

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 KA 0770

STATE OF LOUISIANA

VERSUS

KHIRI DANIELS

***DATE OF JUDGMENT:***      **DEC 21 2018**

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT  
NUMBER 16-CR-132313, DIVISION J, PARISH OF WASHINGTON  
STATE OF LOUISIANA

HONORABLE WILLIAM J. KNIGHT, JUDGE

\* \* \* \* \*

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District Attorney  
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Assistant District Attorney  
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Counsel for Appellee  
State of Louisiana

Katherine M. Franks  
Madisonville, Louisiana

Counsel for Defendant-Appellant  
Khiri Daniels

\* \* \* \* \*

BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

**Disposition: ATTEMPTED ARMED ROBBERY CONVICTION AND SENTENCE (COUNT 3) REVERSED AND VACATED, AND DEFENDANT DISCHARGED AS TO COUNT 3 ONLY. ALL OTHER CONVICTIONS AND SENTENCE FOR AGGRAVATED BATTERY AFFIRMED; SENTENCE FOR FELON IN POSSESSION OF A FIREARM CONVICTION AMENDED TO INCLUDE A \$1,000 FINE AND, AS AMENDED, AFFIRMED; HABITUAL OFFENDER ADJUDICATION AND ENHANCED ATTEMPTED FIRST DEGREE MURDER SENTENCE AFFIRMED; REMANDED FOR CORRECTION OF MINUTES AND COMMITMENT ORDER.**

**CHUTZ, J.**

The defendant, Khiri K. Daniels, was charged by bill of information with attempted first degree murder, a violation of La. R.S. 14:30 and 14:27 (count 1); aggravated battery, a violation of La. R.S. 14:34 (count 2); attempted armed robbery, a violation of La. R.S. 14:64 and 14:27 (count 3); and felon in possession of a firearm, a violation of La. R.S. 14:95.1 (count 4). The defendant pled not guilty to the charges and, following a jury trial, was found guilty as charged on all counts. For the attempted first degree murder conviction, the defendant was sentenced to forty-five years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence; for the aggravated battery conviction, the defendant was sentenced to ten years imprisonment at hard labor; for the attempted armed robbery conviction, the defendant was sentenced to forty-five years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence; for the felon in possession of a firearm conviction, the defendant was sentenced to twenty years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The sentences were ordered to run concurrently.

The State subsequently filed a habitual offender bill of information, seeking to enhance the attempted first degree murder sentence.<sup>1</sup> At the habitual offender hearing, the defendant was adjudicated a third-felony habitual offender. The trial court vacated his forty-five-year sentence for the attempted first degree murder conviction, and resentenced the defendant to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The enhanced sentence was ordered to run concurrently with the defendant's other sentences. Defense counsel in a post-sentencing hearing requested that the trial court

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<sup>1</sup> The defendant had prior convictions for two counts each of aggravated burglary and attempted simple robbery, as well as one count of second degree battery.

reconsider the defendant's trial counsel's motion in arrest of judgment, which was filed prior to sentencing. The State and the trial court agreed that under La. C.Cr.P. art. 859(6), the motion in arrest of judgment should be granted because the defendant's convictions for both attempted first degree murder and attempted armed robbery violated the prohibition against double jeopardy. Accordingly, the trial court granted the motion, and the State dismissed the attempted armed robbery count.

The defendant now appeals, designating three assignments of error. We note that conviction and sentence for the attempted armed robbery (count 3) have been reversed and vacated; thus, the defendant is hereby discharged as to count 3 only. We affirm all other convictions and the sentence for aggravated battery. We amend the sentence for the felon in possession of a firearm conviction to include \$1,000 fine and, as amended, affirm. We affirm the habitual offender adjudication and the enhanced attempted first degree murder sentence. The matter is remanded for correction of the minutes and the commitment order.

### **FACTS**

On August 28, 2015, Bobby Smith was at his home in Clifton, Washington Parish. Bobby was in his backyard, taping wires on his AC unit, when two men approached. One man had a gun and the other man, later identified as the defendant, had a machete. They forced him into his house, made him lie on the floor, and demanded money. Bobby said he did not have any money. They began beating Bobby. The defendant then went into Bobby's bedroom. At this point, Bobby ran out of the back door. The defendant either took the gun from his accomplice or had his own gun, and shot Bobby on his right side. Bobby ran to his father-in-law's house, which was nearby. The police were called and Bobby was airlifted to a hospital in Hammond. When Bobby recovered and got home, he

identified the defendant in a photographic lineup. The defendant did not testify at trial.

### ASSIGNMENTS OF ERROR NOS. 1 and 2

In these assignments of error, the defendant contends that convictions for both attempted first degree murder and attempted armed robbery constitute double jeopardy; and that defense counsel was ineffective for failing to raise the double jeopardy issue.

The record shows that after appellate counsel filed the defendant's brief, defense counsel moved to arrest judgment on double jeopardy grounds. It is undisputed that, with the agreement of the State, the trial court granted the motion in arrest of judgment under La. C.Cr.P. art. 859(6), concluding that the defendant's convictions of both attempted first degree murder and attempted armed robbery violated the prohibition against double jeopardy.<sup>2</sup> Thereafter, the State dismissed the attempted armed robbery count.

Given this, the defendant's first and second assignments of error are without merit and/or moot. The judgment of arrest was granted on double jeopardy grounds and, accordingly, as to the attempted armed robbery conviction and sentence, the defendant is hereby discharged. See La. C.Cr.P. art. 862. We emand

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<sup>2</sup> Where one of the offenses is felony murder, conviction of both felony murder and the underlying felony is barred by double jeopardy. *Harris v. Oklahoma*, 433 U.S. 682, 682-83, 97 S.Ct. 2912, 2913, 53 L.Ed.2d 1054 (1977) (per curiam); *State v. Frank*, 2016-1160 (La. 10/18/17), 234 So.3d 27, 33. In this case, the defendant's convictions for attempted first degree murder and attempted armed robbery have placed him in jeopardy twice for the same course of conduct. See *State v. Garcia*, 2010-755 (La. App. 5th Cir. 5/10/11), 66 So.3d 24, 26-28. See also *State v. Stewart*, 400 So.2d 633, 635 n.4 (La. 1981); *State v. Cotten*, 438 So.2d 1156, 1160-61 (La. App. 1st Cir. 1983), writ denied, 444 So.2d 606 (La. 1984). Where multiple punishments have been erroneously imposed, the proper procedure on review is to eliminate the effect of the less severely punishable offense. *State ex rel. Adams v. Butler*, 558 So.2d 552, 553 (La. 1990). Here, the less severely punishable offense is attempted armed robbery as it carries a potential sentence of five to 49-½ years imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence; whereas, attempted first degree murder carries a potential sentence of ten to 50 years imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. See *Garcia*, 66 So.3d at 28; La. R.S. 14:27(D)(1)(a) & (D)(3); La. R.S. 14:30(C)(2); La. R.S. 14:64(B).

the matter to ensure that the minutes and commitment order have been duly corrected.

### **ASSIGNMENT OF ERROR NO. 3**

In his third assignment of error, the defendant asserts that the habitual offender bill of information sought to enhance sentences that cannot be enhanced by law.

For the felon in possession of a firearm charge (count 4), the State provided the following in the bill of information:

**KHIRI K. DANIELS, on or about August 28, 2015**, by being a convicted felon; having previously been convicted of two counts of Aggravated Burglary, Attempted Simple Robbery, and Second Degree Battery in docket number 08-02398, in the 24th Judicial District Court, Parish of Jefferson on March 30, 2009, and Attempted Simple Robbery in docket number 473134 in the Criminal District Court, Parish of Orleans, on August 22, 2008.

In the habitual offender bill of information, the State provided the following prior convictions of the defendant:

1. In the 24th JDC, Jefferson Parish, Louisiana for the crime of two counts of Aggravated Burglary, Attempted Simple Robbery, and Second Degree Battery on March 30, 2009, under case number 08-02398;

2. In the Criminal District Court, Parish of Orleans, Louisiana for the crime of Attempted Simple Robbery on August 22, 2008, under case number 473134.

That is, the prior convictions listed in the first paragraph of the habitual offender bill of information are the same prior convictions the State listed in the bill of information to establish that the defendant was a felon in possession of a firearm. In the habitual offender bill of information, the State listed all of the crimes the defendant had been convicted of in the instant matter: attempted first degree murder, aggravated battery, attempted armed robbery (which had been dismissed as noted above, prior to the habitual offender hearing), and possession of a firearm by a convicted felon. Accordingly, it was not clear which instant sentence the State was seeking to enhance.

The defendant maintains that it is apparent from the two bills of information the State sought to use the same underlying set of prior convictions to obtain the felon in possession of a firearm conviction to enhance his habitual offender sentence. According to the defendant, this (double) enhancement is in violation of the jurisprudential rule set out in *State v. Sanders*, 337 So.2d 1131 (La. 1976) and its progeny.

The defendant is incorrect. We note initially that *State v. Baker*, 2006-2175 (La. 10/16/07), 970 So.2d 948, 958, cert. denied, 555 U.S. 830, 129 S.Ct. 39, 172 L.Ed.2d 49 (2008), partially overruled *Sanders*, holding that a sentence imposed under La. R.S. 14:95.1 may be enhanced under the habitual offender law, as long as the prior felony conviction used as an element in the firearm conviction is not also used as a prior felony conviction in the multiple offender bill of information. Regardless, the prohibition articulated in *Baker* is not at issue here.

During the habitual offender hearing, which took place on the same day as and subsequent to the grant of the defendant's motion in arrest of judgment for the double jeopardy violation,<sup>3</sup> the State informed the trial court that it had amended the habitual offender bill of information. The State advised the trial court that it was seeking to enhance only the attempted first degree murder sentence. The trial court then correctly noted that the defendant's instant conviction of attempted first degree murder and two prior convictions<sup>4</sup> were crimes of violence; and that, accordingly, as a third-felony habitual offender, the defendant would be resentenced to life imprisonment without benefit of parole, probation, or suspension of sentence, pursuant to La. R.S. 15:529.1(A)(3)(b). This sentence was necessarily at hard labor. See La. R.S. 15:529.1(G).

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<sup>3</sup> Thus, the habitual offender hearing was not held until after the defendant's appellant brief was filed.

<sup>4</sup> This reference by the trial court was to all of the prior convictions set forth in the first paragraph as well as the prior conviction of attempted simple robbery stated in the second paragraph of the habitual offender bill of information.

Thus, based on the foregoing, the defendant's sentence for his conviction of the crime of felon in possession of a firearm was not enhanced. See *Baker*, 970 So.2d at 958. Likewise, the defendant's conviction for felon in possession of a firearm was not used to enhance his sentence for attempted first degree murder, which would constitute a prohibited double enhancement. See *State v. Bailey*, 97-493 (La. App. 5th Cir. 11/12/97), 703 So.2d 1325, 1331. Instead, the underlying felonies used to establish the felon in possession of a firearm conviction were also used in the habitual offender proceeding to enhance the attempted first degree murder sentence. This was permissible because the felon in possession of a firearm conviction was not used to enhance the habitual offender sentence. See *State v. Bias*, 2010-1440 (La. App. 3d Cir. 5/4/11), 63 So.3d 399, 409-11, writ denied, 2011-1063 (La. 11/14/11), 75 So.3d 939. See also *State v. Foster*, 2009-0617 (La. 11/25/09), 23 So.3d 885, 885-86.

This assignment of error is without merit.

#### **SENTENCING ERROR**

Upon conviction for being a convicted felon in possession of firearm, La. R.S. 14:95.1(B) mandates imposition of a fine of not less than \$1,000 nor more than \$5,000. The defendant's sentence for this conviction did not include any fine. Accordingly, the defendant's sentence is illegally lenient. See *State v. Bell*, 2014-1046 (La. App. 1st Cir. 1/15/15), 169 So.3d 417, 426. The State has raised this sentencing error in its brief and suggests that this court impose the minimum fine of \$1,000.

The defendant has no constitutional or statutory right to an illegally lenient sentence. See *State v. Kondylis*, 2014-0196 (La. 10/3/14), 149 So.3d 1210, 1211. As an appellate court, we are authorized to correct an illegal sentence that involves no more than the ministerial correction of a sentencing error. See La. C.Cr.P. art. 882(A); *State v. Haynes*, 2004-1893 (La. 12/10/04), 889 So.2d 224 (per curiam).

In general, imposition of a mandatory minimum fine can be considered nothing more than the ministerial correction of a sentencing error. See *State v. Robertson*, 2014-0252 (La. App. 1st Cir. 9/19/14), 2014 WL 4668685, \*6 (an illegally lenient sentence under La. R.S. 14:95.1(B) was amended on appeal to include the minimum fine of \$1,000); contrast *Haynes*, 889 So.2d at 224 (finding the court of appeal erred by amending an illegally lenient sentence under La. R.S. 14:95.1(B) to include the *maximum* fine of \$5,000).

Accordingly, we amend the defendant's sentence for his felon in possession of a firearm conviction to include a fine in the minimum amount of \$1,000. See *State v. Carter*, 2016-1078 (La. App. 1st Cir. 12/22/16), 210 So.3d 306, 309-10.

### DECREE

For these reasons, we expressly note that the attempted armed robbery conviction (count 3) has been reversed and vacated; the defendant is discharged as to count 3. We affirm all the other convictions as well as the sentence for aggravated battery. We amend the sentence for the felon in possession of a firearm conviction to include \$1,000 fine and affirm the sentence as amended. And we affirm the habitual offender adjudication and the enhanced attempted first degree murder sentence. The matter is remanded for correction of the minutes and the commitment order.

**ATTEMPTED ARMED ROBBERY CONVICTION AND SENTENCE (COUNT 3) REVERSED AND VACATED; DEFENDANT IS DISCHARGED AS TO COUNT 3 ONLY. ALL OTHER CONVICTIONS AND SENTENCE FOR AGGRAVATED BATTERY AFFIRMED; SENTENCE FOR FELON IN POSSESSION OF A FIREARM CONVICTION AMENDED TO INCLUDE A \$1,000 FINE AND, AS AMENDED, AFFIRMED; HABITUAL OFFENDER ADJUDICATION AND ENHANCED ATTEMPTED FIRST DEGREE MURDER SENTENCE AFFIRMED; REMANDED FOR CORRECTION OF MINUTES AND COMMITMENT ORDER.**