

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 KA 1105

STATE OF LOUISIANA

VERSUS

DANIEL BARRIOS

Judgment rendered: DEC 23 2009

**On Appeal from the 17th Judicial District Court
Parish of Lafourche, State of Louisiana
Criminal Number: 450151; Division: B
The Honorable Jerome J. Barbera, III, Judge Presiding**

**Camille A. Morvant, II
District Attorney
Jennifer F. Richard
Assistant District Attorney
Joseph S. Soignet
Assistant District Attorney
Thibodaux, LA**

**Counsel for Appellee
State of Louisiana**

**Larry P. Boudreaux
Thibodaux, LA**

**Counsel for Appellant
Daniel Barrios**

BEFORE: DOWNING, GAIDRY AND McCLENDON, JJ.



DOWNING, J.

The defendant, Daniel Barrios, was charged by bill of information with one count of possession of alprazolam (count I), a violation of La. R.S. 40:969, and one count of second-offense possession of marijuana (count II), a violation of La. R.S. 40:966(E), and pleaded not guilty on both counts. He moved to quash count II, but the motion was denied. Thereafter, he withdrew his former pleas and pleaded guilty to counts I and II, pursuant to **State v. Crosby**, 338 So.2d 584 (La. 1976), reserving his right to challenge the trial court's ruling on a motion to suppress and the motion to quash. On each count, he was sentenced to five years at hard labor, with the sentences to run concurrently. He now appeals, contending that the trial court erred in denying the motion to quash count II. (Defense brief, p. 2). For the following reasons, we affirm the convictions and sentences on counts I and II.

FACTS

At the **Boykin**¹ hearing the State set forth that if the matter were to proceed to trial, it would show that following a traffic stop of the defendant on July 4, 2007, it was determined that active warrants for the arrest of the defendant were outstanding. Thereafter, during a search incident to a lawful arrest, suspected controlled dangerous substances were found on the person and under the control of the defendant. The Louisiana State Police Crime Laboratory subsequently determined that the substances were alprazolam and marijuana. The defense stipulated that the recited facts were the facts indicated in the report.

MOTION TO QUASH

In his sole assignment of error, the defendant argues the trial court erred in failing to grant the motion to quash to count II because the failure to provide a

¹ **Boykin v. Alabama**, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

“cleansing period”² for recidivist marijuana convictions was an “oversight” by the legislature. (Defense brief, pp. 3-6). He also argues that the predicate guilty plea was defective because the trial court failed to advise him of the mandatory minimum and maximum penalties before accepting the plea and that a subsequent possession of marijuana charge could result in a felony conviction. (Defense brief, pp. 3-6).

Initially, we note that the defendant’s written motion to quash did not reference his argument concerning the absence in La. R.S. 40:966 of a prohibition on the use of a previous conviction for enhancement after a certain time. That argument, however, was made to the trial court prior to its ruling denying the motion to quash. Accordingly, the defendant’s first argument is properly before us.

Provisions of law which prohibit the use of previous convictions to enhance sentences for subsequent crimes after the passage of some legislatively-defined period of time are self-imposed restraints on the State’s plenary power to define and punish crimes. Due process does not require them and several Louisiana repeat offender statutes do not have them. **State v. Everett**, 2000-2998, p. 14 La. 5/14/02) 816 So.2d 1272, 1280.

The trial court denied the motion to quash, relying on **State v. Forrest**, 439 So.2d 404 (La. 1983). **Forrest** involved prosecutions under La. R.S. 14:82, a statute which at the time did not contain a prohibition on the use of a previous conviction for enhancement after a certain time.³ In **Forrest**, the trial court granted motions to quash, finding merit in claims that enhanced sentencing provisions based on previous misdemeanor violations violated due process and equal protection since La. R.S. 14:82 did not provide a time limitation for the use of prior offenses. **Forrest**, 439 So.2d at 405. The Louisiana Supreme Court

² The Louisiana Supreme Court has disapproved of the use of the term “cleansing period.” See **State v. Everett**, 2000-2998, pp. 6-7 (La. 5/14/02), 816 So.2d 1272, 1276.

³ Prior to amendment by 1987 La. Acts No. 569, § 1.

reversed the rulings granting the motions to quash, holding that it was entirely within the power of the legislature to implement a prescriptive period, but it had chosen not to do so, and there was no provision which would require interference with the broad discretion of the legislature in setting up a system of punishment specifically designed to combat certain types of offenses. **Forrest**, 439 So.2d at 407.

Here, the trial court correctly rejected the defendant's motion to quash based on the absence in La. R.S. 40:966 of a prohibition on the use of a previous conviction for enhancement after a certain time. The legislature acted within its authority in choosing not to include such a prohibition in La. R.S. 40:966. Further, we find no support for the defendant's claim that the failure to provide such a prohibition was an "oversight." To the contrary, numerous cases have noted the absence in La. R.S. 40:966(E) of a prohibition on the use of a previous conviction for enhancement after a certain time, but the legislature has chosen not to add such a prohibition to the statute. See **State v. Williams**, 502 So.2d 1388 (La. 1987) (per curiam) (directly applying the holding of **Forrest** to recidivist prosecutions under La. R.S. 40:966(D)⁴); **State v. Rolan**, 95-0347, p. 5 (La. 9/15/95), 662 So.2d 446, 449 (per curiam) (recognizing the Louisiana repeat offender statutes, including La. R.S. 40:966(D),⁵ which did not contain prohibitions on the use of previous convictions for enhancement after a certain time).

Also at the hearing on the motion to quash, the court found that the defendant had made a knowing and intelligent waiver of his rights in connection with his August 13, 1992 predicate guilty plea to distribution of marijuana, and thus, that guilty plea could be used to enhance the punishment on count II. If the defendant denies the allegations of the bill of information, the burden is on the

⁴ 2001 La. Acts No. 403, § 4, redesignated then existing subsection (D) as subsection (E).

⁵ See footnote 4, supra.

State to prove the existence of the prior guilty plea and that the defendant was represented by counsel when it was taken. If the State meets this burden, the defendant has the burden to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. If the defendant is able to do this, then the burden of proving the constitutionality of the plea shifts to the State. The State will meet its burden of proof if it introduces a "perfect" transcript of the taking of the guilty plea, one which reflects a colloquy between the judge and the defendant wherein the defendant was informed of and specifically waived his right to trial by jury, his privilege against self-incrimination, and his right to confront his accusers. If the State introduces anything less than a "perfect" transcript, for example, a guilty plea form, a minute entry, an "imperfect" transcript, or any combination thereof, the judge then must weigh the evidence submitted by the defendant and by the State to determine whether the State has met its burden of proving that the defendant's prior guilty plea was informed and voluntary, and made with an articulated waiver of the three **Boykin** rights.⁶ **State v. Shelton**, 621 So.2d 769, 779-80 (La. 1993); **State v. Bickham**, 98-1839, p. 4 (La. App. 1st Cir. 6/25/99), 739 So.2d 887, 889-90. The purpose of the rule of Shelton is to demarcate sharply the differences between direct review of a conviction resulting from a guilty plea, in which the appellate court may not presume a valid waiver of rights from a silent record, and a collateral attack on a final conviction used in a subsequent recidivist proceeding, as to which a presumption of regularity attaches to promote the interests of finality. See **State v. Deville**, 2004-1401, p. 4 (La. 7/2/04), 879 So.2d 689, 691 (per curiam).

⁶ In **Boykin**, the United States Supreme Court reversed five robbery convictions founded upon guilty pleas because the court accepting the pleas had not ascertained that the defendant voluntarily and intelligently waived his right against compulsory self-incrimination, right to trial by jury, and right to confront his accusers. **Boykin** only requires a defendant be informed of these three rights. "Its scope has not been expanded to include advising the defendant of any other rights which he may have, nor of the possible consequences of his actions." **State v. Smith**, 97-2849, p. 3 (La. App. 1st Cir. 11/6/98), 722 So.2d 1048.

The transcript of the August 13, 1992 guilty plea indicates that the defendant, while represented by counsel and after being advised of his **Boykin** rights, pleaded guilty to distribution of marijuana.

The defendant argues that, under La. Code Crim. P. art. 556.1, the trial court must inform the defendant of the elements of the crime charged and any mandatory maximum and minimum sentence exposure, and under **State ex rel. Martin v. State**, 462 So.2d 637 (La. 1985) (per curiam), the failure to discuss these conditions makes the plea defective for enhancement purposes on a subsequent conviction. (Defense brief, pp. 6-7).

In the instant case, the trial court also correctly rejected the defendant's motion to quash based on a defective predicate guilty plea. The State met its initial burden under **Shelton**. Thereafter, the defendant failed to produce any affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. Accordingly, the State had no burden to prove the constitutionality of the predicate guilty plea by "perfect" transcript or otherwise. Louisiana Code of Criminal Procedure art. 556.1, does not apply retroactively to predicate guilty pleas entered prior to the enactment of the article in 1997. **State v. Phillips**, 99-1629, p. 4 (La. App. 1st Cir. 5/12/00), 762 So.2d 172, 174. Further, unlike the instant case, **State ex rel. Martin** involved a **Boykin** violation, rather than a statutory violation, which the defendant attacked directly, rather than collaterally, through post-conviction relief.

DECREE

We affirm the convictions and sentences on counts I and II.

**CONVICTIONS AND SENTENCES ON COUNTS I AND II
AFFIRMED**