NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2003-KA-1030**
VERSUS	*	**COURT OF APPEAL**
SHAUN L. BAILEY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 429-662, SECTION "B"
Honorable Patrick G. Quinlan, Judge

* * * * * *

Judge Terri F. Love

* * * * * *

(Court composed of Judge James F. McKay III, Judge Terri F. Love, Judge David S. Gorbaty)

Eddie J. Jordan, Jr., District Attorney
Zata W. Ard, Assistant District Attorney
619 South White Street
New Orleans, LA 70119

COUNSEL FOR PLAINTIFF/APPELLEE

David Melson
Tulane Law School
Commnity Service Program
Sherry Watters

LOUISIANA APPELLATE PROJECT
P. O. BOX 58769
New Orleans, LA 701588769

COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

On April 19, 2002, the appellant was charged with one count each of possession of a firearm while in possession of marijuana, distribution of heroin, and simple possession of ketamine. At his arraignment, he pled not guilty to all charges. The court denied the defendant's motion to suppress the evidence and found probable cause for simple possession of heroin and probable cause for the other two counts as charged. At some point, the second count was amended to charge the appellant with the possession with the intent to distribute heroin. The appellant waived his right to a jury, and he moved to have the firearm count quashed on double jeopardy grounds. The court denied the motion, and the case proceeded to trial. At the conclusion of the trial, the trial judge found him guilty of simple possession of heroin and guilty as charged in the other two counts. The State immediately filed a multiple bill, and the appellant admitted to the allegations in the bill. The appellant waived all delays, and the court sentenced him on the firearms count to serve five years at hard labor without benefits of parole, probation, or suspension of sentence as a second offender. On the other two counts, the court sentenced him to serve five years at hard

labor on each count, with all three sentences to run concurrently. The court granted his motion for appeal. For the following reasons, we affirm the defendant's sentence.

FACTS

Around lunchtime on March 9, 2002, Officer Bruce Gentry was on patrol. As he turned off Orleans Avenue onto N. Scott Street, a woman flagged down his car and told him people in the next double, at 633 N. Scott Street, were selling drugs. The woman told the officer the double was vacant and that there had been a lot of traffic in and out of the double. Officer Gentry testified the double had two front doors, the left one of which was nailed shut, and the right door was wide open. Officer Gentry testified the windows on the left side were boarded up, while the ones on the right side were covered with black plastic. He testified he walked around the house and saw no electrical meters. He also questioned a passing mail carrier, who told him house had last been occupied "quite a long time ago."

Officer Gentry testified he went to the open door and noticed there were pry marks next to the locks on the door and the frame. Believing a burglary might be in progress, he entered the house. He testified the front room contained a mattress leaning against a wall and a small pile of clothing, which he indicated was standard for other abandoned houses he had seen.

He testified he walked back through the house and observed the defendant Shaun Bailey standing in the dining room area with his back to the officer. Officer Gentry testified Bailey was standing in front of a counter, and a gun was on the counter to his left. Bailey was talking on a cell phone and did not notice the officer. When Officer Gentry announced his presence and ordered Bailey to turn around with his hands up, Bailey hesitated and then turned. He eventually hung up the phone and complied with Officer Gentry's order to lie on the ground. Officer Gentry testified he handcuffed Bailey and stood him up, noticing at that time various items lying on the counter in front of which Bailey had been standing: a bag of marijuana, a small bag containing a white powder, small baggies, small cut pieces of foil, and a scale. The officer arrested Bailey for possession of the drugs and the gun, and in a search incident to Bailey's arrest the officer seized two more bags of marijuana from Bailey's pockets. The officer seized the items on the counter, which included a pill later identified as ketamine.

Corey Hall, a criminalist with N.O.P.D., testified he analyzed various items seized from the house and found the baggie containing the white powder was 5.9 grams of heroin. He also testified the three baggies with vegetable matter contained marijuana, and the pill was ketamine. The other items either tested negative for the presence of controlled dangerous

substances or were not tested because he could see no residue on them.

John Broggi, a lead meter installer for Entergy, testified his records indicated that on March 9, 2002, there was no electrical service at 633 N. Scott Street. Mr. Broggi testified service was started on March 4 in the name of Theresa Baker, but the service was turned off on March 7 and was not reinstated until April 10.

Theresa Baker testified she was Bailey's wife. She stated she and Bailey rented the right side of the double at a reduced rate in exchange for their work in renovating the apartment "back up to livable status". She testified they had not yet lived in the apartment at the time of Bailey's arrest. Ms. Baker testified the front door to the apartment had a bad lock, which nonetheless worked. She testified she and Baker spent the night in a hotel the night before Bailey's arrest, and she dropped him off in the neighborhood that morning so that he could work on the apartment while she went to work. She admitted the rental agreement did not mention the work on the apartment in lieu of part of the rent and that the lease prohibited using bags as window coverings. She insisted they had gotten verbal permission to put the bags on the windows to shield the construction and cleaning supplies they kept in the apartment while they worked on it. She also insisted she had never before seen the gun seized from the house. She

admitted that at the time of Bailey's arrest he was not working and that she drove an ice cream truck, yet they had stayed in an expensive hotel the night before Bailey's arrest.

Shaun Bailey testified he and Ms. Baker, his common-law wife, were renting the right half of the double where he was arrested. He stated the front door lock did not work and the doorframe had been kicked in before he and Ms. Baker started renting the apartment. He also stated there was no electricity in the apartment, and he could not work there at night. He testified he was in the apartment on the day before his arrest, but he and Ms. Baker spent the night before his arrest in a hotel. He testified that the next morning Ms. Baker dropped him off at a grocery store near the apartment, and after getting some supplies he walked over to the apartment. He stated the front door was open when he got there, and as he walked inside he noticed things were different from when he left it the day before. He testified he called his father, who lived around the corner, to ask him if he had been in the apartment. Bailey stated he heard noises coming from further inside the house, and as he walked inside he saw a police officer walking toward him in the hallway. The officer had his gun drawn and ordered him to freeze. Bailey testified the officer told him a neighbor had told him people were going in and out of the house. He stated the officer

arrested him and placed him in the back of a police car, even though a neighbor told the officer when they were walking out of the apartment that Bailey lived there. Bailey stated the officer let him wait in the car until his father arrived on the scene, and then the officer went back inside the apartment and came out carrying the drugs.

Bailey insisted he never saw drugs in the apartment; he stated the officer met him in the hallway before he made it back to the kitchen. He admitted he had a prior conviction for armed robbery, for which he was on parole at the time of his arrest. He insisted he was not involved with drugs because he had "lost" family members to drugs. He testified he had just been hired prior to his arrest, and he further stated his common-law wife's ice cream sales were good.

ASSIGNMENTS OF ERROR

In his first assignment of error, the appellant contends the trial court erred by denying his motion to suppress the evidence. Specifically, he argues the State failed to show that the officer had probable cause and exigent circumstances to enter the apartment without first obtaining a search warrant.

Officer Gentry's testimony at the suppression hearing differed little from that he gave at trial, which was summarized above. In addition, he

testified the mail deliverer stated the last tenant moved out of the apartment approximately five months earlier. He stated the gun seized from the counter had an obliterated serial number. He testified the defendant was under arrest at the time the officer saw the marijuana lying on the counter and he handcuffed the defendant. Officer Gentry testified that after he advised the defendant of his rights, the defendant said the gun was not his and that people were able to go in and out of the apartment because he could not lock the door. The officer stated that the defendant's father told him that the defendant was getting ready to move into the apartment. The officer further stated that he thought someone could have broken into the apartment because it did not appear anyone was living there, and the door was open.

Ms. Baker also testified at a hearing on the motion to suppress. In addition to testimony similar to that she later gave at trial, at the hearing she stated that because the residence was not secure, she and the defendant were not staying there. She insisted the electricity was on in the apartment at that time.

The appellant first argues the officer could not lawfully enter the apartment because he did not have probable cause to believe drug activity was occurring in the apartment. He acknowledges that the officer received a complaint about drug activity from the neighbor, but he points out the officer

did not conduct any surveillance, which would have corroborated the tip from the untested source. He further argues the officer was unjustified in believing the apartment was abandoned and that there were no exigent circumstances to allow the officer to enter the house without obtaining a warrant.

In *State v. Jones*, 2002-1931, pp. 5-6 (La. App. 4 Cir. 11/6/02), 832 So. 2d 382, 286, this court discussed the exigent circumstances exception to the warrant requirement:

> In *State v. Page*, 95-2401, p. 10 (La. App. 4 Cir. 8/21/96), 680 So. 2d 700, 709, this court discussed the warrantless entry into a protected area:
>
> > There is a justified intrusion of a protected area if there is probable cause to arrest and exigent circumstances. *State v. Rudolph*, 369 So.2d 1320, 1326 (La. 1979), cert. den., *Rudolph v. Louisiana*, 454 U.S. 1142, 102 S.Ct. 1001 (1982). Exigent circumstances are exceptional circumstances which, when coupled with probable cause, justify an entry into a "protected" area that, without those exceptional circumstances, would be unlawful. Examples of exigent circumstances have been found to be escape of the defendant, avoidance of a possible violent confrontation that could cause injury to the officers and the public, and the destruction of evidence. *State v. Hathaway*, 411 So.2d 1074, 1079 (La. 1982).

> See also *State v. Julian*, 2000-1238 (La. App. 4 Cir. 3/4/01), 785 So. 2d 872; writ den. 2001-1247 (La. 3/22/01), 8111 So.2d 920; *State v. Brown*, 99-0640 (La. App. 4 Cir. 5/26/99), 733 So. 2d 1282.

Here, the appellant first argues the officer did not have probable cause to believe there was narcotics activity in the apartment. Considering the fact that the officer had only the tip from the unknown woman who identified herself as a neighbor, it appears the appellant is correct in this argument. However, the officer's testimony indicated he did not enter the apartment because he had received the tip from the neighbor. In addition, he testified he entered the apartment because it appeared the double was abandoned, and he noticed the door was open and that there were pry marks on the door jam and the door. He testified these factors, when added to the neighbor's statement of people going in and out of what appeared to be an abandoned building, caused him to believe unauthorized people were inside the building.

The appellant argues the officer still would not have been authorized to enter the apartment because it was not abandoned, but rather he and his common-law wife were renting the apartment. However, the officer testified that all indications were that both sides of the double appeared to be abandoned. This court considered a similar situation in *State v. Robertson*,

557 So. 2d 315 (La. App. 4 Cir. 1990), where an officer testified that there were numerous complaints about drugs being sold out of the front and rear of an abandoned building in the area. He and other officers entered the building, believing it was abandoned. Upon entry into the front apartment, they found only trash and debris, which lent further credence to the belief that the building was abandoned. Although the officer testified that they subsequently learned that the rear apartment, where the officers found defendants and the drugs, had been rented by the owner of the building for the purpose of card playing at the time of the arrests and seizure of evidence, there was no evidence that the apartment was rented to any of the arrested individuals, or that any of them had a right to be in the apartment. There was no evidence that any of the doors were capable of being locked or secured, and access was apparently available to everyone. This court found that neither the defendants *nor the legal tenant* had a reasonable expectation of privacy. Because the officers had a right to be on the premises, the evidence seized from the house was admissible under the plain view exception to the warrant requirement.

Here, as noted above, to all intents it appeared to the officer that both sides of the double were abandoned. The neighbor told him the building was vacant. There were no electric meters on the building. The windows of

both sides were covered, and the door to the left side was nailed shut. The postal worker told the officer the no one had lived in the building for quite some time. Based upon these factors, we find that the officer had ample reason to believe the double was abandoned.

The appellant correctly notes that in the absence of exigent circumstances, an officer cannot lawfully enter a residence in the absence of a warrant. See *Kirk v. Louisiana*, 536 U.S. 635, 122 S.Ct. 2458 (2002); *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371 (1980). He contends that here the officer did not have exigent circumstances to enter the apartment, and the lack of such exigency rendered the entry illegal. Many of the cases cited by the appellant in support of his contention, however, are inapplicable to the circumstances of this case. In *Illinois v. McArthur*, 531 U.S. 326, 121 S.Ct. 946 (2001), the Court found officers could stop and detain a defendant outside his home while they awaited the issuance of a search warrant for the home. *Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692 (1999), involved an action for civil damages arising out of the police decision to have media members accompany officers executing arrest warrants in the defendant's house. Kylo v. United States, 533 U.S. 27, 121 S.Ct. 2038 (2001) held that thermal imaging of a house was a search under the Fourth Amendment.

Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408 (1978) and *Thompson v. Louisiana*, 469 U.S. 17, 105 S.Ct. 409 (1984) both involved extensive crime scene searches conducted in the defendants' residences long after the victims had been removed.

Other cases cited are distinguishable. In *McDonald v. United States*, 335 U.S. 451, 69 S.Ct. 191 (1948), the officers set up a surveillance of the building suspected of gambling activities, and upon hearing what appeared to be adding machine noises, the officers entered without first obtaining a warrant. The Court held that such warrantless entry was illegal, finding there were no exigent circumstances to justify their entry. In *Welsh v. Wisconsin*, 466 U.S. 740, 104 S.Ct. 2091 (1984), the officers entered the defendant's home in the middle of the night to arrest him without a warrant for a DWI charge. The Court found the officers had no exigent circumstances to enter the house without a warrant. In *Vale v. Louisiana*, 399 U.S. 30, 90 S.Ct. 1969 (1970), officers arrested the defendant outside his house after witnessing his involvement in a drug sale, and after entering to establish no one was inside the house, the officers searched the house without first obtaining a warrant. The Court invalidated the search.

In *State v. Kirk*, 2000-0190 (La. App. 4 Cir. 11/13/02), 833 So. 2d 418, officers conducting a surveillance observed four suspected drug

transactions from the defendant's apartment, at least one of which involved the defendant. The officers stopped one suspected buyer near the apartment. Finding contraband, the officers went back to the defendant's apartment, entered it to "secure" it, arrested the defendant, and found contraband on his person pursuant to the search incident to his arrest. On appeal of his conviction, the defendant alleged the officers' warrantless entry into his house was illegal due to the absence of exigent circumstances. In its first opinion, *State v. Kirk*, 2000-0190 (La. App. 4 Cir. 11/15/00), 773 So. 2d 259, this court found that because the officers had probable cause to arrest the defendant, this court need not consider whether there were exigent circumstances to allow the officers to enter the house to "secure" it while they obtained a warrant. The Louisiana Supreme Court denied writs. *State v. Kirk*, 2000-3395 (La. 11/9/01), 801 So. 2d 1063. On review, the U.S. Supreme Court reversed, noting that probable cause by itself would not have justified the officers' entry into the apartment. The Court remanded the case for a determination of whether there were exigent circumstances which would have justified the officers' entry. *Kirk v. Louisiana*, 536 U.S. 635, 122 S.Ct. 2458 (2002). On remand, this court found the facts did not support a finding of exigent circumstances, and it suppressed the evidence and reversed the defendant's conviction. *State v. Kirk*, 2000-0190 (La. App.

4 Cir. 11/13/02), 833 So. 2d 418.

These cases are distinguishable from the circumstances of the instant case in that there were exigent circumstances in this case to justify the officer's entry into the apartment. The officer testified he entered the apartment because he was under the impression the apartment was abandoned, the door to the apartment was wide open, he saw pry marks on and around the door, and the neighbor told him she saw people going in and out of the residence. If, indeed, he had probable cause to believe an unauthorized person was still on the premises, his entry would be justified to prevent the escape of the intruder. The appellant argues the officer's testimony did not convincingly demonstrate that he believed someone might have been in the apartment at the time he entered it. In support, he notes that the officer did not set up a surveillance to see if anyone was inside, nor did he check with the owner to see if the apartment had been rented, nor did he announce his presence or draw his gun prior to entering. However, the trial court found this testimony believable, and a reviewing court must accept the trial court's credibility findings in the absence of manifest error. See *State v. Perez*, 99-2063 (La. App. 4 Cir. 9/15/99), 744 So. 2d 173. Given these circumstances, we find the officer was justified in believing unauthorized people were in the apartment, and his entry to prevent their escape gave him

exigent circumstances to enter without first obtaining a search warrant. The appellant appears to argue that an abandoned house cannot be burglarized because no one lives there. Nonetheless, someone still owned the building, and anyone inside the building without the owner's permission would, at the very least, be trespassing.

The appellant further argues that the officer's testimony that he believed a burglary might be in progress was merely a pretext to enter because his real reason to enter was to investigate the neighbor's tip about drug sales. However, as noted in *State v. Anthony*, 98-0406, p. 20 (La. 4/11/00), 776 So. 2d 376, 389-90:

> This Court has made clear that "the determination of reasonable grounds for an investigatory stop, or probable cause for an arrest, does not rest on the officer's subjective beliefs or attitudes but turns on a completely objective evaluation of all of [the] circumstances known to the officer at the time of his challenged action." *State v. Kalie*, 96-2650, p. 1 (La.9/19/97), 699 So.2d 879, 880 (emphasis in original) (citing *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) and *State v. Wilkens*, 364 So.2d 934, 937 (La.1978)).

Thus, this court finds the circumstances of this case gave the officer probable cause to believe the apartment was abandoned and to believe there were unauthorized people inside the apartment, whose escape his entry would prevent. As a result, it did not matter whether the officer might have

also believed there was drug activity occurring in the apartment, because there was an independent basis for the probable cause and exigent circumstances.

Furthermore, we find that the State showed probable cause and exigent circumstances for the officer's entry, and therefore, the seizure of the evidence inside the apartment was lawful.

Once the officer entered the apartment, he saw a mattress pushed up against the wall and a pile of clothes, which he testified was consistent with other abandoned houses he had seen. He testified that when he walked back into the kitchen area, the gun and the most of the drugs were lying in plain view. The officer could lawfully seize this evidence. See *State v. Jones*, 2002-1171 (La. App. 4 Cir. 6/26/02), 822 So. 2d 205; *State v. Nogess*, 98-0670 (La. App. 4 Cir. 3/3/99), 729 So. 2d 132. In addition, once the officer arrested the appellant, he could lawfully seize the bags of marijuana they found in his pocket during the search incident to his arrest. See *State v. Wilson*, 467 So. 2d 503, 515 (La. 1985); *State v. Fontenot*, 2001-0178 (La. App. 4 Cir. 8/8/01), 795 So. 2d 410; *State v. Johnson*, 94-1170 (La. App. 4 Cir. 8/23/95), 660 So. 2d 942.

In *State v. Scull*, 93-2360, p. 9 (La. App. 4 Cir. 6/30/94), 639 So. 2d 1239, 1245, this court stated: "The trial court is vested with great discretion

when ruling on motion to suppress." See also *State v. Jones*, 2002-1931 (La. App. 4 Cir. 11/6/02), 832 So. 2d 382; *State v. Briley*, 2001-0143 (La. App. 4 Cir. 10/3/01), 798 So. 2d 1191. Here, although it is a close case, given the circumstances known to the officer at the time he entered the apartment, the trial court did not abuse its discretion by denying the motion to suppress the evidence in this case. This assignment has no merit.

By his second assignment of error, the appellant contends the trial court erred by denying his motion to quash. He first alleges the court should have granted his motion to quash the firearm charge because the type of drug alleged in the bill (marijuana) was not the type of drug the legislature intended to use to enhance a simple possession of a firearm charge into a felony charge. He further argues the court erred by allowing the State to multiple bill him on the firearm charge because this allowed the State to enhance the firearm charge twice.

With respect to the first argument, the appellant filed a motion to quash the firearm count, which the trial court denied. The appellant was charged with and convicted of being in possession of a firearm while in possession of marijuana, a violation of La. R.S. 14:95E. He argues that because both simple possession of a firearm and simple possession of marijuana are misdemeanors and are not defined as crimes of violence in La.

R.S. 14:3, the Legislature did not intend for these types of offenses to be combined to comprise a felony conviction. In support he cites language from *State v. Blanchard*, 99-599, p. 7 (La. App. 5 Cir. 11/10/99), 749 So. 2d 19, 25 concerning the intent of the La. R.S. 14:95E to help "prevent those engaged in drug use and distribution from engaging in violent behavior endemic to the drug trade." However, on review, the Supreme Court rejected the defendant's constitutional challenge to La. R.S. 14:95E which was based on his claim that he had the right to bear arms while in possession of a small amount of marijuana. The Court stated:

> Further, we find that there is a rational relationship between the statute's scope, i.e., making it a felony for a person to possess a firearm in connection with a drug offense, even a misdemeanor drug offense, and its legitimate state purpose of preventing drug-related violence. Thus, we find that defendant's equal protection argument fails as well.

State v. Blanchard, 99-3439, p. 10 (La. 1/18/01), 776 So. 2d 1165, 1173.

In addition, the appellant's argument that the State should not have been allowed to enhance his firearm count because neither possession of marijuana nor possession of a firearm are crimes of violence also fails. By its very terms, La. R.S. 14:95E prohibits the possession of a firearm "while committing or attempting to commit a crime of violence *or* while in the possession of . . . a controlled dangerous substance." (emphasis added)

Marijuana is a controlled dangerous substance. Thus, his possession of marijuana while in possession of the gun permitted the State to charge him with a violation of La. R.S. 14:95E.

The appellant further argues that the court mistakenly believed that the firearms charge was linked to his possession of the cocaine, not to the marijuana. However, had the State charged him with being in possession of cocaine while in possession of the gun, such charge would have subjected him to double jeopardy because the State also charged him with possession of cocaine. Charging him with possession of cocaine and naming cocaine as the controlled dangerous substance in the La. R.S. 14:95E count would have violated the appellant's constitutional right against being placed in double jeopardy. See *State v. Sandifer*, 95-2226 (La. 9/5/96), 679 So. 2d 1324; *State v. Thomas*, 99-2219 (La. App. 4 Cir. 5/17/00), 764 So. 2d 1104; *State v. Warner*, 94-2649 (La. App. 4 Cir. 3/16/95), 653 So. 2d 57.

The trial court did not err by denying the motion to quash the La. R.S. 14:95E count. This claim has no merit.

The appellant argues at greater length that the State should not have been allowed to prosecute the multiple bill in this case because his conviction for La. R.S. 14:95E was already an enhancement, and thus his right against double jeopardy was violated by a second enhancement as a

multiple offender. In support, he cites cases where courts held that a conviction for being a convicted felon in possession of a firearm in violation of La. R.S. 14:95.1 **and** the underlying felony conviction upon which the that conviction was based could not both be used as predicate offenses in a later multiple offender proceedings. For example, in *State v. Moten*, 619 So. 2d 683 (La. App. 4 Cir. 1993), the defendant was convicted of possession of cocaine, and the State charged him as a multiple offender based on a prior La. R.S. 14:95.1 conviction. This court found the La. R.S. 14:95.1 conviction could be used as the predicate in the multiple bill as long as its underlying felony was not also alleged in the multiple bill. See also *State v. Hymes*, 513 So. 2d 371 (La. App. 4 Cir. 1987) (State could not use both the La. R.S. 14:95.1 conviction and the La. R.S. 14:64 conviction that had been used to enhance the firearm conviction); *State v. Fletcher*, 2001-809 (La. App. 5 Cir. 2/26/02), 811 So. 2d 1010 (State could not use both the La. R.S. 14:95.1 conviction and its underlying La. R.S. 14:62 felony as predicates to the multiple bill); *State v. Davis*, 2002-387 (La. App. 5 Cir. 9/30/02), 829 So. 2d 554 (State could not use both the enhanced misdemeanor theft conviction and the earlier felony theft conviction which enhanced the misdemeanor theft conviction as predicates to the multiple bill); *State v. Harrison*, 32,643 (La. App. 2 Cir. 10/27/99), 743 So. 2d 883 (State could not

use both the second offense possession of marijuana conviction and the earlier distribution of marijuana offense it was based upon as predicates to the multiple bill).

These cases, however, are distinguishable because in each of the cited cases the defendant had been twice exposed to enhancement *using the same prior offense*. The collective holdings of these cases prohibited the use of a *prior* conviction to enhance the present conviction when it had already been used to enhance another prior conviction, also used as a predicate offense in the same multiple offender proceeding. Here, by contrast, the State did not allege a prior conviction to enhance the appellant's firearm conviction; rather, it was the *contemporaneous* circumstance of being in possession of marijuana while also being in possession of the firearm, which led to the enhancement of the firearm charge. The marijuana possession was an element of the firearm offense, not a separate, prior conviction used to enhance his firearm sentence.

The appellant also points to *State v. Forest*, 439 So. 2d 404 (La. 1983) and *State v. Holland*, 356 So. 2d 427 (La. 1978), to support his argument that he should not have been exposed to a multiple offender sentence under La. R.S. 15:529.1. In *Forest*, the defendant was charged with and convicted of second offense prostitution. There was no multiple bill filed in the case.

On appeal the defendant contested the validity of her sentence, arguing that there was no time limitation on the use of the prior prostitution conviction such as that provided in La. R.S. 15:529.1 on the use of prior convictions. The Court rejected this argument. In *Holland*, the Court held that a defendant could not be sentenced as a multiple offender under La. R.S. 15:529.1 when he was convicted of La. R.S. 14:95.1. The Court noted: "Since defendant's *status as a prior felon* subjected him to an enhanced penalty under La.R.S. 14:95.1, his sentence could not be further enhanced by application of La.R.S. 15:529.1" *Holland*, 356 So. 2d at 428 (emphasis added). Here, as noted above, it was not a prior conviction, which enhanced the appellant's firearm conviction; it was his possession of marijuana while being in possession of the firearm, which enhanced that conviction. Thus, there was no "double jeopardy" violation by charging and sentencing him as a multiple offender based upon a *different, prior* conviction. There is no merit to the appellant's assignment of error two.

Accordingly, we affirm the defendant's convictions and sentences.

AFFIRMED

Accordingly, it is recommended the appellant's convictions and sentences be affirmed.