STATE OF LOUISIANA	*	**NO. 2017-KA-0553**
VERSUS	*	
		COURT OF APPEAL
ERVIN SMITH	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 521-802, SECTION "K"
Honorable Arthur Hunter, Judge
* * * * * *
Judge Marion F. Edwards, Pro Tempore
* * * * * *
(Court composed of Judge Paula A. Brown, Judge Tiffany G Chase, Judge Marion F. Edwards, Pro Tempore)

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AFFIRMED; MOTION TO WITHDRAW AS COUNSEL GRANTED

DECEMBER 13, 2017

Defendant, Ervin Smith, appeals his conviction on a charge of possession with intent to distribute cocaine in violation of La. R.S. 40:967(B)(1), and his sentence as a multiple offender. For reasons that follow, we affirm the conviction and sentence.

FACTS AND PROCEDURAL HISTORY

In June of 2014, two New Orleans police officers on routine patrol in a marked car observed four men standing in front of a car repair shop on Jackson Avenue in New Orleans in an area known for drug trafficking. The officers saw what appeared to be a drug transaction between Smith and a man subsequently identified as Ricky Brock. In the transaction, Brock handed money to Smith who was fidgeting with something in his hand. As the officers drove by, Brock put the money in his pocket. After observing this transaction, the officers circled back to the area and stopped the car. As one officer got out, he saw Smith drop a pill bottle to the ground. The officer retrieved the bottle, which contained thirty-two individually wrapped pieces of crack cocaine.

The officers arrested Smith. Initially, Smith denied ownership of the pill bottle, but subsequently admitted the cocaine was his and stated that he would, "take the charge."

Smith was charged by bill of information with possession of cocaine with intent to distribute, and in due course was tried by a jury. The jury returned a verdict of guilty as charged. Smith was sentenced to serve five years imprisonment, two years without benefit of parole. The State filed a multiple offender bill of information. At the hearing on that bill, Smith admitted to being a second felony offender as part of a plea agreement. The trial court vacated the five year sentence and imposed a sentence of fifteen years in accordance with the plea agreement on the multiple offender bill of information. This appeal followed.

DISCUSSION

By the sole counseled assignment of error, defense counsel requests a review of the record for errors patent. Defense counsel complied with the procedures outlined by *Anders v. California*[1], as interpreted by this Court in *State v. Benjamin*[2]. Defense counsel's detailed review of the procedural history and the facts of the case indicate a thorough review of the record. Further, defense counsel moved to withdraw because she believed, after a conscientious review of the record, that there were no non-frivolous issues for appeal.

[1] 386 U.S. 738, 87 S.Ct. 1396 (1967).
[2] 573 So.2d 528 (La.App. 4 Cir. 1990).

As per *State v. Benjamin*, this Court has performed an independent, thorough review of the pleadings, minute entries, and the bill of information in the appeal record. We have determined that defense counsel correctly concluded the defendant's appeal is wholly frivolous for reasons set forth in this opinion. We find Smith was properly charged by bill of information with possession with the intent to distribute cocaine, a violation of La. R.S. 40:967, and the bill was signed by an assistant district attorney. Smith was present and represented by counsel during arraignment, trial, and at sentencing. The jury's verdict of guilty as charged is legal in all respects. Furthermore, a review of the trial transcript shows that the State introduced sufficient evidence to prove beyond a reasonable doubt that Smith was guilty of possession with the intent to distribute cocaine.

Thereafter, the State filed a bill of information charging Smith with being a multiple offender. As part of a plea agreement, Smith admitted to being a second felony offender. He executed a written waiver of rights form, also signed by his counsel and the trial judge, which indicates he was advised of the allegations of the multiple bill to which he was pleading and the sentence which he would receive. In the executed form, he acknowledged the rights he was waiving by entering an admission, and confirmed that he was satisfied with his counsel's assistance. The transcript reflects that the trial court advised Smith of the rights he was waiving, and Smith verified to the court that he had signed and initialed the form after discussing it with his counsel.

Our review of the allegations of the multiple bill reflects that less than ten years elapsed between the completion of the sentence for the listed prior felony and the date the crime that was committed. However, review of defendant's sentence reveals that the trial court failed to order that the first two years of the sentence be served without benefit of parole, as mandated by La. R.S. 40:967 B(4)(b) as it read at the time of commission of the crime.[3] Thus, the sentence imposed by the court is illegally lenient. However, as per La. R.S. 15:301.1A and *State v. Williams*[4], the sentence is deemed to have been imposed with these restrictions of benefits, even when the trial court fails to delineate them. Thus, no need exists for this court to correct the sentence.[5]

PRO SE ASSIGNMENTS OF ERROR

Smith has filed a *pro se* brief in which he assigns fourteen assignments of error for our review.

> 1." The trial court erroneously denied petitioner Smith's "Motion to Suppress Evidence" and the alleged oral confession . . . based upon Officer Nunnery's hearsay testimony about what Officer Pichon did and say who were not subjected to confrontation and cross-examination."

By this assignment, Smith essentially argues that the police lacked reasonable suspicion of criminal activity to perform an investigatory stop after observing the transaction between him and Ricky Brock. Smith argues that the police saw nothing more than U.S. currency being transferred, which he notes is not contraband.

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[3] La. R.S. 40:967B has been subsequently amended to eliminate this penalty.
[4] 2000–1725, pp. 10–12 (La. 11/28/01), 800 So.2d 790, 798–99.
[5] See *State v. Phillips*, 03–0304 (La.App. 4 Cir. 7/23/03), 853 So.2d 675.

La. C.Cr.P. art. 215.1, which codifies the standard enunciated in *Terry v. Ohio*[6], allows an officer to perform an investigative stop where there is reasonable suspicion to believe that the individual has committed or is about to commit a crime. Reasonable suspicion is less than the probable cause needed to arrest a defendant; an officer "must have a particularized and objective basis for suspecting the particular person stopped of criminal activity."[7]

Courts have found either reasonable suspicion or probable cause existed after observing hand-to-hand transactions on numerous occasions.[8] Further, Officer Pichon had the authority to retrieve the prescription pill bottle discarded by Smith. The circumstances clearly support the officers' belief that they might have interrupted a narcotics transaction. We find there was probable cause to believe that the vial contained contraband and it was abandoned by defendant.

The assignment of error lacks merit.

> 2. "The trial court erroneous denied petitioner Smith's "Motion to Suppress" the alleged confession gave to Officer Pichon based upon the hearsay testimony of Officer Nunnery without proving a voluntarily and knowing waiver of my Miranda rights."

By this assignment, Smith argues that there is a discrepancy between the State's Notice of Intent to Use Confession or Statements which identifies his statement as having been given to Officer Harold Nunnery, and the testimony by Officer Nunnery at the motion to suppress that it was Officer Pichon who advised defendant of his rights.

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[6] 392 U.S. 1, 88 S.Ct. 1868 (1968).
[7] *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 695 (1981); *State v. Temple*, 2002-1895 (La. 9/9/03), 854 So.2d 856, 859-860.
[8] See *State v. Smith*, 2011-0312 (La. 2/21/11), 56 So.3d 232; *State v. Armstead*, 2002-1030 (La.App. 4 Cir. 11/6/02), 832 So.2d 389, *writ denied*, 2002-3017 (La. 4/21/03), 841 So.2d 791.

La. C.Cr.P. art. 768 mandates that a defendant be given written notice of the intent to introduce a confession or inculpatory statement in evidence prior to trial. However, the article does not regulate the issuance of *Miranda*[9] warnings. From the testimony at trial, it is clear that both officers were present when Smith made the statement. The fact that Office Pichon, not Officer Nunnery, administered *Miranda* warnings does not create a discrepancy with the Notice of Intent. Furthermore, it is clear that Smith received adequate *Miranda* warnings and the fact that his statement was freely and voluntarily given was well established.

> 3. "The trial court erroneous allowed Officer Nunnery to give hearsay testimony of Officer Pichon to establish probable cause to allow the State to use unconstitutionally obtained evidence and petitioner Smith's alleged confession to be used at trial without any opportunity to confront and cross-examine Officer Pichon at the Suppression hearing."

In the argument on this assignment, Smith asserts that his constitutional right to confront witnesses against him was violated on the basis that hearsay testimony was admitted at the hearing on defense motions.[10] However, it has been recognized that hearsay rules do not apply in hearings on motions to suppress evidence.[11] Furthermore, in reviewing a trial court's ruling on a motion to suppress, the reviewing court looks to the totality of the evidence presented at the motion to suppress hearing and the trial.[12] Smith confronted both arresting officers at trial as to the legality of the search and seizure and the voluntariness of his statement; accordingly, the assignment of error lacks merit. Furthermore, trial

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[9] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[10] The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

[11] *State v. Shirley*, 2008-2106 (La. 5/5/09), 10 So.3d 224.

[12] *State v. Montejo*, 2006-1807 (La. 5/11/10), 40 So.3d 952.

counsel did not object to inadmissible hearsay or an infringement of his right to confrontation and, therefore the issue is waived on appeal.[13]

> 4. "The State's constructively amended the indictment to include possession with the intent to distribute one piece of the 32-rocks tested positive for the presence of cocaine and 31-piece were imitation thru testimony of the expert witness Brian Schultz in violation of due process."

By this assignment Smith essentially argues that the State constructively amended the bill of information during trial to charge him with possession with intent to distribute an imitation or counterfeit controlled dangerous substance in contravention of La. R.S. 40:971.1. Smith argues that he was entitled to notice of the amended charges prior to the commencement of trial to properly prepare. The basis of Smith's claim rests with the fact that the criminalist did not test all thirty-two pieces of cocaine. However, this fact did not change the nature of the offense.

Smith was charged and convicted of possession with intent to distribute cocaine. No constructive amendment of the charging document occurred. There is no basis for defendant's claim.

> 5. "The State failed to prove that all 32-pieces of the alleged crack cocaine were in fact cocaine thru its expert witness Brian Schultz to sustain a conviction and sentence for possession with the intent to distribute 32-pieces of crack cocaine."
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> 9. "The State failed to prove that defendant Smith possessed 32-pieces of crack cocaine as told to the jury in 'opening' and 'closing' arguments."

These two assignments have been combined because they both relate to the testing of the cocaine. Smith argues that by only testing one of the pieces, the State failed to prove the crime of possession with the intent to distribute, proof of which rested in part on the large quality of cocaine discovered in the vile. Defendant suggests that the State's proof that only one of the pieces was actually

[13] La. C.Cr.P. art. 841.

cocaine was insufficient to prove that he possessed cocaine with the intent to distribute and not simply for personal use.

However, the record shows that Smith's claim that the State only tested one piece is incorrect. The criminalist who testified at trial stated that according to protocols in place at the time he would have tested four pieces, not one as Smith claims. In *State v. Ballom*[14], this Court noted that random testing of controlled substances "is the accepted customary practice" and that it is both reasonable and reliable. In *Ballom*, the analyst had randomly tested the contents of four out of 1,095 bags of the white powdery substance recovered. Each of the bags tested was found to contain pure cocaine and there was no evidence that the other packages were not fungible. Accordingly, this Court concluded that a rational juror could have found the defendant was in possession of 260 grams of cocaine.

In the matter before us, we find the evidence was sufficient for a rational trier of fact to conclude that the quantity of cocaine possessed by Smith was consistent with the intent to distribute. These assignments of error are without merit.

> 6. "The State knowingly use perjured testimony of Officer Nunnery at trial which is contrary to his testimony on December 19, 2014, "Motion for Suppression of Evidence' and 'Preliminary Hearing"."

By this assignment, Smith makes an unsubstantiated and unspecific claim that Officer Nunnery's trial testimony was contradictory and false. Review of Officer Nunnery's testimony at the trial and at the motion hearing does not reflect any apparent contradictions. We find no merit in this assignment of error.

> 7. "The State of Louisiana its prosecutor expressed his personal belief to the jury that Officer Nunnery and Pichon told the truth and had no reason to lie."

[14] 562 So.2d 1073, 1075 (La.App. 4 Cir.1990).

This assignment of error is in reference to the State's closing argument wherein the prosecutor rebutted the claim made by defense counsel that the officers were "crooked," that they planted the drugs, and that they invented defendant's statement. Any expression of belief in the guilt of the accused or the credibility of a witness would be reversible error if it had occurred.[15] However, our review of the comments by the prosecutor fails to reflect that he vouched for the officers' credibility. The prosecutor merely pointed out flaws in defense counsel's arguments, and made a commonsense attack on the logic of defense counsel's argument. The assignment of error lacks merit.

> 8. "Defense Counsel Gorrell was ineffective in not doing an adequate investigation of the predicate offenses and preserves my appellate right as to all constitutional claims presented in this 'Supplemental Brief'."
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> 10. "Counsel Gorrell failed to place my medical history before the Court as mitigating evidence resulting in an excessive sentence without due process."
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> 11. "Counsel Gorrell was ineffective by not preserving all errors assigned in this Supplemental Brief especially the denial to suppress evidence (32-rocks) and the alleged oral confession."

These three assignments of error raise ineffective assistance of counsel claims. Under the Sixth Amendment to the United States Constitution and Article I§13 of the Louisiana Constitution, a defendant is entitled to effective assistance of counsel. The standard of review for an ineffective assistance of counsel claim mandates that a reviewing court must reverse a conviction if the defendant establishes; (1) that counsel's performance fell below an objective standard of

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[15] La. C.Cr.P. art. 774, see also *State v. Theard,* 527 So.2d 393, 398 (La.App. 4 Cir., 1988), *writ denied,* 533 So.2d 372 (La. 1988).

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reasonableness under prevailing professional norms; and (2) counsel's inadequate performance prejudiced defendant.[16]

In the first claim, Smith argues his defense counsel failed to investigate the "constitutionality of the prior pleas used for enhance (sic) base upon unlawfully search and seizure in violation or (sic) my 4th, 6th, and 14th Amendment rights of the U.S. Const."

Review of the multiple bill of information reflects that Smith pled guilty to the offense of possession with intent to distribute crack cocaine in 2014. By pleading guilty Smith waived all non-jurisdictional defects occurring prior thereto.[17] Accordingly, the only relevant issue at the multiple bill hearing was whether the predicate plea was intelligent and voluntary.[18] The constitutionality of any searches and seizures giving rise to Smith's conviction on a predicate offense is not subject to attack in a multiple bill hearing.[19]

The next claim is that his attorney was ineffective for failing to place his poor health before the court as a mitigating factor, resulting in an excessive sentence. A defendant cannot appeal or seek review of a sentence imposed in conformity with a plea agreement which was set forth in the record at the time of the plea.[20] The waiver of rights form Smith executed in connection with the

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[16] *Strickland v. Washington*, 466 U.S. 668 (1984), and *State v. Washington*, 491 So.2d 1337, 1339 (La.1986).
[17] *State v. Sellers*, 2004-1922, 2004, 1923 (La.App. 4 Cir. 4/20/05), 902 So.2d 418, 421; *State v. Moore*, 420 So.2d 1099, 1100 (La.1982).
[18] See *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, (1969) (holding that a guilty plea that is informed, free and voluntary, is made with an articulated waiver of the constitutional privilege against self-incrimination, the right to trial by jury, and that right to confront accusers); see also *State v. Shelton*, 621 So.2d 769 (La.1993).
[19] See *State v. Shelton*, supra.
[20] La. C. Cr. P. art. 881.2. See also *State v. McQuarters*, 44,074 (La.App. 2 Cir. 4/8/09), 8 So.3d 822.

multiple bill reflects that he acknowledged that he would receive a sentence of fifteen years, the minimum applicable sentence as a second felony offender. In his waiver, Smith acknowledged that it was an agreed upon sentence and that he waived his right to appeal the term of the sentence.

In the final claim, Smith's arguments are more far-reaching than set forth in his assignment of error. Initially he suggests that his trial attorney was ineffective for failing to determine the identities of the other four men present at the time of his arrest. However, there is nothing to suggest that Smith was prejudiced by this purported failure.

Smith also claims that his appellate attorney was ineffective for failing to diligently investigate the actions taken in the district court and assigns errors accordingly. However, as demonstrated by Smith's failure to identify any meritorious claims, there is nothing to suggest that appellate counsel was ineffective.

Smith also alleges that his trial counsel was ineffective for failing to seek writs following the denial of his motions to suppress evidence. This claim lacks merit because Smith possessed an adequate remedy on appeal with respect to the denial of his motions to suppress evidence and statements. Accordingly, we find no merit in any of defendant’s claims of ineffective assistance of counsel.

> 12. "The State introduces other crime(s) evidence...attempt distribution to a Rickey Brock who was not subject to confrontation and cross-examination."(ellipsis in original)

Smith argues that the State was "allowed to introduce evidence of an alleged drug sale to an unknown black male and an outstanding warrant for possession with the intent to distribute cocaine in explaining the nature and reason for the

alleged *Terry* Stop.[21]" Defendant also complains that the use of his criminal history which involves distribution and possession with the intent to distribute cocaine violated his due process rights.

Smith does not provide support for the allegation that evidence of an outstanding warrant was introduced or that his criminal history was made public during the trial. The record does reflect that the prosecutor attempted to elicit testimony from Officer Nunnery regarding the results of the officers' criminal history inquiry, but the question drew an objection which was quickly sustained by the trial court.

Smith's complaint regarding the use of other crimes evidence stems from the testimony of the officers that they believed they witnessed a hand-to-hand drug transaction involving the defendant as they passed the group of men in their patrol car.

Generally, evidence of other crimes or bad acts committed by a criminal defendant, is inadmissible at trial due to the risk of grave prejudice to the defendant.[22] But evidence of other crimes may be introduced if it is independently relevant or when it relates to conduct, formerly referred to as *res gestae*, that "constitutes an integral part of the act or transaction that is the subject of the present proceeding."[23] "*Res gestae* events constituting other crimes are deemed admissible because they are so nearly connected to the charged offense that the State could not accurately present its case without reference to them."[24] Using the

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[21] *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).
[22] La. C.E. art. 404 B(1); *State v. Prieur*, 277 So.2d 126 (La.1973).
[23] La. C.E. art. 404 B(1).
[24] *State v. Taylor*, 2001-1638 p. 10 (La. 1/14/03), 838 So.2d 729, 741.

doctrine of *res gestae* the State completes the story of the crime on trial by proving its immediate context of happenings near in time and place.[25] The *res gestae* doctrine is broad and includes not only spontaneous utterances and declarations made before or after the commission of the crime, but also testimony of witnesses and police officers pertaining to what they heard or observed during or after the commission of the crime, if a continuous chain of events is evident under the circumstances.

Officer Pichon's and Nunnery's comments that they believed they witnessed a drug transaction were clearly relevant *res gestae* testimony as it showed the immediate context of why the officers' attention was drawn to the defendant initially, and why they approached the group. The testimony was clearly admissible. Therefore, this assignment of error lacks merit.

> 13. "The State of Louisiana has constructively denied petitioner Smith counsel as indigent to perfect these claims to which Louisiana Appellate Counsel Katherine Franks claimed the appeal to be frivolous."

The assignment of error lacks merit. The brief filed by appellate counsel complied with *State v. Jyles*[26], and it is clear that appellate counsel cast "an advocate's eye over the trial record and considered whether any ruling made by the trial court, subject to the contemporaneous objection rule, had a significant, adverse impact on shaping the evidence presented to the jury for its consideration."[27] The brief provided "a detailed and reviewable assessment for both the defendant and the appellate court of whether the appeal is worth pursuing

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[25] *Id.*
[26] 96-2669 (La. 12/12/97), 704 So.2d 241.
[27] *State v. Jyles*, supra p. 2, 704 So.2d 241.

in the first place."[28] Defendant was not constructively denied counsel. The assignment of error lacks merit.

> 14. "Petitioner Smith is entitled to application of Act 282 and Act [Senate Bill# 139] effective August 1, 2017."

Acts 2017, No. 282, § 1, eff. Nov. 1, 2017, in pertinent part, amended the Habitual Offender Law[29] to provide that the sentence for a second felony offender to be "not less than one-third the longest term and not more than twice the longest term prescribed for a first conviction." Previously, La. R.S. 15:579.1(A)(1) provided the minimum sentence to be one-half the longest term. Additionally, Section 2 of Acts 2017, No. 282 provides:

> This Act shall become effective November 1, 2017, and shall have prospective application only to offenders whose convictions became final on or after November 1, 2017.

Pursuant to Section 2, the amended provisions of La. R.S. 15:579.1(A)(1) are inapplicable to Smith's sentence which was imposed on September 8, 2016. The assignment of error lacks merit.

CONCLUSION

Because we find no merit in any assignments of error, we affirm Smith's conviction and sentence. Further, we grant defense counsel's motion to withdraw as counsel.

AFFIRMED; MOTION TO WITHDRAW AS COUNSEL GRANTED

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[28] *Id*. at p. 3, 704 So.2d at 242, (quoting *State v. Mouton*, 95-0981, p. 2 (La. 4/28/95), 653 So.2d 1176, 1177).
[29] La. R.S. 15:579.1(A)(1).