). The defendant waived his right to a trial by jury. A bench trial was held on November 21, 2016, and the defendant was found guilty as charged. On January 26, 2017, the State filed a habitual offender bill of information.[1] The matter came for sentencing on March 22, 2017, at which time the State advised that the trial court judge had represented the defendant on one of the predicates listed as a basis for the habitual offender bill of information. Upon oral motion of the defendant based upon the prior representation, the trial court judge recused himself from both trial court docket number 545989, the simple burglary proceeding, and trial court docket number 561513, the habitual offender proceeding. Both matters were re-allotted to another division. The defendant filed a motion for new trial in connection with trial court docket number 545989, the simple burglary proceeding. Prior to the hearing on the motion for new trial, the original trial court judge signed an amended order of recusal stating that the recusal pertained only to trial court docket number 561513, the habitual offender proceeding. The defendant's motion for new trial was heard and denied by the trial court judge to whom the cases had been re-allotted, and trial court docket number 545989, the simple burglary proceeding, was transferred back to the original trial court judge, who sentenced the defendant to ten years imprisonment at hard labor, with the first year to be served without the benefit of parole. The defendant now appeals, assigning error to the trial court's actions after recusal and the denial of his motion for new trial.

[1] While the habitual offender bill of information was filed under a different docket number (561513), the motion sought to enhance the sentence to be imposed on the conviction in the instant case, the simple burglary proceeding (545989).

For the following reasons, we affirm the conviction, vacate the sentence, and remand with instructions.

FACTS

On June 10, 2015, Ann Mejia[2] called the police after returning to her residence at 245 East 54th Street in Cutoff, Louisiana, and discovering that it had been burglarized while she was working off-shore. As she entered her residence, she observed that her phone had been knocked to the floor, her bedroom was in disarray, and several items were missing, including jewelry, cash, a firearm, tools, a video camera, a laptop computer, credit cards, and a checkbook. Near the time of the offense, Mejia had hired a carpenter, Robert Worthington, and his helper, Blake Hernandez, to perform work in her home. Based on their arrangements, Mejia would call Worthington to schedule the work during the two-week periods that she spent home after working twenty-eight days offshore. During one of those time periods, prior to the offense, Hernandez disconnected Majia's security cameras purportedly to work on the ceiling.

With Worthington's assistance, the police were able to recover some of Mejia's items that Hernandez sold to pawn shops. The police subsequently confirmed that Hernandez and the defendant used one of Mejia's credit cards at Hibbett Sports in Galliano, Louisiana.[3] After his arrest, in a recorded statement to Detective Joseph Anderson of the Lafourche Parish Sheriff's Office, Hernandez confessed that he, the defendant, and Robert Bourgeois (also known as "Skunky") planned and committed the burglary. At trial, Bourgeois denied that he or the defendant had any involvement in the instant offense.

---

[2] Mejia's last name was Griffin at the time of the trial. Herein, the last name at the time of the offense will be referenced.

[3] The store clerk identified Hernandez and the defendant in a photographic lineup.

ACTIONS BY TRIAL COURT JUDGE AFTER HIS RECUSAL

In assignment of error number one, the defendant argues that it was error for the original trial court judge to act in this case after recusing himself therefrom. In assignment of error number three, the defendant argues that it was error for the original trial court judge to impose a sentence in a case from which he had been recused.

Louisiana Code of Criminal Procedure article 672 provides that, "[a] judge may recuse himself, whether a motion for his recusation has been filed by a party or not, in any case in which a ground for recusation exists." According to La. C.Cr.P. art. 673, a judge has full power and authority to act "until he is recused, or a motion for his recusation is filed."

In his brief, the defendant cites *State v. Clarke*, 2003-0129 (La. App. 1 Cir. 9/26/03), 857 So.2d 599, as support for his argument that action taken by the original trial court judge after his recusal, including his attempt to amend and rescind the recusal, was an absolute nullity. In *Clarke,* the trial judge recused herself after the defendant waived his right to a jury trial. A week later the defendant sought to withdraw his prior waiver; thus, the trial judge vacated her previous recusal order. Noting that the trial judge's authority to act in the defendant's case ceased at the moment of recusal, the *Clarke* court found that the trial court's granting of the defendant's motion to reconsider his prior waiver of his right to trial by jury, as well as the trial court's vacating of its own recusal, were without authority. *Id.* at 603. In *Clarke*, this court cited the following analysis made by the Louisiana Supreme Court in *State v. Price,* 274 So.2d 194 (La.1973):

> [Louisiana Code of Criminal Procedure articles 673 and 676 are] based upon similar provisions in the Code of Civil Procedure, and interpretation of the latter provisions is pertinent here. It has long been recognized in our civil procedure that once a judge is recused ... he has no power to act (except to appoint the proper person to sit ad hoc when the law provides for such an appointment). **Any action taken by a recused judge is an absolute nullity** ....

> In considering the particular action taken by a recused judge, our courts have made no distinction between ministerial and judicial acts. We have determined that no action may be performed by the recused judge. The theory of recusation is based upon public policy, for it is applied not only for the protection of the litigants but generally to see that justice is done by an impartial court. It is, therefore, for the sake of appearance to the general public as well as protection against the acts themselves that a judge be prohibited from any activity in a case in which he has been recused.
>
> *Price,* 274 So.2d at 197 (Emphasis added and citations omitted).

In *Price,* the state's appeal was dismissed as untimely, since it had sought and obtained an extension of time in which to file its appeal from a judge who had been recused in the case. *Clarke*, 857 So.2d at 601-602.

The Clarke court further stated:

> Applying *Price* in a civil case, this court held in *Revere v. Strain,* 02-0254 (La.App. 1st Cir.12/31/02), 837 So.2d 137, that a judge who had recused herself could not sign an order that she had orally sustained prior to the recusal. This court noted that "the power and authority for [one] to act as judge in a particular case for any and all reasons ceases at the moment of recusal." *Revere,* 837 So.2d at 138. *See also Arcement v. Cruz,* 02-2533 (La.App. 4th Cir.12/20/02), 836 So.2d 314, 315 ("Once a judge recuses himself or herself from hearing a case, the judge is thereafter precluded from hearing that case ever again.") Given the foregoing, it is clear that if a trial judge recuses herself from a case, the trial judge may not take any further action in that case, including that of rescinding her prior order of recusal.

Clarke, 857 So.2d at 602.

In the instant case, the defendant made an oral motion to recuse the original trial court judge upon being advised by the State that the judge had represented the defendant on one of the predicates listed as a basis for the habitual offender bill of information. In response, the trial court judge stated, in part, "Right. It's my understanding that the record does reflect that Mr. Allen was represented by the Public Defender's Office and I actually appeared on his behalf on several occasions in that predicate offense...." Without objection by the State, the trial court judge recused himself, noting that the law required him to recuse himself in

matters where he has represented a party or a defendant in the case. In doing so, the trial court judge stated the following:

> Because this is a habitual offender bill, these prior docket numbers or prior convictions are essential elements. There may be issues regarding advice of rights, knowing or intelligent pleas which could entail issues of representation. There may be issues of identification where the Court could conceivably be a witness or require testimony from the Court.
>
> Accordingly, the Court feels it's mandatory that it recuse itself from the habitual offender bill proceeding in docket 561513.
>
> Accordingly, I'll have to recuse myself from any further proceedings in the other matter while the habitual offender bill is pending. So it will be both docket numbers, the 545989 and 561513.

An order of recusal was signed on March 22, 2017, containing both trial court docket numbers in the case caption, and ordering that "this cause be re-allotted by the Clerk of Court for appropriate proceedings and final disposition." Both matters were then re-allotted to Division C of the 17th Judicial District Court.

On May 3, 2017, the defendant filed a motion for new trial, predicated primarily on the basis that the original trial court judge who rendered the verdict in the simple burglary proceeding "had previously represented the defendant in a prior criminal matter and has recused himself from any further proceedings in the matter." A hearing on the defendant's motion for new trial was held before the judge to whom the cases had been re-allotted on May 19, 2017. Prior to the hearing, on May 4, 2017, the original trial court judge signed an "Amended Order of Recusal," which provided as follows:

> [T]he Court, after reviewing the record in this matter, observed that:
>
> On March 22, 2017 an Order of Recusal was signed in the above referenced matters by this Court. The Order of Recusal erroneously referred to Docket #545989 as being included in said order of recusal. On said date, pursuant to La. C. Cr. Proc. Art. 671 (3)[4], this Court recused itself from Docket #561513 only, based upon it's [*sic*] prior representation by the Indigent Defender's Office during

[4] Louisiana Code of Criminal Procedure article 671(A)(3) provides that a trial judge shall be recused when he or she "[h]as been employed or consulted as an attorney in the cause."

> this Courts [*sic*] tenure as Chief Indigent Defender in one of the predicate convictions listed in the habitual offender bill.
>
> ACCORDINGLY, IT IS ORDERED that the Order of Recusal dated March 22, 2017 is hereby amended to reflect that only Docket #561513 be re-allotted by the Clerk of Court for appropriate proceedings and final disposition.

At the May 19, 2017 hearing, the trial court recognized that the May 4, 2017 "Amended Order of Recusal" created a dilemma, stating as follows, "Does a district court judge have the power, if a clerical error was made, to rectify a clerical error with a subsequent document notifying his intent that he didn't intend to recuse out of a [matter]?" The trial court concluded that, "a Court can amend its error by filing a subsequent clarifying document signifying that it wasn't the intent to recuse out of the matter when two docket numbers were placed on one recusal." Accordingly, the motion for new trial was denied, and trial court docket number 545989, the simple burglary proceeding, was transferred back to the original trial court judge, while trial court docket number 561513, the habitual offender proceeding, remained in Division C. Thereafter, the original trial court judge imposed sentencing upon the defendant in trial court docket number 545989, the simple burglary proceeding.

We find that by virtue of the order of recusal signed on March 22, 2017 that contained both trial court docket numbers in the case caption, the original trial court judge recused himself from both cases. His power and authority to act in either case for any and all reasons ceased at the moment of recusal. See *Clarke*, 857 So.2d at 602 (citing *Revere,* 837 So.2d at 138). Moreover, any action taken after that time was an absolute nullity. *Clarke*, 857 So.2d at 602 (citing *Price,* 274 So.2d at 197). Thus, both the May 4, 2017 "Amended Order of Recusal" and the June 22, 2017 sentence imposed upon the defendant in connection with his conviction of simple burglary of an inhabited dwelling are absolute nullities.

Considering the foregoing, we find merit in assignments of error numbers one and three. Accordingly, we vacate the sentence imposed in this case and remand for resentencing before the trial court judge to whom the cases were re-allotted following the March 22, 2017 recusal.

We now turn to the defendant's argument regarding the ruling on his motion for new trial.

MOTION FOR NEW TRIAL

In assignment of error of error number two, the defendant argues that it was an abuse of discretion to rely upon the May 4, 2017 "Amended Order of Recusal," which was a nullity, to deny his motion for new trial.

Louisiana Code of Criminal Procedure article 851(A) provides that, "[t]he motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded." The defendant's motion for new trial is based upon La. C.Cr.P. art. 851(B)(4), which provides, in pertinent part, that the trial court, on motion of the defendant, shall grant a new trial whenever the defendant has discovered, since the verdict or judgment of guilty, a prejudicial error or defect in the proceedings that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before the verdict or judgment.[5] Generally, a motion for new trial will be denied unless the defendant establishes that he has suffered some injustice. La. C.Cr.P. art. 851(A); *State v. Burrell*, 561 So. 2d 692, 701 (La. 1990), cert. denied, 498 U.S. 1074, 111 S. Ct. 799, 112 L. Ed. 2d 861 (1991).

[5] On appeal the defendant states that the basis of his motion for new trial is Subsection (B)(4) of Article 851. We note that while the defendant's written motion for new trial further lists as a basis for the motion, "The ends of justice would be served by the granting of a new trial," the defendant did not attempt to assert that basis on appeal.

In this case, the defendant would only be entitled to a new trial if there existed a defect in the proceedings that led to his conviction for simple burglary of an inhabited dwelling. As noted above, the original trial court judge recused himself pursuant to La. C.Cr.P. art. 671(A)(3), which requires a trial judge to recuse himself when he "[h]as been employed or consulted as an attorney in the cause." The Official Comments to article 671 note, in pertinent part:

> The words "cause" and "case" are advisedly used in this Title. The broader word "cause" embraces the entire situation, in both its civil and criminal implications. The word "case" is limited to the particular criminal prosecution at bar. "Cause imports a judicial proceeding entire, and is nearly synonymous with *lis* in Latin, or suit in English. 'Case' not infrequently has a more limited signification, importing a collection of facts, with the conclusion of law thereon." Black's Law Dictionary 279 (4th Ed.1951).

The "cause" referenced in the codal article refers to the case presently being litigated, not a prior case. *State v. Kennedy*, 2010-1606 (La. App. 4 Cir. 8/10/11), 73 So.3d 985, 990. In this case, the predicate conviction on which the original trial court judge was employed as an attorney did not become part of the entire situation or "cause" until the State filed the habitual offender bill of information. Prior thereto, there was no basis for recusal under La. C.Cr.P. art. 671(A)(3). Therefore, the original trial court judge was not under a duty to recuse himself prior to the defendant's motion for recusal made upon the filing of the habitual offender bill of information. Accordingly, there was no prejudicial error or defect in the proceedings that would require a new trial pursuant to La. C.Cr.P. art. 851(B)(4). The trial court's denial of the motion for new trial will not be disturbed absent a clear abuse of discretion. *State v. Collins*, 470 So.2d 553, 559 (La. App. 1 Cir. 1985). Based on the foregoing, we find no error or abuse of discretion in the trial court's denial of the defendant's motion for new trial. Assignment of error number two is without merit.

CONCLUSION

For all of the foregoing reasons, defendant's conviction for simple burglary of an inhabited dwelling is affirmed. However, we vacate the defendant's sentence and remand for resentencing before the trial court judge to whom the cases were re-allotted following the March 22, 2017 recusal.

CONVICTION AFFIRMED; SENTENCE VACATED AND REMANDED FOR RESENTENCING WITH INSTRUCTIONS

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 KA 1737

STATE OF LOUISIANA

VERSUS

LEEROY ALLEN

THERIOT, J., concurring and assigning reasons.

I concur with the majority's opinion. I write separately to point out that the defendant, in my opinion, is not entitled to a new trial because he failed to exercise reasonable diligence as discussed in La. Code Crim. P. art. 851(B)(4). Louisiana Code of Criminal Procedure article 851(B)(4) provides in pertinent part:

> The court, on motion of the defendant, shall grant a new trial whenever any of the following occur:
>
> (4) The defendant has discovered, since the verdict or judgment of guilty, a prejudicial error or defect in the proceedings that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before the verdict or judgment. (Emphasis added.)

Once the defendant became aware of the judge presiding over his simple burglary case, the defendant should have realized that the judge had previously represented him. Clearly, the previous representation should have been known by the defendant before the verdict or judgment. However, the defendant did not seek recusal until the sentencing phase. Thus, the defendant was not reasonably diligent and is not entitled to a new trial pursuant to La. Code Crim. P. art. 851(B)(4).

For the foregoing reasons, I respectfully concur.