

STATE OF LOUISIANA

*

NO. 2002-KA-1847

VERSUS

*

COURT OF APPEAL

JAMES M. SCOTT

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 417-253, SECTION "C"
Honorable Sharon K. Hunter, Judge
* * * * *

JUDGE

JOAN BERNARD ARMSTRONG

* * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Dennis R.
Bagneris Sr. and Judge Edwin A. Lombard)

KAREN G. ARENA
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COUNSEL FOR DEFENDANT

GRANTED.

**AFFIRMED;
MOTION TO WITHDRAW**

STATEMENT OF THE CASE

On October 6, 2000, the defendant, James M. Scott, was charged by bill of information with distribution of cocaine, a violation of La. R.S. 40:966(A). He pleaded not guilty at his arraignment. The trial court found probable cause after a hearing on October 27, 2000. The defendant elected a judge trial after being advised of his right to a jury. He was found guilty as charged on November 30, 2000 and was sentenced on December 8, 2000 to serve five and one-half years at hard labor.

Several multiple bill hearings were set, and on March 16, 2001, when the defendant appeared for a hearing, the State requested a continuance which the trial court denied. The State presented no evidence. Furthermore, the record indicates that it was not until June 5, 2002, that the State filed the multiple bill. At that hearing the defendant filed a motion for a new trial, which was denied, and an out-of-time appeal, which was granted. On July 29, 2002, defense counsel filed a motion to quash the multiple bill, and on August 7, 2000, the trial court granted the motion to quash.

FACTS

At trial the following facts were adduced. Sergeant Michael Glasser and Agent Jennifer Palmer were working undercover on May 31, 2000,

about 11:50 p.m. when they encountered the defendant. He was riding a bicycle and called to the officers. They stopped and he approached the driver's window, asking, "What's up?" Sergeant Glasser said he was looking for a "dime," and the defendant told him to pull over. As the officers waited, he biked off. Meanwhile the sergeant radioed his backup team a description of Scott who was wearing a black shirt with "504" on the front and "Wobble, Wobble" on the back. Scott returned and spit out a piece of white rock which he handed over to Sergeant Glasser in exchange for two pre-recorded five-dollar bills. The defendant pedaled away, and the officers notified their backup team of his direction. He was stopped and arrested; the two photocopied five-dollar bills were found in his possession. When Sergeant Glasser drove around the block after the arrest to ensure that the proper person had been stopped, he noted that the defendant had been apprehended.

Detective Marc Amos and Officer Christopher Martin testified that they arrested the defendant.

The parties stipulated that the rock was tested and proved to be cocaine.

ERROR PATENT REVIEW

Counsel filed a brief requesting a review for errors patent. Counsel complied with the procedures outlined by Anders v. Cal., 386 U.S. 738, 87 S.Ct. 1396 (1967), as interpreted by this Court in State v. Benjamin, 573 So. 2d 528 (La. App. 4 Cir. 1990). Counsel filed a brief complying with State v. Jyles, 96-2669 (La. 12/12/97), 704 So. 2d 241. Counsel's detailed review of the procedural history of the case and the facts of the case indicate a thorough review of the record. Counsel moved to withdraw because she believes, after a conscientious review of the record, that there is no non-frivolous issue for appeal. Counsel reviewed available transcripts and found no trial court ruling which arguably supports the appeal. A copy of the brief was forwarded to defendant, and this Court informed him that he had the right to file a brief in his own behalf.

As per State v. Benjamin, this Court performed an independent, thorough review of the pleadings, minute entries, bill of information, and transcripts in the appeal record. The defendant was properly charged by bill of information with a violation of La. R.S. 40:967(A), and the bill was signed by an assistant district attorney. The defendant was present and represented by counsel at arraignment, motion hearings, trial, and sentencing. A review of the trial transcript reveals that the State proved the offense beyond a reasonable doubt.

A review of the record reveals two errors patent. The transcript for December 8, 2000, the date of the denial of motion for new trial and sentencing, does not reflect that the defendant waived his right to a twenty-four hour delay between the denial of his motion for new trial and his sentencing as required by La. C. Cr. P. art. 873. In State v. Augustine, 555 So. 2d 1331 (La. 1990), the Louisiana Supreme Court held that failure to waive the twenty-four hour delay voided the defendant's sentence if the defendant attacks his sentence, even though he fails to specifically allege this failure as an error on appeal. This Court has held that the failure to observe the delay would be deemed harmless error where the defendant did not challenge his sentence on appeal. State v. Collins, 584 So. 2d 356 (La. App. 4 Cir. 1991). Accordingly, in the present case where no error is raised as to the defendant's sentence, the failure of the trial court to observe the delay period is harmless error.

We also note an error in the sentence. When the defendant was sentenced in 2000, La. R.S. 40:967(B)(4)(b) mandated a sentence of five to thirty years with the first five years served without benefit of parole, probation, or suspension. The trial court imposed a sentence below the statutory minimum in that benefits were not prohibited. However, the State did not object at sentencing, did not file a motion to reconsider sentence, did

not seek supervisory writs, and withdrew its appeal. On December 23, 2002, this court dismissed the State's appeal on its own motion. According to the defendant's brief, he was released from prison by the end of October, 2002. Accordingly, the issue is moot.

For the foregoing reasons, the defendant's conviction and sentence are affirmed. Appellate counsel's motion to withdraw is granted.

GRANTED.

**AFFIRMED;
MOTION TO WITHDRAW**