

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 1606

Handwritten initials and signatures on the left side of the page. At the top is a circled 'P'. Below it is a signature that appears to be 'W.P.R.' and below that is another signature that appears to be 'J.M.M.'

STATE OF LOUISIANA

VERSUS

BETTY M. BALLARD

Judgment Rendered: March 23, 2012

On Appeal from the 22nd Judicial District Court
In and For the Parish of St. Tammany
Trial Court No. 493750, Division "I"

The Honorable Reginald T. Badeaux, III., Judge Presiding

Walter P. Reed
District Attorney
Covington, Louisiana

Counsel for Appellee
State of Louisiana

and

Kathryn W. Landry
Special Appeals Counsel
Baton Rouge, Louisiana

Gwendolyn Brown
Louisiana Appellate Project
Baton Rouge, Louisiana

Counsel for Defendant/Appellant
Betty M. Ballard

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

HUGHES, J.

The defendant, Betty M. Ballard, was charged by bill of information with distribution of cocaine (a controlled dangerous substance pursuant to LSA-R.S. 40:964 Schedule II A(4)), in violation of LSA-R.S. 40:967(A)(1). The defendant pled not guilty. Following a jury trial, she was found guilty as charged. The defendant was adjudicated a second-felony habitual offender and was sentenced to fifteen years imprisonment at hard labor.¹ The defendant now appeals, challenging the habitual-offender adjudication. For the following reasons, we affirm the conviction, vacate the habitual-offender adjudication and sentence, and remand for further proceedings.

STATEMENT OF FACTS

On June 24, 2010 Detective Brandon Stephens of the St. Tammany Parish Sheriff's Office, as an undercover officer, arranged to purchase crack cocaine from the defendant at her residence in Pearl River, Louisiana. To facilitate on-going communication during the transaction with the case agent, Detective Christopher Como, and a recovery team in the area, Detective Stephens wore a body wire and travelled in an unmarked vehicle equipped with video cameras. Upon negotiation, Detective Stephens purchased two grams of crack cocaine for two hundred dollars. Detective Stephens also gave the defendant forty extra dollars for personal expenses as agreed.

ASSIGNMENT OF ERROR

In the sole assignment of error, the defendant contends that the trial court erred by adjudicating her a second-felony habitual offender. The defendant specifically contends that the trial court failed to advise her of her right to remain

¹ In sentencing the defendant, the trial court failed to restrict parole on the first two years of the sentence as required by the statute for the underlying offense. See LSA-R.S. 40:967(B)(4)(b). However, as *State v. Williams*, 2000-1725 (La. 11/28/01), 800 So.2d 790, 798-99 and LSA-R.S. 15:301.1(A) provide, the "without benefits" provision of LSA-R.S. 40:967(B)(4)(b) is self-activating. Nonetheless, in this case we must vacate the sentence on separate, unrelated grounds as indicated herein.

silent at the hearing. The defendant notes that she had the right to stand mute at the arraignment on the habitual-offender bill of information along with the right against self-incrimination at the ensuing habitual-offender proceeding. The defendant further argues that the exchange that took place between the trial court and the defendant prior to the adjudication was insufficient to provide a proper basis for concluding that she was indeed confessing to her status as a habitual offender. The defendant contends that there is no record evidence to suggest that she understood and/or waived her rights. On review, we find this assignment of error has merit.

Herein, the State filed a habitual-offender bill of information on May 16, 2011 alleging one predicate guilty plea conviction of distribution of a Schedule II controlled dangerous substance in violation of LSA-R.S. 40:967(A). At the habitual-offender proceeding, the court read the bill to the defendant and informed the defendant that her rights under LSA-R.S. 15:529.1 are to either admit the allegations, deny the allegations, or stand mute. The trial court further informed the defendant that if she denied the allegations or stood mute, the State would have to present evidence to prove that she is indeed the same person convicted in both cases. The colloquy proceeded as follows:

THE COURT:

If you admit the allegations there will not be a hearing. You are basically waiving your right to a hearing in this matter.

I also want you to know, that although we have discussed your sentence up here, I'm sure your attorney discussed it with you, I want you to know I am not going to punish you anymore if you decide you want to have a hearing in this matter.

So do you understand your rights in this matter, either admit, deny or stand mute?

MR. LINDER (DEFENSE COUNSEL):

Do you understand?

MS. BALLARD:

I do.

Based on this response, the trial court concluded the defendant admitted to the allegations in the habitual-offender bill of information. The trial court adjudicated the defendant a second-felony habitual offender and imposed sentence.

Louisiana Revised Statutes 15:529.1(D)(1)(a) provides that upon the filing of a multiple-offender bill of information, the trial court shall cause the defendant to be brought before it and “shall inform him of the allegation contained in the information and of his right to be tried as to the truth thereof according to law and shall require the offender to say whether the allegations are true.” See State v. Martin, 427 So.2d 1182, 1184-85 (La. 1983). In State v. Johnson, 432 So.2d 815-817 (La. 1983), the Louisiana Supreme Court stated this section of the statute clearly recognizes that the defendant, if he chooses, has the right to remain silent and implicitly provides that the defendant should be advised, by the court, of his statutory right to remain silent. Subsection (D)(3) of LSA-R.S. 15:529.1 further provides that the court shall sentence a defendant as a habitual offender when “he acknowledges or confesses in open court, after being duly cautioned as to his rights, that he has been so convicted....” The Louisiana Supreme Court has stated that a habitual-offender proceeding will be upheld as valid where the defendant made a voluntary admission of identity at the multiple-offender proceeding, and the proceedings as a whole accorded the defendant fundamental fairness and due process of law. State v. Harris, 95-0900 (La. 5/19/95), 654 So.2d 680 (per curiam).

Herein the record supports a finding that the defendant was adequately advised of her right to remain silent and her right to a hearing at which the State would be required to prove the allegations in the habitual-offender bill of information. The defendant's assertion, therefore, that she was not advised of her right to remain silent is incorrect. It is clear from the above-mentioned discussion at the sentencing hearing that the defendant was made aware that she would be

foregoing a habitual-offender hearing if she stipulated to her identity as a habitual offender.

However, we agree with the defendant's assertion that the colloquy was insufficient to provide a proper basis for concluding that she admitted to her status as a habitual offender. The defendant confirmed that she understood her rights but never affirmatively stated that she was waiving those rights by confessing to being a multiple offender. While a full-fledged colloquy is not required, the record must demonstrate that the defendant "acknowledges or confesses in open court" that she was convicted as alleged in the habitual-offender bill of information. LSA-R.S. 15:529.1(D)(3). The instant record is devoid of such an acknowledgement or confession. See State v. Easton, 463 So.2d 783, 784 (La. App. 2d Cir. 1985) (sentence vacated in part based on the trial court's failure to require the offender to say whether the allegations in a habitual-offender bill were true). Furthermore, we note that the record herein is devoid of any other evidence substantiating the defendant's prior criminal record. Thus, we cannot conclude that the record demonstrates that the proceedings as a whole were fundamentally fair and accorded the defendant due process of law. Accordingly, the defendant's habitual-offender adjudication and sentence must be vacated and this matter remanded for further proceedings. In doing so, we note that the defendant is not protected by principles of double jeopardy from being adjudicated again under the Habitual-Offender Law. See State v. Young, 99-1310 (La. App. 1st Cir. 4/17/00), 769 So.2d 12, 14.

**CONVICTION AFFIRMED, HABITUAL-OFFENDER
ADJUDICATION AND SENTENCE VACATED, AND REMANDED.**