

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * NO. 2004-KA-0138
VERSUS * COURT OF APPEAL
CALVIN D. RICE * FOURTH CIRCUIT
* STATE OF LOUISIANA
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 414-381, SECTION "B"
Honorable Patrick G. Quinlan, Judge
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Judge Dennis R. Bagneris, Sr.
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(Court composed of Judge Charles R. Jones, Judge James F. McKay, III,
and
Judge Dennis R. Bagneris, Sr.)

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SENTENCE VACATED AND REMANDED FOR RESENTENCING

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This appeal concerns the appellant's resentencing as a third-felony offender. Finding the record does not contain sufficient evidence to prove that he was adjudicated a multiple offender, we vacate the sentence and remand for resentencing.

Calvin D. Rice was convicted of possession of crack cocaine after a jury trial on August 8, 2000. He was adjudicated a third-felony offender and sentenced to life imprisonment without benefit of parole, probation or suspension of sentence. He appealed, and this Court affirmed his conviction, vacated his sentence, and remanded the case for resentencing. *State v. Rice*, 2001-0215 (La. App. 4 Cir. 1/16/02), 807 So. 2d 350.

Mr. Rice was resentenced on April 17, 2003, to serve ten years at hard labor as a third-felony offender.

The facts are not relevant to the issues on appeal.

Counsel filed a brief requesting a review for errors patent. This appeal is different from most errors patent appeals because defense counsel argues

that the appellant seeks reversal based only on those errors, which are detrimental to him.

Mr. Rice filed a pro se brief, arguing that his resentencing as a multiple offender was illegal. He is correct. The minute entries and docket master indicate the following: on December 4, 2002, the trial court vacated the multiple bill and set the matter for a new hearing ; on January 29, 2003, the State filed another multiple bill, and the appellant pleaded not guilty to the bill on March 17, 2003, the State filed a new multiple bill, and Mr. Rice pleaded not guilty to the new bill. There are no transcripts of any of those hearings. On April 17, 2003, the sentencing hearing was held at which Mr. Rice was sentenced to ten years at hard labor. The record on appeal contains no transcript of the guilty plea to the multiple bill filed on March 17, 2004, and neither the minute entry nor the sentencing transcript that indicates any dialogue between the appellant and the judge.

At that hearing the transcript indicates that the prosecutor stated that Mr. Rice was being charged as a triple not a quadruple offender, and the defense attorney agreed, noting that Mr. Rice had been so charged. The prosecutor then began a discussion of whether a life sentence was mandated by La. R.S. 15:529.1(A)(1)(b)(ii) or whether the trial court had discretion to find the life sentence unconstitutionally excessive and impose a lesser term.

The trial court determined that the sentence should be ten years at hard labor and imposed the sentence, adding that it was “the maximum sentence the Court can give to a third offender.”

In his pro se brief, Mr. Rice states that he was never informed of a new multiple bill being filed and that he never pleaded guilty to it. He asks that this Court vacate the multiple bill sentence.

The record contains no guilty plea to the multiple bill filed on March 17th. Furthermore, after the appellant was re-sentenced, he applied to this Court for an out-of-time appeal. This Court, noting that the guilty plea was not in the record, granted the writ and ordered the district court to determine whether the defendant agreed to the ten-year sentence in exchange for his plea of guilty because if he did so, he would not be entitled to an appeal. *State v. Rice*, unpub. 2003-0949 (La. App. 4 Cir. 6/18/03). The trial court issued a judgment on July 9, 2003, stating that there was no agreement to the ten-year sentence in exchange for the guilty plea. The trial court then granted Mr. Rice an out-of-time appeal.

Mr. Rice maintains he did not know a new multiple bill was being filed and he never pleaded guilty to the new bill. While the record indicates that a multiple bill was filed and that bill is in the record, there is no guilty plea in the record, and while the minute entry and docket master state that

the appellant pleaded guilty, they do not show that he was informed of his *Boykin* rights prior to his plea.

We find merit in the appellant's argument given the facts that there is no guilty plea in the record, and that the transcript does not reflect that a guilty plea was made, and that the minute entry refers to the guilty plea only in an addendum dated April 22, 2003, five days after the hearing. Thus, the record indicates he was sentenced as a third felony offender without being so adjudicated.

Accordingly, his sentence is vacated, and the case is remanded for resentencing.

SENTENCE VACATED AND REMANDED FOR RESENTENCING