STATE OF LOUISIANA	*	**NO. 2004-KA-0014**
VERSUS	*	**COURT OF APPEAL**
GREGORY GREEN	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 395-456, SECTION "K"
HONORABLE ARTHUR HUNTER, JUDGE
* * * * * *
JUDGE MAX N. TOBIAS, JR.
* * * * * *

(COURT COMPOSED OF JUDGE JAMES F. MCKAY, III, JUDGE TERRI F. LOVE, AND JUDGE MAX N. TOBIAS, JR.)

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CONVICTION AFFIRMED; REMANDED FOR RE-SENTENCING.

On 15 October 1997, the defendant/appellant, Gregory Green ("Green"), was arrested on one count of possession with intent to distribute approximately one-half ounce of cocaine, one count of possession of diazepam ("Valium"), and one count of resisting arrest by flight.

On 5 February 1998, the state charged Green by bill of information with one count of possession with intent to distribute cocaine, a violation of La. R.S. 40:967, and one count of possession with intent to distribute Valium, a violation of La. R.S. 40:969B. On 27 February 1998, Green appeared at his arraignment with counsel and entered pleas of not guilty.

On 26 March 1998, the trial court heard Green's motions to suppress the evidence and to suppress the statement he gave the police at the time of his arrest. The trial court denied both motions.

On 11 May 1998, Green, attended by counsel, withdrew his previous pleas of not guilty and entered pleas of guilty. His counsel began the plea hearing by stating, "Pursuant to negotiations with the State, your Honor, Mr. Green withdraws his former plea of not guilty and tender[s] to the Court, a waiver of constitutional rights, plea of guilty form, pursuant to *State versus Crosby* and *North Carolina versus Alford*." The trial court responded by

stating, “What the Court has before it is a waiver of constitutional rights plea of guilty pursuant to *State v. Crosby* and *Alford v. North Carolina* [sic].”

The trial court then confirmed with Green that he had reviewed the plea agreement with his attorney and asked: “By doing so, Gregory Green, do [you] hearby [sic] plead guilty to the crime of possession with intent to distribute Diazepam, which is commonly known as valium, and cocaine; is that correct?” Green replied, “Yes, your Honor.”

The trial court then reviewed with Green the rights he was giving up by pleading guilty. The trial court informed him that the maximum possible sentence on each count was from five to thirty years and also confirmed that he had not been forced to enter the pleas, had not been promised anything of value for his pleas, and was not under the influence of drugs or alcohol.

The trial court went on to ask Green the following: “Do you understand the possible legal consequences of pleading guilty and wish to plead guilty at this time because you’re, in fact, guilty of these crimes?” He answered, “Yes, your Honor.” The trial court then asked Green the following: “All right. The Court is also noting that you’re pleading in your best interest; is that correct?” The appellant replied, “Yes, your Honor.”

The trial court then informed Green of the time limits for an appeal and for post-conviction relief, confirmed the signature on the plea forms

were his; and concluded by stating, "All right. These pleas of guilty, which are in the best interest of Gregory Green are accepted by the Court as being knowingly, intelligently and voluntarily made by the Defendant."

On 19 June 1998, the trial court held the sentencing hearing. Green's counsel repeated the terms of the plea agreement and Green's motivation for accepting the plea, stating:

> . . [W]e entered a plea for a determined sentence, that being a minimum on a double bill on possession with intent to distribute cocaine, which is 15 years.
>
> * * *
>
> 15 years flat, the minimum sentence that's to be imposed in this case and we (inaudible) is an incredible length of time to be incarcerated. But, under the circumstances, the fact that we analyzed them and the expo-facto [sic] application of the three strikes law that has been ratified or has been in court, my analysis indicated that this was, in fact, a beneficial plea bargain and Mr. Green stands by his bargain, your Honor.

The trial court sentenced Green to two concurrent fifteen-year sentences. The trial court then vacated both sentences and re-sentenced Green to two concurrent fifteen-year sentences pursuant to La. R.S. 15:529.1, based on his prior conviction for possession with intent to distribute cocaine in 1993.

On 26 January 2000, Green filed an application for post-conviction relief, arguing that he was denied due process and that his right to be free of

unreasonable search and seizure was violated when the officers stopped him without probable cause or reasonable suspicion that he had committed a crime or was about to commit a crime. On 18 January 2002, this court granted the application for post-conviction relief for the sole purpose of transferring the matter to the trial court to be considered as a motion for an out of time appeal. The motion for an out of time appeal was granted, and this appeal follows.

As Green entered a guilty plea, the following facts are drawn from the testimony of Special Alcohol, Tobacco, and Firearms ("ATF") Agent Michael Hutton at the pretrial hearing on the motion to suppress evidence and testimony:

On 15 October 1997, Green was observed driving on Annunciation Street in New Orleans by Agent Hutton in a vehicle with a temporary license taped to the rear windshield. Agent Hutton determined that the license taped to the rear window was unreadable, causing him to believe that the vehicle was either unregistered or improperly registered. When Green stopped the car at a one-hour cleaner on Annunciation Street, Agent Hutton parked behind the vehicle. As Green exited his vehicle and began walking toward the one-hour cleaner, Agent Hutton exited his vehicle and summoned Green.

Agent Hutton asked Green to remove his right hand from his front pocket. Green started to remove his hand from his front pocket, pushed it back in, and began running.

Agent Hutton chased Green down the street and observed Green pull his hand out of his jacket and discard a plastic object while running through a yard. Agent Hutton picked up the plastic object as he chased until Green gave up and submitted to arrest. The plastic object later tested positive for cocaine. A police report in the record indicates that the cocaine weighed approximately one-half ounce.

Agent Hutton read Green his *Miranda* rights, and another officer asked Green if he had discarded any other objects during the chase. Green stated that he stashed some money under a house, and he retrieved approximately $400.00 with the officers. The officers found approximately $1,800.00 more on Green's person and in his vehicle. In addition, a bottle of Valium was found in the vehicle. Green stated that the Valium belonged to his sister, but admitted he was using it. No further details are present in the record regarding the Valium.

ERRORS PATENT

A review of the record reveals errors in Green's charging and sentencing, in addition to the sentencing issue raised on appeal. These errors

are discussed in conjunction with Green's second assignment of error regarding sentencing.

DISCUSSION

ASSIGNMENT OF ERROR NUMBER 1

Green first argues that the trial court should not have accepted his plea to either count under *Alford*, asserting that no strong factual basis existed to support intent to distribute either cocaine or Valium. The state argues that Green actually entered a *nolo contendere* plea because he failed to make the necessary claim of innocence during the plea colloquy, and the trial court was thereby relieved of its duty to resolve the conflict between a waiver of trial and a claim of innocence. *State v. Francis*, 02-0862 (La. App. 3 Cir. 12/11/02), 832 So. 2d 1225; *State v. Orman*, 97-2089 (La. 1/9/98), 704 So. 2d 245; *State v. Guffey*, 94-797, p. 11 (La. App. 3 Cir. 2/1/95), 649 So. 2d 1169, 1174.

We find that Green's plea should be treated as a *nolo contendere* plea rather than an *Alford* plea because he failed to maintain his innocence during the plea colloquy and in his brief to this court. In *Orman*, the Louisiana Supreme Court addressed a similarly inadequate *Alford* plea, stating:

> Although relator purported to enter a guilty plea under *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), relator did not claim at the guilty plea colloquy, and does not maintain in his present application, that he is

> innocent of the crime but instead has alleged only that as the result of drug and alcohol intoxication at the time of the offense, he remains unable to recall the critical events surrounding the death of the victim. Relator thus entered the equivalent of a nolo contendere plea which did not require the trial court to resolve the inherent conflict between the waiver of trial and a claim of innocence. See *State v. Guffey*, 94-0797, p. 11 (La. App. 3 Cir. 2/1/95), 649 So.2d 1169, 1174 (a nolo contendere plea, unlike a plea accompanied by a claim of innocence, does not put the trial court on notice that it must ascertain a factual basis).

Orman, 97-2089, p. 1, 704 So. 2d 245.

In the instant case, Green simply maintains that the trial court did not have a sufficient factual basis for accepting his plea under *Alford*. In *Orman*, the Louisiana Supreme Court discussed the standard under *Alford* for finding a strong factual basis for the plea, stating:

> Moreover, even assuming that relator had protested his innocence when he entered his guilty plea and further assuming that in all cases involving a bona fide *Alford* plea the record "before the judge [must] contain[ ] strong evidence of actual guilt," id., 400 U.S. at 38, 91 S.Ct. at 167, the standard under *Alford* is not whether the state may prevail at trial by establishing the essential elements of the crime beyond a reasonable doubt and negating all possible defenses, but rather whether the strength of the factual basis, coupled with the other circumstances of the plea, reflect that the plea "represents a voluntary and intelligent choice among the alternative[s]." Id., 400 U.S. at 31, 91 S.Ct. at 164.

Orman, 97-2089, pp. 1-2, 704 So. 2d 245.

As in *Orman*, the trial court in the case at bar did not conduct an inquiry into the factual basis of the state's prosecution at the plea colloquy itself. Nevertheless, the trial court had previously conducted a hearing on the motion to suppress evidence and testimony, during which Agent Hutton testified regarding his observations of Green, the physical evidence recovered from and near him, and the statements made by Green after his arrest. As a result, the trial court had before it a sufficient record for evaluating statements by Green's counsel at the plea hearing, to-wit, the plea was in the best interest of Green in light of the "three strikes law." Therefore, this assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 2

Green next argues that remand is necessary for him to be re-sentenced because the trial court erred in enhancing both sentences under La. R.S. 15:529.1, the habitual offender law. The state concedes that a review of the multiple bill and sentencing transcript of 19 June 1998 fails to show which count was enhanced and agrees that Green's case should be remanded to the trial court for the multiple bill to be vacated as to one count and for Green to be re-sentenced.

In addition, our review of the record for errors patent, discloses the

trial court failed to sentence Green under the relevant statutes in effect at the time he committed his offense.

Green was charged with a violation of La. R.S. 40:967A(1) and was sentenced pursuant to La. R.S. 40:967B(1). La. R.S. 40:967 was amended by Acts 1997, No. 1284, effective 15 August 1997, which was prior to Green's 15 October 1997 offense date. Therefore, the version of La. R.S. 40:967 in effect at the time Green committed his offenses would be La. R.S. 40:967A(1) and B(4)(b), which mandated that the first five years of imprisonment be without benefit of parole, probation, or suspension of sentence.

By failing to recite the statutory provisions of La. R.S. 40:967B(4)(b), Green's sentence is illegally lenient. However, La. R.S. 15:301.1(A) provides that in instances where the statutory restrictions are not recited at sentencing, the restrictions are deemed contained in the sentence, whether or not imposed by the sentencing court. The correction is statutorily effected. La. R.S. 15:301.1(A); *State v. Williams,* 2000-1725 (La.11/28/01), 800 So.2d 790.

Green was also charged with violation of La. R.S. 40:969A(1) and was sentenced pursuant to La. R.S. 40:969B. Acts 1997, No. 1191, amended this statute effective 15 August 1997, which was before Green's 15 October

1997 offense date. Although the version of La. R.S. 40:969 in effect at the time of Green's offense was rewritten, it did not differ substantively in pertinent part. However, the trial court erred in sentencing Green initially to a fifteen-year term of imprisonment when the maximum term was no more than ten years.

CONCLUSION

Green's conviction is affirmed, but we remand this matter to the trial court for the multiple bill to be vacated as to one count and for Green to be re-sentenced.

CONVICTION AFFIRMED; REMANDED FOR RE-SENTENCING.