STATE OF LOUISIANA	*	**NO. 2000-KA-0770**
VERSUS	*	**COURT OF APPEAL**
MICHAEL N. BROWN A/K/A CLIFTON BROWN	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 393-927, SECTION "G"
HONORABLE JULIAN A. PARKER, JUDGE

* * * * * *

JAMES F. MC KAY, III
JUDGE

* * * * * *

(Court composed of Judge James F. McKay III, Judge Michael E. Kirby, Judge Max N. Tobias, Jr.)

YVONNE CHALKER
LOUISIANA APPELLATE PROJECT
New Orleans, Louisiana
Attorney for Defendant/Appellant

AFFIRMED AS AMENDED

This appeal concerns a multiple bill sentencing.

Michael Brown, a/k/a Clifton Brown, charged with theft of an automobile valued at five hundred dollars or more, was tried on April 29, 1998, and found to be guilty as charged. On September 10, 1998, the court sentenced the defendant to serve eight years and six months at hard labor, without benefit of parole, probation or suspension of sentence. He appealed, and in an unpublished opinion, this Court affirmed his conviction and vacated his sentence, remanding the case for resentencing. State v. Brown, 99-0420 (La. App. 4 Cir. 3/15/00).

Meanwhile on December 13, 1999, at a multiple bill hearing Brown was sentenced as a fourth felony offender to serve twenty years at hard labor without benefit of parole, probation, or suspension of sentence.

The facts as presented in the earlier opinion are as follows:

> On July 31, 1997, Charlton Camp's vehicle, a Chevy Suburban, was towed to Banner Chevrolet for repairs. The following day, when Camp went to the dealership to retrieve the vehicle, he was told it had been stolen. On August 2, 1997, Camp's vehicle was recovered in Gulfport, Mississippi. There was no evidence of physical damage to the vehicle or of tampering with its ignition.
>
> New Orleans Police Officer Harold Furlong investigated the theft and testified that, from conversations with personnel at Banner Chevrolet, he learned that defendant, a Banner employee, had left with the vehicle. Defendant's removal of the vehicle from the Banner premises was recorded on

> videotape.
>
> Carlos Neville testified that he was assigned to provide security services at Banner Chevrolet on August 1, 1997. He explained that he was stationed in the security shack located at Banner's main gate to monitor all vehicles entering and exiting the premises. The guard shack is equipped with videotaping cameras and monitors positioned to record all vehicles and drivers exiting the premises. On August 1st, Defendant told Neville he was taking the Camp vehicle to the car wash across the street. In conjunction with Neville's testimony, the jury viewed the videotape of defendant driving the vehicle off the Banner lot. Neville noted that defendant never returned to his job at Banner after leaving with the vehicle.

State v. Brown, 99-0420 (La. App. 4 Cir. 3/15/00), pp. 1-2.

Before addressing the assignment of error, we note an error patent in the sentence. It was imposed without benefit of parole, probation, or suspension of sentence. Brown was sentenced under La. R.S. 14:67B(1) which does not restrict the benefits and under La. R.S. 15:529.1A(1)(c)(i) & G which restricts only the benefits of probation and suspension of sentence. Therefore, the trial court erred in denying the benefit of parole. Accordingly, that portion of his sentence will be deleted.

In his assignment of error, Mr. Brown argues that the evidence was insufficient to support his conviction as a fourth felony offender.

The first issue that must be resolved is whether he has preserved this issue for appellate review. In State v. Cossee, 95-2218 (La. App. 4 Cir.

7/24/96), 678 So. 2d 72, this Court held that the failure to file a written response to the multiple bill as required by La. R.S. 15:529.1(D)(1)(b) precluded appellate review of the defendant's claim that the documentary evidence was not sufficient to support the prior convictions set forth in the multiple bill.

When the record does not contain the defendant's written response to the multiple bill, the issue will not be preserved for appellate review unless the objection is made orally. State v. Anderson, 97-2587 (La. App. 4 Cir. 11/18/98), 728 So. 2d 14. At the multiple bill hearing, when the State offered into evidence the exhibits documenting Brown's three prior convictions, the trial court asked if there were any objections, and defense counsel answered "No, sir." The judge then called for a side bar and spoke to the attorneys. At the close of the side bar, the trial court stated, "I note his objection . . ." After the sentence was imposed, the judge said, "Mr. Brown, I note your objection."

Because there was an objection to the sentence, the merits of this issue will be considered. The defendant first complains that the evidence as to identity is inadequate.

The multiple bill of information was based on a 1988 conviction for possession of stolen property (case # 329-643), a 1991 conviction for

possession of cocaine (case # 350-663), and a 1994 conviction for theft of more than $550 (case # 161-367 from 34th JDC). At the multiple bill hearing on December 13, 1999, Officer Terry Bunch, Sr., an expert in identification of fingerprints, examined the evidence submitted by the State. He found that the fingerprints taken from documents concerning the defendant's convictions in 1988, 1991, and 1994 matched the fingerprints of the defendant taken in court that day. The defendant contends that the fingerprints taken in 1988 and 1991 should be on the back of the bills of information rather than the arrest registers; however, this Court has affirmed multiple offender status where the fingerprints were on the back of an arrest register rather than on the bill of information. State v. Bazile, 99-2011 (La. App. 4 Cir. 4/26/00), 2000 WL 722262, ____So. 2d ____; State v. Thompson, 539 So. 2d 1008 (La. App. 4th Cir. 1989). Furthermore, the State introduced the bills of information, the guilty plea forms, the docket masters, the minute entries, and the arrest registers from the 1988 and 1991 convictions. Accordingly, we find that the record indicates the evidence was sufficient to establish the defendant's identity. State v. Henry, 96-1280, (La. App. 4 Cir. 3/11/98), 709 So. 2d 322.

In arguing insufficiency, Brown maintains there is no evidence that he was advised of his Boykin rights in two of the prior convictions.

The Louisiana Supreme Court in State v. Shelton, 621 So.2d 769 (La. 1993), reviewed the jurisprudence concerning the burden of proof in habitual offender proceedings and found it proper to assign a burden of proof to a defendant who contests the validity of his guilty plea. In State v. Winfrey, 97-427 (La. App. 5 Cir 10/28/97), 703 So. 2d 63, 80, writ denied, 98-0264 (La. 6/19/98), 719 So. 2d 481, the Fifth Circuit Court of Appeal addressed the procedure for determining the burden of proof in a multiple offender hearing:

> If the defendant denies the multiple offender allegations then the burden is on the State to prove (1) the existence of a prior guilty plea, and (2) that defendant was represented by counsel when the plea was taken. Once the State proves those two things, the burden then shifts to the defendant to produce affirmative evidence showing (1) an infringement of his rights, or (2) a procedural irregularity in the taking of the plea. Only if the defendant meets that burden of proof does the burden shift back to the State to prove the constitutionality of the guilty plea. In doing so, the State must produce either a "perfect" transcript of the *Boykin* colloquy between the defendant and the judge or any combination of (1) a guilty plea form, (2) a minute entry, or (3) an "imperfect" transcript. If anything less than a "perfect" transcript is presented, the trial court must weigh the evidence submitted by the defendant and the State to determine whether the State met its burden of proof that defendant's prior guilty plea was informed and voluntary.

Brown maintains that in two of his prior convictions the

documentation does not contain a reference to the Boykin rights. However, the guilty plea/waiver of rights form in case # 350-663 is initialed by Brown on the line listing the sentencing range and signed after a list of the Boykin rights as well as after the statement declaring the judge addressed him personally as to "all of these matters." The document is also signed by the defense attorney and the judge. Furthermore, in case # 161-367 from 34th JDC, the docket master states that the defendant was "boykinized by the court" and represented by counsel when he made his guilty plea.

Once the State offered proof of the guilty plea, the burden of proof shifted to the defendant to affirmatively prove an infringement existed on his rights or a procedural irregularity occurred in the taking of the plea itself. At the hearing, the defense attorney never voiced an objection, and the trial court entered one for him. On appeal the defendant now argues that evidence of Boykinization is insufficient. However, such an argument must be made at the hearing.

We find that the trial court correctly held that the defendant's pleas were informed and voluntary on the basis of a review of the record. There is no merit in this assignment of error.

In his pro se assignment, the defendant maintains that his sentence is excessive. He was sentenced as a fourth felony offender under La. R.S.

15:529.1(A)(2)(c)(i) which mandates a sentence of between twenty years and life. The defendant argues that the trial court did not state a basis for the sentence and that because he has no history of violent offenses, the trial court erred in sentencing him to twenty years.

The Louisiana Supreme Court has addressed the issue of when the minimum sentence imposed under the Habitual Offender Law constitutes an excessive term. In State v. Johnson, 97-1906 (La. 3/4/98), 709 So.2d 672, the court noted the Habitual Offender Statute is constitutional, and therefore, the minimum sentence it imposes are presumed to be constitutional. Thus, a trial court "may only depart from the minimum sentence if it finds that there is clear and convincing evidence in the particular case before it would rebut [the] presumption of constitutionality." (Id., p. 676, 677). To succeed in his argument, a defendant must show that:

> [he] is exceptional, which in this context means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case.

(Id., citing State v. Young, 94-1636 (La. App. 4 Cir. 10/26/95), 663 So.2d 525, 529.

The Supreme Court also commented that while a defendant's non-violent history may be taken into account, it cannot be a major reason for finding a

multiple offender's sentence excessive because the factor has already been taken into account in the Habitual Offender Law. Additionally, the trial court must consider the purposes of the law, which are to deter and punish recidivism.

In the case at bar, the defendant was convicted of possession of stolen property in 1988, of possession of cocaine in 1991, for theft of more than $500 in 1994, and theft of an automobile in 1998. At the multiple bill hearing, the defendant offered no proof that his case was in any way exceptional, and thus, he failed to carry his burden under State v. Johnson. In ten years he has committed four felonies, and the fairly lenient sentences he has received have not deterred him from his life of crime. At the sentencing hearing, the trial court stated that the provisions of the Habitual Offender Statute had been taken into account, and the sentence would be the minimal sentence allowed.

Under State v. Johnson , supra, we find no error in the sentence imposed.

Accordingly, for reasons stated above, the defendant's sentence is modified to delete the prohibition of parole, and as amended, the sentence is affirmed.

AFFIRMED AS AMENDED