NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 KA 0845

STATE OF LOUISIANA

VS.

JOHN S. WELLS

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JUDGMENT RENDERED: DEC 2 3 2008

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ON APPEAL FROM
TWENTY-SECOND JUDICIAL DISTRICT COURT
DOCKET NUMBER 422267, DIVISION G
PARISH OF ST. TAMMANY, STATE OF LOUISIANA

THE HONORABLE LARRY J. GREEN, JUDGE

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John S. Wells

BEFORE: PETTIGREW, McDONALD, AND HUGHES, JJ

Hughes, J., concurs.
Pettigrew, J. concurs

McDONALD, J.

The defendant, John S. Wells, was charged by bill of information with distribution of cocaine on May 25, 2006 (count 1) and distribution of cocaine on June 1, 2006 (count 2), violations of La. R.S. 40:967(A)(1). He pled not guilty and, following a jury trial, he was found not guilty on count 1 and guilty as charged on count 2. The defendant filed a motion for new trial, which was denied. The defendant was sentenced to five years at hard labor, with the first two years of the sentence to be served without the benefit of parole, probation, or suspension of sentence. The State filed a "multiple offender" bill of information and, following a hearing on the matter, the defendant was adjudicated a second felony habitual offender. The trial court vacated the underlying five-year sentence and sentenced the defendant to fifteen years at hard labor, with the first two years of the sentence without the benefit of parole, probation, or suspension of sentence. The trial court also imposed a $1,000.00 fine and costs. The defendant now appeals, designating two assignments of error. We affirm the conviction and sentence.

FACTS

In an undercover operation from May 24, 2006 to June 8, 2006, Detectives Darren Blackmon and Cheryl Kaprielian, both with the St. Tammany Parish Sheriff's Office narcotics task force, conducted four controlled narcotics purchases from Charlie Miller near a mobile home and a FEMA trailer off of Varnado Road in north Folsom. On the first, second, and fourth buys, the detectives purchased various amounts of crack cocaine from Miller. On the third buy, which took place on June 1, 2006, the detectives purchased 12.02 grams of powdered cocaine from Miller. Subsequently, a search warrant was issued for the FEMA trailer and surrounding area. No drugs were found when the officers searched the residence and area, but a business-type envelope addressed to "John Wells" with a 13150

Varnado Road, Folsom, LA address, and an invitation envelope to "Mr. and Mrs. John Wells" were seized.

On the third buy, the detectives drove to the mobile home and met Miller in the yard. According to Detective Kaprielian, who testified at trial, they gave Miller the purchase money. Miller then handed the money to the defendant, walked around the back of the FEMA trailer, and returned to the detectives with the cocaine. Detective Kaprielian further testified that, at the second buy, she had seen Miller talking to the defendant in between his (Miller's) negotiations for the price of the drugs. Miller, who also testified at trial, stated the drugs he sold on the third drug buy came from the defendant. Miller testified the undercover detectives had asked for "soft dope" for this third buy, but Miller had only "hard dope."

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues that the trial court abused its discretion in denying his motion for new trial. Specifically, the defendant contends that Charlie Miller's recantation of his trial testimony is newly discovered evidence that warrants a new trial.

At trial, Miller, who had been severed as a co-defendant, testified that he had pled to four counts of distribution of cocaine, two of which involved the current charges against the defendant. Miller had not yet been sentenced. Part of the plea agreement was that if he (Miller) testified truthfully at the defendant's trial, he would receive a six-year sentence. However, if he did not testify truthfully, he would receive a twelve-year sentence. Miller testified that the cocaine for his third drug sale with undercover officers came from the defendant. According to Miller, he went behind a trailer where the defendant handed him the cocaine. Regarding his veracity, Miller testified, "I'm telling you the truth for what happened. And he and I know this is all true."

Following his conviction, the defendant timely filed a motion for new trial. Prior to sentencing, the trial court conducted a hearing on the motion for new trial. At the hearing, Miller recanted his trial testimony. Following is the brief colloquy between Miller and defense counsel:

> Q. Mr. Miller, is your testimony the same or substantially the same as it was as you gave at trial?
> A. No, sir.
> Q. What is different?
> A. He asked me some questions about where the drugs [c]ame from, I think I was kind of spooked. I was scared. They threaten to give me a lot of time and I think I got this man he is not guilty, he is not [sic].
> Q. So, you're recanting your testimony at trial completely, you're saying Mr. John Wells had nothing to do with drug transactions?
> A. No. He was just there.

In denying the motion for new trial, the trial court stated:

> At the hearing, at the trial, Mr. Miller testified as I recall under oath before the jury. [] And personally, he could remember then what happened on the day in question. I find that this coming back today after being incarcerated for several months after that is a little bit questionable. So, I discount the testimony that he is offering.

Louisiana Code of Criminal Procedure article 851 provides in pertinent part that:

> The court, on motion of the defendant, shall grant a new trial whenever: ...
> (3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty....

This rule contains the four generally recognized requisites for a motion for a new trial based on newly discovered evidence: (1) the evidence must have been discovered since the trial; (2) failure to learn of the evidence at the time of trial was not due to defendant's lack of diligence; (3) it must be material to the issues at the trial; (4) it must be of such a nature that it would probably produce an acquittal in the event of retrial. **State v. Prudholm**, 446 So.2d 729, 735 (La. 1984).

The application of these precepts to newly discovered evidence by the trial judge, although a question of law, is entitled to great weight, and his discretion should not be disturbed on review if a reasonable man could differ as to the propriety of the trial court's action. The trial judge's duty is not to weigh the new evidence as though he were a jury determining guilt or innocence, rather his duty is the narrow one of ascertaining whether there is new material fit for a new jury's judgment. **Id.** at 735-36.

Recantations are highly suspicious and, except in rare circumstances, a motion for new trial should not be granted on the basis of a recantation since that disclaimer is tantamount to admission of perjury so as to discredit the witness at a later trial. **Id.** at 736. We find no reason to dispute the trial court's finding of Miller's recantation as questionable. Miller's threadbare assertions at the hearing that he was "kind of spooked" because they threatened to give him "a lot of time" and that the defendant "is not guilty" do not amount to rare circumstances wherein a motion for new trial should be granted. Since there are no special circumstances that would suggest that Miller's latest testimony was truthful, the trial court reasonably could have concluded that his recantation would not have created a reasonable doubt of guilt in the mind of any reasonable juror. See **Prudholm**, 446 So.2d at 736. See also **State v. Davis**, 2000-278, pp. 9-11 (La. App. 5th Cir. 8/29/00), 768 So.2d 201, 208-09, writ denied, 2000-2730 (La. 8/31/01), 795 So.2d 1205.

We find no abuse of discretion in the trial court's denial of the motion for new trial. Accordingly, this assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues that his sentence was excessive. Specifically, the defendant contends that his fifteen-year sentence,

although the statutory minimum for him as a second felony habitual offender, is nevertheless constitutionally excessive as to him.[1]

A thorough review of the record indicates that the defendant did not make a written or oral motion to reconsider sentence. Under La. Code Crim. P. arts. 881.1(E) and 881.2(A)(1), the failure to make or file a motion to reconsider sentence shall preclude the defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. The defendant, therefore, is procedurally barred from having this assignment of error reviewed. **State v. Duncan**, 94-1563, p. 2 (La. App. 1st Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam). See also **State v. Felder**, 2000-2887, p. 10 (La. App. 1st Cir. 9/28/01), 809 So.2d 360, 369, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173.

CONVICTION AND SENTENCE AFFIRMED.

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[1] See La. R.S. 40:967(B)(4)(b) and La. R.S. 15:529.1(A)(1)(a).