

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 KA 1423

STATE OF LOUISIANA

VERSUS

RICKY J. DOURESSEAU, JR.

Judgment Rendered: February 13, 2012

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Q.28
ME

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 453,560

Honorable Peter J. Garcia, Judge

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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

WELCH, J.

The defendant, Ricky J. Douresseaux, Jr., was charged by bill of information with one count of distribution of cocaine, a violation of La. R.S. 40:967(A)(1).¹ He pled not guilty.² Following a jury trial, the defendant was convicted as charged. The trial court sentenced the defendant to ten years with the Department of Corrections without benefit of probation, parole, or suspension of sentence. The defendant moved for a new trial, which was denied.

The State filed a habitual offender bill of information. The State alleged the defendant was a second-felony habitual offender, which he denied.³ However, at the May 4, 2009 habitual offender proceeding, the defendant stipulated that he was, in fact, the individual who pled guilty to the predicate felony listed in the habitual offender bill. The trial court adjudicated the defendant as a second-felony habitual offender, vacated the previously imposed sentence, and imposed an enhanced sentence of fifteen years to be served without benefit of probation, parole, or suspension of sentence.

The defendant was granted an out-of-time appeal. He now appeals his conviction and sentence as a habitual offender.⁴ For the reasons set out below, we affirm the defendant's conviction and the adjudication as a second-felony habitual offender, but we vacate the sentence and remand for the purpose of resentencing.

¹ In various documents in the record, the defendant is also identified as "Ricky J. Douresseaux," "Ricky John Douresseaux, IV," and "Ricky J. Vouresseaux."

² The facts surrounding the charge of distribution of cocaine are omitted from this opinion because they are not relevant to the issues raised in this appeal.

³ The predicate offense was the defendant's obstruction of justice conviction under Twenty-Second Judicial District Court Docket No. 97CR77394.

⁴ Previously, the defendant filed an appeal which this court dismissed as being untimely. See this court's action in 2010-0306 (La. App. 1st Cir. 3/11/10)(unpublished).

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant contends that prior to stipulating that he was the individual listed in the predicate felony at the habitual offender hearing, the trial court failed to advise the defendant of his right to remain silent. Thus, the defendant urges that his adjudication and sentencing as a habitual offender must be vacated.

After a habitual offender bill of information is filed, the trial court in which the instant conviction was had shall cause the defendant to be brought before it, shall inform him of the allegations contained in the information, shall inform the defendant of his right to be tried as to the truth thereof according to law, and shall require the defendant to say whether the allegations are true. **State v. Gonsoulin**, 2003-2473 (La. App. 1st Cir. 6/25/04), 886 So.2d 499, 501-02 (en banc), writ denied, 2004-1917 (La. 12/10/04), 888 So.2d 835; see also La. R.S. 15:529.1(D)(1)(a) and (3). A trial court's failure to properly advise a defendant of his rights under the Habitual Offender Law requires that the habitual offender adjudication and sentence be vacated. *Id.* Prior to accepting a defendant's acknowledgement, confession, or admission to the allegations of the habitual offender bill of information, the trial court must advise the defendant of the right to remain silent and of the right to a formal hearing wherein the State would have to prove the allegations of the habitual offender bill of information. *Id.*

In the instant matter, the trial court held the habitual offender hearing on May 4, 2009. Prior to withdrawing his denial of the allegations in the habitual offender bill of information and admitting his status as a second-felony offender, the trial court advised the defendant of his right to a formal hearing in which the State would have to prove the allegations in the habitual offender bill of information. However, the defendant is correct that the trial court did not advise

him of his right to remain silent on May 4, 2009. Nevertheless, the record shows that at the March 5, 2009 arraignment on the habitual offender bill of information, the trial court fully advised the defendant of his rights, including the right to a “hearing to be tried as to the truth of the allegations contained in the bill” and of the defendant’s “right to remain silent at that hearing.”

The law does not expressly state that the trial court is required to inform the defendant of his rights at each phase of the habitual offender proceeding. See Gonsoulin, 886 So.2d at 502. The law requires that the record demonstrate the proceedings as a whole were fundamentally fair and accorded the defendant due process of law. *Id.* At the March 5, 2009 habitual offender arraignment, the defendant was represented by counsel. The trial court advised the defendant of his right to a hearing and his right to remain silent at the hearing. The defendant clearly understood these rights as his denial of the allegations in the bill prompted the setting of the habitual offender hearing. Thus, the record before us shows that the trial court sufficiently advised the defendant of his rights on March 5, 2009, and that the advice of rights was sufficient to comply with the requirements of La. R.S. 15:529.1(D)(1)(a) and (3). This assignment of error is without merit.

SENTENCING ERROR

In accordance with La. C.Cr.P. art. 920(2), all appeals are reviewed for errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record, we have found a sentencing error. See State v. Price, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277. At the habitual offender hearing, the trial court imposed a fifteen-year enhanced sentence to be served without benefit of parole, probation, or suspension of sentence. Louisiana Revised Statutes 15:529.1(G) provides that

any sentence imposed under this statute shall be served at hard labor without benefit of probation or suspension of sentence. However, the habitual offender statute does not authorize the restriction of parole eligibility. Rather, with respect to restrictions on parole eligibility, the conditions imposed on the sentence are those called for in the reference statute of the underlying offense. See State v. Bruins, 407 So.2d 685, 687 (La. 1981); State v. Bonit, 2005-0795 (La. App. 1st Cir. 2/10/06), 928 So.2d 633, 642, writ denied, 2006-1211 (La. 3/16/07), 952 So.2d 688.

Prior to his adjudication as a habitual offender, the defendant's conviction for distribution of cocaine exposed him, under La. R.S. 40:967(B)(4)(b), to a "term of imprisonment at hard labor for not less than two years nor more than thirty years, with the first two years of said sentence being without benefit of parole, probation, or suspension of sentence." Thus, while the habitual offender statute mandates that the sentence shall be served without benefit of probation or suspension of sentence, La. R.S. 40:967(B)(4)(b) grants the trial court authority to restrict parole eligibility for only the first two years of the sentence. Accordingly, the trial court's restriction of parole eligibility for the entire term of the enhanced sentence is illegally excessive.

An appellate court is authorized to correct an illegal sentence pursuant to La. C.Cr.P. art. 882(A), when the sentence does not involve the exercise of sentencing discretion by the trial court. See State v. Haynes, 2004-1893 (La. 12/10/04), 889 So.2d 224. As an adjudicated second-felony offender, La. R.S. 15:529.1(A)(1)(a) provided, prior to its 2010 amendment, that the sentence "shall be for a determinate term not less than one-half the longest term and not more than twice the longest term prescribed for a first conviction." The defendant was not sentenced to the maximum sentence. Had the court known that the defendant was parole-eligible after two years, it is possible that the court

might have given him a different sentence. Thus, the correction of this error necessarily involves sentencing discretion. Therefore, we vacate the sentence and remand the matter to the trial court for resentencing.

CONCLUSION

For all of the reasons set forth above, the defendant's conviction and habitual offender adjudication are affirmed. The sentence is vacated, and the matter is remanded for resentencing.

**CONVICTION AND HABITUAL OFFENDER ADJUDICATION
AFFIRMED; SENTENCE VACATED, REMANDED FOR
RESENTENCING.**