NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-2283**
VERSUS	*	**COURT OF APPEAL**
PEDRO BACOT	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 309-826, SECTION "C"
Honorable Sharon K. Hunter, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Chief Judge William H. Byrnes, III,
Judge James F. McKay, III, and Judge Dennis R. Bagneris, Sr.)

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AFFIRMED

This appeal concerns a third resentencing.

After being convicted of attempted first-degree murder on April 14, 1986, Pedro M. Bacot ("Bacot", "the defendant") was sentenced as a second felony offender to serve twenty-five years at hard labor without benefit of good time on April 24, 1986. His conviction and sentence were affirmed in an unpublished per curiam decision. *State v. Pedro M. Bacot*, KA-7674 (La. App. 4 Cir. 7/17/87). Pursuant to *Lofton v. Whitley*, 905 F.2d 885 (5th Cir. 1990), he was granted a second appeal. In an unpublished opinion, this Court affirmed his conviction but vacated his habitual offender adjudication and sentence and remanded the case for resentencing. *State v. Pedro M. Bacot*, 92-1742 (La. App. 4 Cir. 6/29/95).

The resentencing hearing began on March 21, 1997. On May 15, 1997, the district court again found the defendant to be a second felony offender and sentenced him to serve twenty-five years at hard labor with credit for time served. On appeal, Bacot argued that because the transcript of the hearing on March 21, 1997 was lost, he was denied his right of appellate review of the hearing. This Court agreed, and, in an unpublished opinion, vacated the sentence, and remanded the case for resentencing. *State v. Pedro M. Bacot*, 98-KA-0506 (La. App. 4 Cir. 5/26/99).

The facts of the case are not at issue here.

This appeal concerns the multiple bill hearing and sentencing on

February 18, 2000. There, Officer Raymond Lucemore, an expert in analysis of fingerprints, testified that the defendant's fingerprints taken in court that day matched those on the arrest register of Pedro Bacot, who was arrested in 1985 for possession of cocaine. The defense then challenged the sufficiency of the evidence that Bacot knowingly and voluntarily made a guilty plea. Ms. Ramona Almonte, a qualified translator for criminal court and an expert in defense work, testified that the Waiver of Constitutional Rights/ Plea of Guilty form in Spanish that Bacot signed in 1985 when he pled guilty to possession of cocaine "does not make sense" because words are misspelled, misused, and unintelligible. Pedro Bacot, who was born in Cuba and came to this country in 1981, testified that at the multiple bill hearing in 1985, the translator told him to sign the waiver of rights form so that he could go home. He claims that he did not understand what he was signing. On March 2, 2000, Bacot was again sentenced to serve twenty-five years at hard labor as a second offender with credit for time served.

Through counsel, he argues (1) that he was not under oath at the 1985 multiple bill hearing; (2) that no translator was present when he pled guilty to possession of cocaine; or, alternatively, (3) that the translator was not competent, and he did not understand his rights; and (4) that under La.

C.Cr.P. art. 874, the many delays in finalizing his sentence amount to "unreasonable delay" requiring his discharge.

The defendant cites *State v. Aldridge*, 553 F.2d 922, 923 (5th Cir. 1977), for the proposition that because he was not placed under oath before he entered his 1985 guilty plea, the plea cannot be used in the multiple bill. In *Aldridge,* the defendant successfully argued that the trial court failed to follow the procedures set out in Federal Rule of Criminal Procedure 11; the case was reversed and remanded because the judge failed to "make a painstaking inquiry" into the terms of the plea agreement from the defendant who was not under oath. In the Louisiana Code of Criminal Procedure, articles 556 and 556.1 incorporate the essence of F.R.Cr.P. 11 in requiring the judge to address the defendant and to apprise him of his *Boykin* rights. However, the defendant is not required by Louisiana law to be under oath when he pleads guilty. Therefore, the fact that he was not under oath does not defeat his guilty plea.

There is no merit to this assignment.

The defendant next argues that the record does not reflect that he was provided with an interpreter when he made his guilty plea.

The hearing on June 24, 1985, opened with the defense attorney stating:

> Pedro Bacot enters a plea of guilty to possession of cocaine. He has completed the waiver of constitutional rights forms in both Spanish and English and we have an interpreter to make sure he understands his rights.

The hearing proceeds with the judge asking Bacot questions in English, and Bacot answering both affirmatively and negatively and never indicating that he does not understand what he is being asked or what his answer means. Two Waiver of Constitutional Rights/Plea of Guilty forms were taken from Bacot: one in English and one in Spanish. The one in Spanish is signed by the interpreter, Sara C. Merlo, as well as by the defendant, his attorney and the judge. Sara C. Merlo was identified at a multiple bill hearing on August 16, 1996, as a young woman working in the Clerk of Court's office.

Obviously, the defendant was provided with an interpreter. However, the defendant alternatively argues that the interpreter was inadequate because she did not meet the standard set out in the jurisprudence and in Louisiana Code of Evidence article 604. One cited case, *State v. Tapia*, 631 F. 2d 1207 (5th Cir. 1980), relies on the Federal Court Interpreters Act of 1978 in requiring a hearing to determine whether a defendant should have had an interpreter with him during trial. The other cases cited by the defendant were decided after 1985; and, in a case decided in 1987, the court commented that qualifications for translators had not yet been established by

the legislature. *State v. Tamez*, 506 So. 2d 531,533, (La. App. 1 Cir. 1987). Similarly, the Code of Evidence was not adopted until 1989. The authorities the defendant relies upon here are not relevant either because they either do not apply to state court or they were not in effect at the time of the multiple bill hearing.

Significantly, neither the defendant nor his attorney objected to the interpreter's qualifications, to the Spanish guilty plea form, or to the procedure at the multiple bill hearing. There is no indication that they or the trial court found her incompetent or the plea form inadequate. It is well established that an irregularity or error cannot be argued after a verdict unless there was an objection at the time it occurred. La. C.Cr.P. art. 841.

Finally, the defendant argues that the Spanish guilty plea form failed to inform him that he was pleading guilty or what his rights were when he pleaded so that he could make a knowing and voluntary plea. The defense argued this issue at the sentencing hearing on February 18, 2000, and presented a witness, who as a qualified translator and expert in defense work, pointed out the mistakes in the plea form. She translated the form and declared that it appeared to have been written by a second or third grader.

Bacot testified that he came to this country in 1981, knowing no English. He claimed that he learned the language only after he was

imprisoned. He described what happened between himself and the interpreter in 1985:

> when she came to read the document, I told her I couldn't really understand what the document say [sic], because I was not responding. She told me to sign the document and I'll go home, so I did.

When asked if the interpreter had explained anything to him, Bacot answered that she had not because "she didn't know either what the document say." Under cross-examination, Bacot acknowledged that he received a tenth grade education in Cuba and knows how to read and write in Spanish. He also admitted that he had been convicted of a crime in Cuba before coming to the United States. When the trial court questioned Bacot, he said that at the hearing in 1985, he realized he was in court because he had been charged with a crime, and he understood "some of the words" on the plea of guilty form, but the "form don't explain anything." He added that whoever "did the form" was in kindergarten. The trial court asked Bacot if Cuba's criminal justice system relied on police officers, courts, and judges, and he answered affirmatively. She asked if the words "court" and "I'm pleading guilty" were on the form, and he acknowledged they were. However, he objected that the word "guilty" was mistakenly written "defensa." Finally, Bacot stated that when he entered his guilty plea to possession of cocaine in 1985, he did not realize he was giving up his right

to a trial by jury, his right to confront his accusers, or his right against self-incrimination.

Bacot's complaint about the Spanish plea form concerns whether his plea was knowing and voluntary and whether he received his *Boykin* rights before pleading guilty to possession of cocaine. 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, 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.

Both the transcript of the hearing of June 24, 1985, and the Waiver of Constitutional Rights/ Plea of Guilty Form in English indicate that the trial court spoke to Bacot and informed him of each of his rights. The transcript reveals that at the hearing Bacot responded to each question so that the judge could only conclude that Bacot was entering a valid guilty plea. The plea of guilty form indicates that the defendant was represented by counsel, and the plea was signed by the defendant and initialed in eleven places. The fact that the Spanish plea form was marred by misspellings and misused, unintelligible words is not fatal, given the fact that an interpreter was at the hearing, the defense attorney was present, and when the judge addressed him, Bacot answered appropriately.

The defendant's self-serving testimony—that he did not understand the Spanish plea form because it was full of mistakes and he could not read the English plea form nor understand the spoken English at the hearing—is unconvincing. He testified that he had some familiarity with the courts prior to 1985 because he had already been involved in the criminal justice system in Cuba. Moreover, the fact that he had a Spanish plea form—no matter

how imperfect the translation—and a Spanish interpreter meant that he had every opportunity to question, complain, or object that he did not understand the process. Yet he did not take that opportunity; instead he answered as though he understood the proceedings, both in his responses to the judge and in initialing the English and Spanish plea forms. We find that Mr. Bacot must take responsibility for his unanswered questions arising from his 1985 plea hearing.

The credibility of witnesses is within the discretion of the trier of fact and should not be disturbed unless clearly contrary to the evidence. State v. Vessel, 450 So. 2d 938, 943 (La. 1984). The trial court's determination in this case was not contrary to the evidence. Accordingly, this court will not overturn the trial court's finding that the defendant's prior plea was knowingly and voluntarily made.

There is no merit to this assignment.

Finally, in his last assignment of error, the defendant argues that he is entitled to a discharge because of the unreasonable delays in resentencing. Under La. C.Cr.P. art. 874, a sentence must be imposed without unreasonable delay, and Bacot avers that he has suffered a fourteen-year delay between his conviction in 1986 and his most recent sentencing in 2000. However, on April 10,1986, Bacot was convicted of attempted first

degree murder of a police officer, and two weeks later he was sentenced to serve twenty-five years at hard labor as a second offender without benefits; the conviction and sentence were affirmed in July of 1987. He received the minimum sentence under La. R.S. 14:27(30) and La. R.S. 15:529.1. His sentence has been vacated twice because of procedural errors. Because his first appeal concerned only a request for a review of possible errors patent, he was granted another appeal in 1992 pursuant to *Lofton v. Whitley*, 905 F. 2d 885 (5th Cir. 1990). A two year delay occurred due to a number of changes in appointed counsel before this court affirmed his conviction and vacated his multiple offender adjudication and sentence. The case was remanded for resentencing on June 29, 1995, after a finding that he was not advised of his *Boykin* rights when he pled guilty in 1986. On May 25, 1997, he was resentenced to the same term as a second offender; the two-year delay between 1995 and 1997 was due to problems in bringing the defendant to court and again to changes in appointed counsel. Then, because parts of the 1997 transcript of this resentencing were lost, this court again vacated the sentence and remanded the case in an opinion dated May 26, 1999. He was last resentenced on February 18, 2000.

Under La. C.Cr.P. art. 874, a "[s]entence shall be imposed without unreasonable delay." The Louisiana Supreme Court considered this issue

and stated:

> Principles of fundamental fairness dictated by the due process clause of the Fourteenth Amendment prohibit inordinate delays in post-conviction proceedings such as imposition of sentence . . . when the delays cause prejudice to the defendant.
>
> . . . . In determining whether the delay was unreasonable or prejudicial, the court should adopt a flexible approach in which all of the circumstances are evaluated.

State v. Duncan, 396 So. 2d 297, 299 (La. 1981)

The defense cites several cases to support the position that the defendant should be released because of the delay in resentencing. In *City of Baton Rouge v. Bourgeois*, 380 So. 2d 63 (La. 1980), a defendant, who pled guilty to driving while intoxicated was sentenced four years later to serve thirty days; the sentence was suspended, and he was placed on one year's unsupervised probation. The Supreme Court found an unjustified delay and reversed the trial court's denial of the motion to quash. Similarly, in *State v. Milson*, 458 So. 2d 1037 (La. App. 3rd Cir. 1984), a defendant pled guilty to manslaughter and was not sentenced for four and one-half years to serve ten years at hard labor. The Third Circuit found the delay unreasonable and unjustified, and the sentence was vacated and the defendant ordered discharged.

These cases can be distinguished from the case at bar. In the first

place, the delay in the instant case was caused by three prior appeals and not because someone forgot to sentence Bacot. Secondly, in *Bourgeois* and *Milson,* the trial courts had more discretion as to the sentence imposed than the judge did in the instant case. In the case at bar, the sentencing range under La. R.S. 14:27(30) and La. R.S. 15:529.1 is twenty-five to one hundred years. The defendant's sentence was first vacated in 1995, and he was resentenced in 1997 to the same term. The next appeal also resulted in a vacated sentence, and a resentencing to the same twenty-five year term in 2000. Although fifteen years or sixty percent of the defendant's prison time has expired while his sentence was being vacated and reimposed, he has had only two year intervals between sentences, and the term of imprisonment has remained constant.

This case is similar to *State v. Johnson,* 363 So. 2d 458, 461 (La. 1978), and *State v. Dorsey*, 95-1084 (La. App. 3rd Cir. 3/20/96), 672 So.2d 188, where courts found no prejudice to the defendants could be shown by the delay. Bacot's conviction was never at issue, and he could hardly expect a lesser sentence for attempted first degree murder of a police officer.

Under La. C.Cr.P. art. 921, an appellate court shall not reverse a judgment because of an error not affecting the substantial rights of the defendant. Bacot was first sentenced ten days after his conviction. Through

no fault of his, his case has been before this court on appeal four times. However no prejudice can be found because his offense required a substantial term of imprisonment.

There is no merit to this assignment.

Accordingly, for reasons cited above, the defendant's sentence is affirmed.

AFFIRMED