NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2013-KA-0073**
VERSUS	*	
		COURT OF APPEAL
KERRY A. SMITH	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

* * * * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 492-480, SECTION "F"
Honorable Robin D. Pittman, Judge
* * * * * *
JUDGE SANDRA CABRINA JENKINS
* * * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Roland L. Belsome, Judge Sandra Cabrina Jenkins)

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AFFIRMED; MOTION TO WITHDRAW GRANTED
DECEMBER 18, 2013

Defendant appeals his conviction and sentence for possession with the intent to distribute cocaine. Appellate counsel requests a review of the record for errors patent only and permission to withdraw. The defendant assigns error to the trial and sentencing proceedings. Finding one sentencing error which does not require corrective action by the court (La. R.S. 15:301.1 A; State v. Williams, 2000–1725, p. 10 (La.11/28/01), 800 So.2d 790, 799); and finding no merit to the defendant's assignments of error, we affirm defendant's conviction and sentence. Appellate counsel's motion to withdraw is granted.

PROCEDURAL HISTORY

On August 17, 2011, a jury found the defendant guilty of possession with intent to distribute cocaine, a violation of La. R.S. 14:967(B). The defendant was sentenced to a term of imprisonment of seven years at hard labor. The State subsequently filed a multiple bill of information charging the defendant as a third felony offender under the habitual offender statute, La. R.S. 15:529.1. The defendant filed a pro se motion to quash the multiple bill and defense counsel's motion to quash the multiple bill of information followed. After a hearing on the motions, the trial court denied the motions to quash, vacated the original sentence

and adjudicated the defendant a third felony offender. The defendant was re-sentenced to a term of imprisonment of fifteen years at hard labor. This appeal follows.

Appellate counsel filed a motion to withdraw and a brief pursuant to Anders v. California, 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) and in compliance with State v. Jyles, 96-2669 (La. 12/12/97), 704 So.2d 241, requesting a review for errors patent. The defendant assigns errors to the trial and sentencing proceedings.

RELEVANT FACTS

On the night of July 3, 2009 Officer Sherife Davis was on patrol with a partner riding on Robertson Street when they spotted a male riding a bicycle in the direction of the defendant's apartment. The officers had been watching the house due to increased activity. People would enter the back hallway of his building, stay a minute or so, and then leave. When the subject on the bicycle turned down the driveway, the officers turned off their lights and followed him. As the subject entered the back door of the building, they exited their unit. There was a substation a few doors down from the defendant's apartment. The two officers waited right outside the defendant's door, but the suspected buyer did not exit. Through a window right in front of the defendant's door they saw the defendant receiving money from a suspected buyer; the defendant had money in both hands. The officers opened the door quickly and announced that they were police officers. There were four suspected buyers inside; the officers were outnumbered, and Officer Davis pulled out his Taser and bluffed by telling them not to move. The buyers put their hands on the wall. While Officer Davis was dealing with the four

buyers, the defendant ran back into his apartment as the partner held his shirt and struggled with the defendant. Officer Davis let the buyers go and went to help his partner. The defendant ran upstairs with the two officers in pursuit. Officer Davis said that he wrestled with the defendant, placed him in handcuffs, and took him down the stairs. He recovered two rocks of crack cocaine that the buyers dropped. The defendant had a clear plastic big bag in his left pocket; it contained crack, and there were smaller bags with crack and powder cocaine.

The owner was outside, and Officer Davis told her (Candace) that they caught the defendant selling crack from her house. He told the owner that he was applying for a search warrant, and she consented to a search of her house and showed the officers the defendant's bedroom. In that bedroom the officers found a scale with cocaine on it, razors and an open drawer containing plastic bags used to package narcotics. Money in different denominations was also found.

The defendant testified on his behalf at trial. He denied residing at the resident where the drugs were found. The defendant admitted at trial that he had prior convictions. He listed a simple burglary, a marijuana charge, an attempted possession of a gun with drugs in 1998 or 1999, and a crack charge in 1999 (possession with intent to distribute cocaine). He claimed that his cousin gave him his disability check, and he left. The defendant said that he did not know that Officer Harris was an officer; he stopped fighting her when he was told that. He stated that the officers threw him to the ground and let everybody else go. On cross-examination he admitted that he had a 1996 conviction for burglary.

COUNSELED ASSIGNMENT OF ERROR - ERRORS PATENT REVIEW

After a review of the record, there is one error patent. The defendant was convicted of possession with intent to distribute cocaine, and he was sentenced to

seven years at hard labor. According to La R.S. 40:967(B) (4) (b), the sentence was required to be imposed without the benefit of parole, probation, or suspension of sentence as to the first two years. See State v. Morton, 2012-0027, p. 19 (La. App. 5 Cir. 5/31/12), 97 So.3d 1034, 1046. However, the State filed a multiple bill, and the trial court vacated that seven-year sentence. When the trial court found the defendant, who had been convicted of possession with intent to distribute cocaine, to be a third offender, it sentenced him to fifteen years at hard labor, but the court did not declare that the first two years would be served without benefit of probation or suspension of sentence under La. R.S. 40:967. Additionally, the court did not impose the restriction as to probation and suspension of sentence as to his entire sentence according to La. R.S. 15:529.1(G). However, this error does not require corrective action, because the "without-benefits" provisions of the statutes are self-activating. La. R.S. 15:301.1 A; State v. Williams, 2000–1725, p. 10 (La.11/28/01), 800 So.2d 790, 799. See also State v. Hackett, 2013-0178, p. 8, 2013 WL 4474090 (La. App. 4 Cir. 8/21/13), __ So.3d __. The first two years of the defendant's sentence are deemed to be without benefit of parole, probation or suspension of sentence according to La. R.S. 40:967, while all fifteen years are deemed to be without benefit of probation or suspension of sentence according to La. R.S. 15:529.1.

DISCUSSION

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 he 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 that arguably supports the appeal.

As per State v. Benjamin, this Court performed an independent, thorough review of the pleadings, minute entries, the 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, and the bill was signed by an assistant district attorney. The defendant was present and represented by counsel at arraignment, during trial, and at sentencing. A review of the trial transcript shows that the State provided sufficient evidence to prove beyond a reasonable doubt that the defendant was guilty of possession of cocaine with the intent to distribute. The jury's verdict was legal in all respects, but the sentence did not comply with the restrictions according to La. R.S. 40:967(B) and La. R.S. 15:529.1. This Court's independent review reveals one error patent relating to sentencing, as noted above. Other than that error relating to restrictions on the sentence that are self-activating, there are no non-frivolous issues and no trial court ruling that arguably supports the appeal.

PRO SE ASSIGNMENTS OF ERROR

Assignment of Error 1-A

The defendant argues that the State failed to properly instruct the jurors during *voir dire* examination as to reasonable doubt. He points to a question asked by the State during *voir dire* examination. The State set up the hypothetical case to involve an armed robbery where one witness said the gun was in the robber's left hand, and another witness said that the gun was in his right hand; the State said that such a difference did not constitute reasonable doubt when both saw the robber with a gun. When defense counsel objected to the State's "misstatement of the law", the trial court asked the State to rephrase. The State then said that the trial

court would explain the elements of the crime of possession with the intent to distribute cocaine and give some examples.

We find no merit in the defendant's argument. It is well established that:

> A substantial probability that jurors may have convicted the defendant under an incorrect definition of the crime justifies setting aside a conviction on due process grounds even in the absence of a contemporaneous objection. *See State v. Williamson,* 389 So.2d 1328 (La.1980). Nevertheless, a State's misstatements of the law during voir dire examination, or in his opening and closing remarks, do not require reversal of a defendant's conviction if the court properly charges the jury at the close of the case. *State v. Holmes,* 388 So.2d 722 (La.1980); *State v. Shilow,* 252 La. 1105, 215 So.2d 828 (1968).

State v. Cavazos, 610 So.2d 127, 128-29 (La. 1992).

The defendant does not claim that the trial court gave erroneous instructions as to reasonable doubt. The defendant's argument is without merit.

Assignment of Error 1-B

The defendant argues the State introduced "other crimes" evidence in violation of La. C.E. art. 404 and State v. Prieur, 277 So.2d 126 (La. 1973). He points to the State's opening argument that provides:

> Ladies and gentlemen, this case, as you already know, is about a drug dealer. It's about a crack dealer. It's about an individual who was caught in the act of selling crack cocaine to members of our community. And that person, that drug dealer, is the defendant, Kerry Smith.

The State then went on to discuss the officers' investigatory activities in the Iberville Project and the facts relating to the defendant's arrest. The defendant eventually lodged and objection to the State's reference to "prior bad acts."

> Generally, evidence of other crimes committed by the defendant is inadmissible due to the "substantial risk of grave prejudice to the defendant." *State v. Prieur,* 277 So.2d 126 (La.1973). Pursuant to La. C.E. art. 404(B)(1), evidence of other crimes, wrongs or acts are generally not admissible to prove character. The article, however, provides for exceptions to this rule, which include admission for the

> purposes of proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident or when the evidence relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

(Citation omitted) State v. Keys, 2012-1177, p. 8, 2013 WL 4759279 (La. App. 4 Cir. 9/4/13), __ So.3d __.

We do not find that the context in which the State offered the statements during opening statement constitute introduction of "other crimes evidence." Defendant's assignment of error is without merit.

Assignment of Error 2-A and 2-B

The defendant argues that the State failed to prove by competent evidence that he had prior felony convictions. He claims that the State failed to present sufficient evidence to prove that the December 6, 1999 guilty plea to possession of cocaine (case 409-761) was his case and that the guilty plea falls within the ten year cleansing period under the multiple offender statute, La. R.S. 15:529.1(C). He notes that the NOPD expert acknowledged that the fingerprints in the certified packet of the 1999 case could not be used for identification. The defendant argues that the use of the arrest register from the prior 1999 case was not sufficient.

In a recent decision, State v. White, 2013-1525, 2013 WL 5951798 (La. 11/8/13), __ So.3d __, the Louisiana Supreme Court reversed the trial court for failure to accept competent evidence offered by the State as proof of the defendant's prior conviction and identity during a multiple bill hearing:

> To meet its burden under the Habitual Offender Act, the State must establish both the prior felony conviction and the defendant's identity as the same person who committed that prior felony. *State v. Payton,* 00–2899, p. 6 (La.3/15/02), 810 So.2d 1137, 1130; *State v. Neville,* 96–0137, p. 7 (La.App. 4 Cir. 5/21/97), 695 So.2d 534, 539–40). This Court has repeatedly held the Habitual Offender Act does not require the State to use a specific type of evidence to carry its burden at a habitual offender hearing. Rather, prior convictions may be proved by *any* competent evidence. *Payton,* 00–2899 at p. 8, 810 So.2d at 1132; *State v.*

Blackwell, 377 So.2d 110, 112 (La.1979); *State v. Curtis,* 338 So.2d 662, 664 (La.1976).

In the instant case, we find that the State introduced sufficient competent evidence to establish the defendant's identity and prior convictions.

At the multiple bill hearing, the State offered and the defense accepted the stipulation that Officer Jackson had previously fingerprinted the defendant on May 18, 2012; those fingerprints were introduced as State's Exhibit 1. State's Exhibit 2 was the certified packet containing the bill of information, a plea of guilty form, a docket master, a minute entry, a screening action form, and an arrest register relating to a charge of simple burglary (sentenced to three years suspended). Officer Jackson reviewed Exhibits 1 and 2; he concluded that the defendant's fingerprints (exhibit 1) matched the fingerprints in the simple burglary case (exhibit 2).

The officer was then given State's Exhibit 3, the certified packet, which related to the 1999 guilty plea to possession of cocaine. Officer Jackson testified that Exhibit 3 included a bill of information, the docket master, the guilty plea form, a minute entry, a screening form, and an arrest register. The officer testified that there were two prints in exhibit 3, but they "were not of any use. They were not suitable for I.D. purposes. There was not enough information in those prints to be able to make a comparison." The officer stated that there was an arrest register in the certified pen pack. The State labeled the certified copy of the arrest register kept on file at NOPD as exhibit 4 and asked the officer to compare the fingerprints on the 1999 arrest register in Exhibit 3 and the defendant's fingerprints on the certified copy of the arrest register, Exhibit 4. Officer Jackson testified that the name is Kerry Smith on both arrest registers; the date of birth is the same, April 21,

1976; the bureau identification number and the social security number matched. The date of arrest in Exhibit 3 was August 25, 1999, and the certified arrest register (Exhibit 4) matched the arrest register in the certified pack. Officer Jackson said that after comparing the fingerprints on the certified arrest register on file at NOPD, Exhibit 4, and comparing those prints with the prints in Exhibit 3, and then comparing the fingerprints in Exhibit 3 with those in Exhibit 2 (the prior guilty plea to simple burglary not contested by the defendant), he "believe[d] they're all placed by one and the same Mr. Kerry Smith." In Exhibit 3 the officer found the sentence to be thirty months at hard labor under La. R.S. 15:529.1; the date of the guilty plea was December 6, 1999.

We find no error in the trial court's ruling denying the defendant's motions to quash and adjudicating the defendant a third felony offender. Defendant's assignment of error (2-A) is without merit.

Defendant's final argument contends that the State failed to show that his 1999 conviction fell within the ten-year cleansing period provided for in La. R.S. 15:529.1(C). Defendant alleges that more than ten years have elapsed between the date of the current offense and the expiration of the maximum sentence of the previous conviction, and then between that offense and the expiration of the maximum sentence of each preceding offense.

Under the provisions of La. R.S. 15:529.1(D)(1)(b), a defendant challenging a predicate conviction in a multiple bill proceeding bears the burden of proving that the conviction relied upon is invalid for these purposes. The statute further provides that the defendant shall file a written response to the multiple bill of information setting forth his claim and the factual basis for it with particularity and any challenge not made before sentence is imposed may not be raised on appeal.

State v. Shelton, 621 So.2d 769 (La. 1993); State v. Cossee, 95-2218 (La. App. 4 Cir. 7/24/96), 678 So.2d 72; State v. Randall, 10-0027 (La. App. 4 Cir. 10/27/10), 51 So.3d 799.

Defendant filed a written response to the multiple offender bill of information but it did not raise the issue of the ten-year cleansing period as a defense. However, at the hearing on the motion to quash the multiple offender bill, defense counsel orally supplemented the motion by arguing that the last predicate conviction was from 1999 and the State did not prove that the sentence imposed for that conviction had not cleansed prior to this offense. The trial court allowed defense counsel to supplement the motion to quash with this argument and denied the motion to quash based upon the arguments raised in the written response and the oral supplementation.

Turning to the merits of defendant's argument, the record supports that defendant's 1999 conviction falls within the ten-year cleansing period set forth under the provisions of La. R.S. 15:529.1(C). Defendant committed the current offense of possession of cocaine with intent to distribute on July 3, 2009 and pled guilty to the predicate offense of possession of cocaine on December 6, 1999, and received a 30-month suspended sentence and was placed on active probation. Under our Louisiana jurisprudence, even if the record does not affirmatively show whether the ten-year period had or had not elapsed, it is sufficient that the showing indicates more probably than not that the cleansing period had not lapsed between the crimes. State v. Turner, 365 So.2d 1352, 1355; State v. Tatten, 12-0443, pp. 9-10 (La. App. 4 Cir. 5/1/13), 116 So.3d 843, 849-50. We find that the record supports the finding that the predicate conviction fell within the ten-year period. Defendant's final assignment of error (2-B) is without merit.

CONCLUSION

Our independent review reveals no non-frivolous issue and no trial court ruling that arguably supports the appeal. Further, we find no merit in defendant's pro se assignments of error.

Therefore, we affirm the defendant's conviction and sentence. We also grant appellate counsel's motion to withdraw.

AFFIRMED; MOTION TO WITHDRAW GRANTED