NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 KA 1412

STATE OF LOUISIANA

VERSUS

DESHAWN MICHAEL JAMES SHEPPARD

Judgment Rendered: JUN 27 2019

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On Appeal from the
Thirty-Second Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
No. 750513

The Honorable George A. Larke, Jr., Judge Presiding

* * * * *

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BEFORE: GUIDRY, THERIOT, AND PENZATO, JJ.

Guidry, J. Dissents and will assign reasons.
Theriot, J. concurs

PENZATO, J.

The defendant, Deshawn Michael James Sheppard, was charged by felony bill of information with two counts of aggravated assault with a firearm, violations of La. R.S. 14:37.4 (counts I and II), and one count of possession of a firearm or carrying a concealed weapon by a convicted felon, a violation of La. R.S. 14:95.1 (count III). He pled guilty on all counts. On both counts I and II, the trial court imposed a sentence of ten years at hard labor, and on count III, the trial court imposed an amended sentence of ten years at hard labor, to be served without the benefit of parole, probation, or suspension of sentence. The trial court ordered the sentences to run concurrently. The defendant now appeals, contending that the trial court erred by the following: (1) accepting his guilty plea; (2) denying his motion to withdraw his guilty plea; (3) sentencing him under the state's initial plea agreement; and (4) that he received ineffective assistance of counsel. For the following reasons, we affirm the convictions and the sentences on count I and II. We reverse and vacate the amended sentence on count III, and reinstate the original sentence.

STATEMENT OF FACTS

Because the defendant pled guilty, this matter did not proceed to trial. Thus, there is no trial testimony concerning the facts. The factual basis for the guilty pleas was that on April 7, 2017, the defendant committed two counts of aggravated assault with a firearm and possessed a firearm as a convicted felon. The bill of information charged that the defendant committed counts I-III "on or about April 7, 2017" in the Parish of Terrebonne. The record indicates that in 2011, the defendant was previously convicted of unauthorized entry of an inhabited dwelling.

Assignments of Error #1 and #2

In his first assignment of error, the defendant claims the trial court erred in accepting his guilty pleas because they were not given knowingly and voluntarily. He claims his pleas were not knowing and voluntary because he was induced to accept a twelve-year sentence instead of the state's original offer of ten years, because he was rushed in making the decision, and because he received only twenty-five days in which to report to prison, instead of the thirty days for which he claims he bargained. In assignment of error two, the defendant contends that the trial court erred by denying his motion to withdraw his guilty plea. Because these assignments of error are so interrelated, we address them together.

Normally, a defendant's plea of guilty waives all nonjurisdictional defects. Upon motion of the defendant and after a contradictory hearing, which may be waived by the state in writing, the court may permit a plea of guilty to be withdrawn at any time before sentence. La. C.Cr.P. art. 559(A). In *State v. Lewis*, 421 So. 2d 224, 225-26 (La. 1982), the Louisiana Supreme Court held that a trial court may permit the withdrawal of a guilty plea after sentencing if the court finds that the guilty plea was not entered freely and voluntarily, or there was an inadequate *Boykin*[1] colloquy advising the defendant of the rights he was waiving by pleading guilty, making the guilty plea constitutionally infirm. There is no absolute right to withdraw a previously entered plea of guilty. The withdrawal of a guilty plea is within the discretion of the trial court and is subject to reversal only if that discretion is abused or arbitrarily exercised. *State v. Williams*, 2017-0339 (La. App. 1 Cir. 9/15/17), 2017 WL 4082429, *1 (unpublished).

For a guilty plea to be found valid, there must be a showing that the defendant was informed of and waived his constitutionally guaranteed right to trial

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

by jury, right of confrontation, and right against compulsory self-incrimination. A guilty plea must be entered knowingly and voluntarily. *See Boykin*, 395 U.S. at 243, 89 S.Ct. at 1712; *see also State v. White*, 517 So. 2d 461, 462 (La. App. 1 Cir. 1987), *writ denied*, 521 So. 2d 1184 (La. 1988). In determining whether the defendant's plea is knowing and voluntary, the court must not only look to the colloquy concerning the waiver of rights, but also other factors that may have a bearing on the decision. Similarly, in reviewing whether the trial court abused its discretion, courts have looked to the guilty plea colloquy to determine whether the defendant was advised of the consequences of his plea and whether he voluntarily and intelligently waived his rights. What the accused understood is determined in terms of the entire record and not just certain "magic words" used by the trial judge. Everything that appears in the record concerning the offense, as well as the trial judge's opportunity to observe the defendant's appearance, demeanor, and responses in court, should be considered in determining whether or not a knowing and intelligent waiver of rights occurred. Factors bearing on the validity of this determination include the age, education, experience, background, competency, and conduct of the accused, as well as the nature, complexity, and seriousness of the charge. *Williams*, 2017 WL 4082429, *2.

A guilty plea is a conviction and, therefore, should be afforded a great measure of finality. Generally, a denial of a motion to withdraw a guilty plea will not be reversed on appeal if the record clearly shows the defendant was informed of his rights and the consequences of his plea, and that the plea was entered into voluntarily. Once a defendant has been sentenced, a guilty plea may not be withdrawn unless the plea is found to be constitutionally infirm. A guilty plea is constitutionally infirm when a defendant is induced to enter that plea by a plea bargain or by what he justifiably believes was a plea bargain, and that bargain is not kept. In such a case a defendant has been denied due process of law because

the plea was not given freely and knowingly. *State v. Maza*, 2011-1430 (La. App. 1 Cir. 3/23/12), 2012 WL 997038, *2 (unpublished), *writ not considered*, 2012-0920 (La. 11/9/12), 100 So. 3d 824.

A criminal plea agreement is analogous to a civil compromise. Thus, in determining the validity of agreements not to prosecute or plea agreements, the courts generally refer to rules of contract law. The first step under contract law is to determine whether a contract was formed in the first place through offer and acceptance. *See* La. C.C. art. 1927. Under the Louisiana Civil Code, the interpretation of a contract is the determination of the common intent of the parties. La. C.C. art. 2045. The offer and acceptance may be verbal unless the law prescribes a requirement of writing. While contractual principles may be helpful by analogy in deciding disputes involving plea agreements, the criminal defendant's constitutional right to fairness may be broader than his or her rights under contract laws. *State v. Young*, 2018-0564 (La. App. 1 Cir. 11/5/18), 2018 WL 5785260 , *7 (unpublished).

The bill of information was filed in this matter on April 24, 2017. The defendant was arraigned on May 16, 2017, at which time he pled not guilty to all charges. Pre-trial and plea dates were scheduled on July 24, 2017 and August 22, 2017, respectively. A trial date was scheduled on September 5, 2017. The plea date and trial date were continued to December 18, 2017 and January 22, 2018. At pre-trial, the state's plea offer was ten years each for counts I and II, and ten years without benefit of probation, parole, or suspension of sentence for count III; all sentences were to run concurrently.[2] On the morning of trial, the state advised the defendant of the prior plea offer; however, the defendant sought additional time to turn himself in after the plea before beginning to serve the sentence. The state

[2] On December 18, 2017, the defendant appeared in court with counsel who advised that the defendant declined the plea offer, at which time the plea offer was taken off the table by the state.

indicated that if the trial court were to allow a request for additional time to report, the offer would be twelve years. The trial court indicated that it would put the offer on the table and give the defendant "some time" to turn himself in. Prior to the defendant entering the plea, the state indicated on the record their position as to a time frame of three weeks for the defendant to report. Defense counsel requested thirty days. Thereafter, the defendant indicated his understanding that the sentence would be two years longer if he wanted "to delay" and acknowledged his acceptance of same.

Thereafter, the trial court conducted the *Boykin* colloquy and accepted the defendant's guilty plea. The trial court then discussed with both counsel in the presence of the defendant the specific date the defendant would be allowed to report. The trial court asked whether three weeks was the correct timeframe and what day the defendant would turn himself in. Defense counsel replied that they had not discussed a specific day; rather, she had suggested thirty days, and the assistant district attorney suggested three weeks. The trial court, defense counsel, and the assistant district attorney then discussed the possibility of the defendant reporting in three weeks. The trial court directly addressed the defendant and informed the defendant he hoped he would report in three weeks, and the defendant replied that the trial court had his word he would report at that time.[3] Following defense counsel's suggestion of a report date of February 16, 2018, as an alternative date, the trial court ordered the defendant to report on Friday, February 16, 2018.[4] The defendant thereafter acknowledged the report date of

[3] Three weeks from the date of sentencing would have been February 12, 2018.
[4] This resulted in a delay of twenty-five days.

February 16, 2018. Thereafter, the trial court sentenced the defendant.[5] The trial court retained jurisdiction to amend the defendant's sentence for one year.[6]

On February 16, 2018, before the defendant reported to serve his sentence, the defendant's newly retained counsel filed a motion to withdraw his guilty plea requesting to proceed to trial on the merits. The matter was heard on April 5, 2018, at which time the trial court asked defense counsel if he was requesting that the sentence be amended to the state's original "plea agreement" of ten years or if he was requesting the guilty plea be vacated. The matter was continued to April 23, 2018, to allow defense counsel to speak with the defendant concerning same.[7] On April 23, 2018, the trial court denied the defendant's motion to withdraw his guilty plea; however, it reinstated the state's original offer of ten years without benefit of probation, parole, or suspension of sentence for count III, and amended count III of the defendant's sentence accordingly.[8]

We find no constitutional infirmity in the defendant's guilty pleas. The trial court properly *Boykinized* the defendant and asked the defendant if he understood that by pleading guilty, he would be waiving the right to a jury trial, the right to confront or cross-examine his accusers, and the right against self-incrimination. The defendant responded affirmatively to the trial court's questions.

The defendant also expressly agreed to a twelve-year hard labor sentence without benefit of parole, probation, or suspension of sentence, on count III, stating that the assistant district attorney informed him that two years would be added to his sentence if he wanted extra time to report and volunteering that he accepted the

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[5] The trial court failed to impose any fine in this matter; we note, however, the sentencing agreement did not provide for a fine. *See* La. C.Cr.P. art. 890.1(A)(1).

[6] The trial court indicated the purpose of retaining jurisdiction was to increase the defendant's sentence if he failed to report.

[7] The record does not reflect a formal response by defense counsel; however, at the April 23, 2018 hearing, the trial court proceeded to hear arguments in connection with the motion to withdraw the plea.

[8] The defendant did not testify or call any witnesses at either hearing on April 5, 2018 or April 23, 2018.

altered agreement "because I need the time to get my wife situated. So if it takes me two extra years to get my wife situated, I'll—I'll—I'll take it." Moreover, the *Boykin* forms signed by the defendant reflect that on count III, the sentence was twelve years without benefit of parole, probation, or suspension of sentence. The defendant was hardly induced to accept the plea agreement; rather, he actively bargained for extra time to report and accepted the state's revised offer of twelve years.[9] The defendant's plea was thus knowing and voluntary. We also note that although the trial court, the defendant, and the state refer to the original ten-year sentence on count III as the state's original **agreement**, it was in fact the state's original **offer**, because the state and the defendant ultimately confected an agreement for twelve years without benefit of probation, parole or suspension of sentence. Further, the defendant concedes in his brief that he was "prepared to accept" an "offer to [the defendant] on January 22, 2018" made by the District Attorney's Office. Thus the defendant was not induced to enter a guilty plea by a plea bargain reflecting a sentence of ten years on count III. *See Maza*, 2012 WL 997038, *2.

We further find that the record reflects only an agreement for a "delay" in reporting without any agreement as to a specific time period. The defendant, the trial court, and the assistant district attorney all ultimately agreed that the defendant would report to begin serving his sentence on February 16, 2018.[10] Thus, the defendant's claim that the state breached its agreement to allow him thirty days

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[9] We expressly make no determination as to the reasonableness of the state's counter offer to the defendant's request of a delay in reporting which the defendant clearly accepted. A mere change of heart or mind by the defendant as to whether he made a good bargain will not ordinarily support allowing the withdrawal of a bargained guilty plea. *State v. Irving*, 35,795 (La. App. 2 Cir. 5/8/02), 818 So. 2d 289, 291, *writ denied*, 2002-1614 (La. 12/19/02), 833 So. 2d 328.

[10] Moreover, the *Boykin* forms in the record are silent concerning any delay in reporting.

before reporting to serve his sentence is without basis. Based on the foregoing, we find the defendant's assignments of error one and two are without merit.

Assignment of Error #4

In his fourth assignment of error, the defendant claims his attorney was ineffective because, he contends, she did not adequately consider his potential defense to count III, possession of a firearm or carrying a concealed weapon by a convicted felon. He claims she disregarded his potential good-faith defense of receipt of a pardon, she encouraged him to plead guilty, and she did not properly advise the defendant not to accept the state's altered plea offer of twelve years without benefit of parole, probation, or suspension of sentence on count III.

A claim of ineffectiveness of counsel is generally relegated to post-conviction proceedings. However, where a claim of ineffectiveness is raised as an assignment of error on direct review and where the record on appeal is adequate to resolve the matter, the claims should be addressed in the interest of judicial economy. The two-part test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), applies to challenges of guilty pleas based on claims of ineffective assistance of counsel. To establish that his trial attorney was ineffective, the defendant must establish: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) that counsel's inadequate performance prejudiced the defendant to the extent that the proceedings were rendered unfair and the convictions suspect. To satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. *State v. Tingle*, 2012-1928 (La. App. 1 Cir. 6/7/13), 2013 WL 2484316, *6 (unpublished).

The record does not support the defendant's claim that his trial counsel's performance was unreasonable or inadequate. We note that although the defendant

claims he had a good-faith defense because he had received a pardon, the record reveals that such was a first-offender pardon and states, "The right to receive, possess or transport a firearm may not be restored unless all legal provisions (refer to La. R.S. 14:95.1) are met." Louisiana Revised Statutes 14:95.1(C) states, "The provisions of this Section prohibiting the possession of firearms and carrying concealed weapons by persons who have been convicted of, or who have been found not guilty by reason of insanity for, certain felonies shall not apply to any person who has not been convicted of, or who has not been found not guilty by reason of insanity for, any felony for a period of ten years from the date of completion of sentence, probation, parole, suspension of sentence, or discharge from a mental institution by a court of competent jurisdiction." The pardon states that, effective June 13, 2013, the defendant discharged his sentences for his offenses of unauthorized entry into an inhabited dwelling and cyber stalking.

Restoration of "all rights of citizenship" upon completion of supervision following a felony conviction does not include the right to possess firearms in contravention of La. R.S. 14:95.1. *State v. Amos*, 343 So. 2d 166, 168 (La. 1977). The prohibition of La. R.S. 14:95.1 applies to persons granted the automatic pardon for a first felony offender as the automatic pardon does not erase the defendant's status as a convicted felon. *State v. Wiggins*, 432 So. 2d 234, 237 (La.), *writ granted in part, denied in part sub nom. State ex rel. Wiggins v. State*, 440 So. 2d 753 (La. 1983). Ignorance of the provisions of the criminal code or any criminal statute is not a defense to any criminal prosecution and a defense of mistake of law based upon receipt of the first felony offender pardon is not available as a defense under La. R.S. 14:17. *State v. West*, 33,133 (La. App. 2 Cir. 3/1/00), 754 So. 2d 408, 411. In the present case, defendant's claim that his counsel was ineffective for failing to recognize his good-faith defense is without basis.

Defendant further asserts that his counsel was ineffective in failing to advise him at the time of his plea that trading the two years in jail for thirty days was illogical and unjust. During the *Boykin* colloquy, the defendant acknowledged his satisfaction with his attorney's work. He acknowledged his attorney had discussed the charges pending against him. Defense counsel also confirmed on the record that she was satisfied the defendant was "knowingly, intelligently and voluntarily" entering his guilty plea. Further, after defense counsel explained that the defendant understood the sentence was now twelve years, the defendant himself clarified with regard to his bargaining tactics, "I'm just taking a chance. I'm doing this on my own will. This don't have nothing to do with Mrs. Brown or my lawyer or anybody else that's out there. This is me on my own."

There is no evidence in the record as to the recommendation or advice of counsel concerning the guilty plea and/or twelve year sentence. We cannot say that defense counsel's actions or inactions rendered the plea agreement constitutionally infirm.[11] Nor can we say that but for defense counsel's representation, the defendant would have maintained his not guilty pleas and gone to trial. Accordingly, the defendant's fourth assignment of error urging ineffective assistance of counsel is without merit. *See Tingle*, 2013 WL 2484316, *6-7.

<u>Assignment of Error #3</u>

In assignment of error number three, the defendant contends that the trial court erred by sentencing the defendant under the state's initial plea agreement because the plea agreement was induced by ineffective assistance of counsel and the agreement was not complied with by the state. As addressed earlier in this opinion, we find no prior agreement in the record offered by the State and accepted

[11] While the trial court indicated that "if" defense counsel advised him to accept the twelve-year sentence it would be ineffective, there is no evidence in the record of their discussions. Further, as noted previously, the defendant acknowledged it was his choice to accept the twelve-year sentence.

by the defendant for a sentence of ten years on count III. Furthermore, as also previously addressed in this opinion, the record does not support a claim of ineffective assistance of counsel.

However, we are obliged to recognize that a district court has no authority to amend or modify a sentence in a felony case in which the defendant has been sentenced to imprisonment at hard labor after the defendant has begun serving the sentence unless the court grants a timely filed motion to reconsider sentence. *See* La. C.Cr.P. arts. 881(A) & 881.1(A)(1). *See also State v. Gedric,* 99-1213 (La. App. 1 Cir. 6/3/99), 741 So.2d 849, 851-52 (*per curiam*), *writ denied*, 99-1830 (La. 11/5/99), 751 So. 2d 239. Furthermore, a defendant cannot seek review of a sentence imposed in conformity with a plea agreement which was set forth in the record at the time of the plea. *See* La. C.Cr.P. art. 881.2(A)(2); *State v. Leblanc*, 2018-1031 (La. App. 1 Cir. 12/21/18), 2018 WL 6718515, *2 (unpublished).

In *State v. Bush*, 39,150 (La. App. 2 Cir. 7/8/04), 875 So. 2d 134, 135, *writ denied*, 2004-2052 (La. 1/7/05), 891 So. 2d 668, the court recognized that La. C.Cr.P. art. 881.2(A)(2) precluded a defendant from filing and obtaining a favorable ruling on a motion to reconsider an agreed sentence. Otherwise, any defendant could plead guilty with an agreed sentence but still subject it to judicial review by the imposing court. "That would eviscerate the efficacy of plea negotiations involving agreed sentences and would remove the district attorney's power to obtain final resolutions of cases as provided by La. C.Cr.P. art. 61." *Bush*, 875 So. 2d at 135.

We find that no motion to reconsider sentence was filed in the present matter. Furthermore, the defendant was not entitled to seek review of a sentence imposed in conformity with a plea agreement, which was set forth in the record at the time of the plea. *See* La. C.Cr.P. art. 881.2(A)(2). Therefore, we are compelled to reverse and vacate the trial court's resentencing of defendant as to

count III to ten years and reinstate the original sentence of twelve years. *See State v. Neville*, 95-0547 (La. App. 4 Cir. 5/16/95), 655 So. 2d 785, 788, *writ denied*, 95-1521 (La. 9/29/95), 660 So. 2d 851 (reversed and vacated the trial court's resentencing of a defendant to five years and reinstated the original sentence of nine years); *State v. Hunter*, 2002-2742 (La. App. 4 Cir. 2/19/03), 841 So. 2d 42, 45 (finding no timely filed motion to reconsider, vacated forty-year sentence and reinstated ninety-nine year sentence).

For the foregoing reasons, the defendant's convictions and the sentences on count I and II are affirmed, and the amended sentence on count III is reversed and vacated, with the original sentence being reinstated.

CONVICTIONS AND SENTENCES ON COUNT I AND II AFFIRMED; AMENDED SENTENCE ON COUNT III REVERSED AND VACATED; ORIGINAL SENTENCE AS TO COUNT III REINSTATED.

NOT DESIGNATED FOR PUBLICATION

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VERSUS

DESHAWN MICHAEL JAMES SHEPPARD

GUIDRY, J., dissents and assigns reasons.

GUIDRY, J., dissenting.

I respectfully dissent from the majority opinion in this matter because I believe defendant's guilty plea was not given knowingly and voluntarily. When ruling on a motion to withdraw a guilty plea, the trial court should look beyond the Boykinization and consider all relevant factors. State v. McGarr, 52,641, p. 12 (La. App. 2 Cir. 4/10/19), 268 So. 3d 1189, 1197. A court, when called upon to ascertain an accused's state of mind, has the power, notwithstanding a record waiver of constitutional rights, to determine whether other factors present at the time of a guilty plea, whether inside or outside the plea colloquy record, were sufficient to render the plea involuntary or unintelligent. Id. The plea offer set forth when the defendant appeared at court on the day of his re-arraignment was for 10 years. The sudden in court confection of the agreement for 12 years in response to defendant's request for additional time to report did not give the defendant enough time to be counseled or to properly consider same. He was rushed into a plea deal that he was not properly counseled on and seems to have not fully considered or understood. Thus, when not only considering the Boykin colloquy but also the other factors surrounding the plea, I find that the plea to the sentence of 12 years was not knowingly and voluntarily entered into.

For these reasons, I respectfully dissent.