

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2000-KA-2711**
VERSUS * **COURT OF APPEAL**
DAVID E. BENDER * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 416-134, SECTION "D"
Honorable Frank A. Marullo, Judge
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Judge David S. Gorbaty
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(Court composed of Judge Joan Bernard Armstrong, Judge Steven R. Plotkin, Judge David S. Gorbaty)

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CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED

FOR RESENTENCING

On August 15, 2000, David E. Bender was charged by bill of information with simple burglary, a violation of La. R.S. 14:62. At his arraignment on August 21, 2000, he pleaded not guilty. Probable cause was found after a hearing on September 26, 2000. After a trial on October 18, 2000, a six-member jury found him guilty of attempted simple burglary. The State then filed a multiple bill of information, and the defendant was sentenced on the same day to serve eight years at hard labor as a third felony offender under La. R.S. 15:529.1. Defendant subsequently filed this appeal.

FACTS

At trial, Officers Eric Bolin and Manuel Castallon testified that in the early morning hours of July 11, 2000, they were on patrol in the 200 block of South Claiborne Avenue. They observed a man standing near the passenger side of a parked car. The car was the only vehicle in a parking lot, and it appeared that the man was putting an object through the window. They saw the man reach into the car and take out four bags.

While the man was reaching inside for the packages, the officers drove into the parking lot. The man saw them and started to walk away. The officers pulled up next to the parked car and noticed that its passenger window was broken. The officers exited their vehicle and ordered the man

to stop, but he dropped his bags and began to run instead. He ran about half a block down Cleveland Avenue, climbed a fence, and crawled under a house at 1722 Cleveland Avenue.

Officer Castallon went to the back of the house to secure the area, and Officer Bolin stayed in the front. They called for additional units and a K-9 officer to assist them in surrounding the perimeter. The defendant subsequently emerged from under the house and was taken into custody. After the defendant was apprehended, Officer Castallon ran the license plate to determine who owned the vehicle. He checked with the hotel located near the parking lot, and discovered that the owner of the Toyota Camry, Barry Morris, was a registered guest. Mr. Morris identified his car and the packages that were on the ground near the car.

Officer Rudy Fascio testified that on July 11, 2000, he was assigned to the K-9 Division when he was called to conduct a search with his dog in the 1700 block of Cleveland Avenue. When he arrived, he was given a brief description of the subject. He began to search the area as the other officers tried to gain entry into some yards that were locked. After they opened the gate to one of the yards, the dog signaled that there was a subject hiding under the house. As Officer Fascio walked around the house, the dog indicated that the subject was toward the rear of the residence. The officer

looked under the house, saw the defendant, and ordered him to crawl out. As he did, the other officers entered the yard and took the defendant into custody.

Mr. Barry Morris of Halodus, Texas testified that on July 11, 2000, he was in New Orleans with his church choir. At about 4 a.m. that day, he received a call from a New Orleans Police Department officer. The officer told him that his car had been broken into, and asked Mr. Morris to accompany him to the scene. He did so, and found that his 1997 Toyota Camry had a broken front passenger side window, and his belongings were scattered nearby in the parking lot. When he opened the door, he discovered a rock on the floorboard on the driver's side of the car. Mr. Morris averred that he had locked his car and had not given anyone permission to access it. He further stated that he did not know the defendant

At trial, the defendant admitted that he had been convicted of a business burglary in 1993, possession of stolen property in 1988, and possession of marijuana and PCP in 1987. Bender testified that on the night in question, he had just left a lady friend on South Galvez Street, and was going to visit another lady friend on North Prieur Street. He explained that he was walking down Claiborne Avenue and turned onto Cleveland Avenue.

Many police officers were in the area, and they stopped him and asked

where he was going. As he was answering, the officers began to hit him. He fled, jumped a fence, and was standing in the backyard of a house on Cleveland Avenue when an officer with a dog approached. After that officer opened the gate to the yard, all of the other officers rushed up to the defendant and pushed him to the ground, yelling, "Stop resisting." The defendant testified that he did not break into the car in question or hide under the house. He claimed that the knapsack he was carrying contained his boots, jeans, shirts, and work tools for cleaning air conditioners.

ASSIGNMENT OF ERROR NUMBER ONE

In his sole assignment of error, the defendant contends that the trial court erred in sentencing him without advising him of his constitutional rights.

La. R.S. 15:529.1(D) provides that the trial court shall inform the defendant of the allegations contained in the multiple bill of information and of his right to be tried as to the truth thereof according to law prior to asking the defendant whether the allegations are true. Furthermore, if a defendant pleads guilty to the multiple bill, the trial court must first duly caution him as to his rights.

In State v. Holmes, 95-0208, p. 4 (La. App. 4 Cir. 2/29/96), 670 So.

2d 573, 576, this court considered a similar issue and summarized the law on the matter:

In State v. Martin, 427 So. 2d 1182 (La. 1983) the Louisiana Supreme Court found that before a plea of guilty to a multiple bill can be said to be made knowingly and voluntarily, the colloquy between the trial judge and the defendant must show that the defendant was advised of his right to a formal hearing on the multiple bill and his right to require the State to prove the issue of his identity as a multiple offender.

In State v. Johnson, 432 So. 2d 815 (La. 1983), decided only a few months after Martin, supra the Louisiana Supreme Court held that La. R.S. 15:529.1(D) implicitly (emphasis added) provides that the defendant should be advised by the court of his statutory right to remain silent before the judge accepts his plea of guilty to the multiple bill. The court found that the right against self-incrimination does not depend on the nature of the proceedings and held that the defendant, after pleading not guilty, was no longer required to speak and, without being advised of his right to remain silent, his acknowledgement or confession of his prior felony conviction was invalid.

This Court in State v. Vincent, 439 So. 2d 1124 (La. App. 4th Cir. 1983), writ denied 472 So. 2d 913 (La. 1985), held that the defense counsel's assurances that he had advised the defendant of his rights did not satisfy sufficiently the requirements of La. R.S. 15:529.1(D) that the court must personally advise the defendant of his rights.

At the multiple bill hearing in the instant case, the trial court informed

the defendant that the State had filed a multiple bill of information charging the appellant as a third felony offender and asked if those charges were correct. The defendant answered that they were correct. The court then stated that the defendant was found to be a triple offender. There is no indication that the trial court advised the appellant of his Boykin rights prior to accepting his admission on the multiple bill of information. Applying the rule elucidated in Johnson, the defendant's acknowledgement of his prior felony convictions is therefore invalid. This assignment of error has merit.

Accordingly, for the foregoing reasons, the defendant's conviction is affirmed. His multiple offender adjudication and sentence are vacated, and the case is remanded to the trial court for resentencing.

CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED
FOR RESENTENCING