

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2008 KA 2273**

**STATE OF LOUISIANA**

**VERSUS**

**FRANK CHARLES SMITH**

**On Appeal from the 18th Judicial District Court  
Parish of Pointe Coupee, Louisiana  
Docket No. 72371, Division "A"  
Honorable James J. Best, Judge Presiding**

**Richard J. Ward, Jr.  
District Attorney  
Elizabeth A. Engolio  
Assistant District Attorney  
Plaquemine, LA**

**Attorneys for  
State of Louisiana**

**Frank Sloan  
Louisiana Appellate Project  
Mandeville, LA**

**Attorney for  
Defendant-Appellant  
Frank Charles Smith**

**Frank Charles Smith  
St. Gabriel, LA**

**Defendant-Appellant  
In Proper Person**

**BEFORE: PARRO, McCLENDON, AND WELCH, JJ.**

**Judgment rendered** MAY - 8 2009

*RJB  
JAW  
HMC*

## **PARRO, J.**

The defendant, Frank Charles Smith, originally was charged by bill of information with attempted first degree murder, a violation of LSA-R.S. 14:27 and 30. The defendant pled not guilty. Pursuant to a plea agreement, the bill of information was subsequently amended to set forth the charge of aggravated assault of a peace officer with a firearm, a violation of LSA-R.S. 14:37.2, and the state agreed to nolle pros the charges against the defendant in docket number 72,376 and to forego charging the defendant as a habitual offender. The defendant withdrew his not guilty plea and, after a **Boykin** examination, entered a "best interest" plea to the amended charge. The defendant was sentenced to ten years of imprisonment at hard labor. The defendant moved for reconsideration of the sentence, and the trial court denied the motion. The defendant now appeals, asserting two assignments of error as follows:

1. The sentence imposed was excessive.
2. The trial court erred in failing to properly inform the defendant of the prescriptive period for post-conviction relief.

For the following reasons, we affirm the defendant's conviction and sentence.

### **FACTS**

The bill of information indicates that the instant offense was committed on March 23, 2006. Because the defendant stipulated to the factual basis of the offense and subsequently pled guilty, the facts of the case were never fully developed for the record.

### **EXCESSIVE SENTENCE**

In his first assignment of error, the defendant argues that the sentence imposed by the trial court in this case was excessive.

Louisiana Code of Criminal Procedure article 881.2(A)(2) provides that "[t]he 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." The prohibition of this article is applicable to both agreed specific sentences and agreed sentence ranges or

sentencing caps. See **State v. Young**, 96-0195 (La. 10/15/96), 680 So.2d 1171, 1174; **State v. Fairley**, 97-1026 (La. App. 1st Cir. 4/8/98), 711 So.2d 349, 352.

Based on the record before us, we find that the defendant voluntarily entered into a plea agreement in which he agreed, along with the trial judge and the prosecutor, that he would receive a sentence of imprisonment at hard labor for ten years. Contrary to the defendant's assertions in his brief, the record reflects that the defendant did not reserve the right to appeal his sentence as excessive. Before accepting the defendant's guilty plea, the trial court specifically advised the defendant that because the sentence was agreed upon as part of the plea bargain agreement, the defendant would not be allowed to challenge the sentence as excessive on appeal.

The defendant's reliance on this court's decision in **State v. Shipp**, 98-2670 (La. App. 1st Cir. 9/24/99), 754 So.2d 1068, is misplaced. In **Shipp**, this court held a defendant could validly reserve the right to appeal the sentence as excessive in a plea bargain agreement providing for the imposition of a specific sentence. **Shipp**, 754 So.2d at 1071. **Shipp** is clearly distinguishable. As previously noted, no reservation of the right to appeal the excessiveness of the sentence was specifically made by the defendant in connection with the plea bargain in the instant case. Accordingly, the prohibition of LSA-C.Cr.P. art. 881.2(A)(2) precludes the defendant from appealing his sentence that was imposed in conformity with a plea agreement, which was set forth in the record at the time of his plea.

### **POST-CONVICTION RELIEF DELAYS**

In his second assignment of error, the defendant argues that the trial court failed to properly advise him of the prescriptive period for applying for post-conviction relief under LSA-C.Cr.P. art. 930.8(C). The state notes that the record reflects that the defendant was, in fact, advised of the post-conviction relief delays at the time of sentencing.

Louisiana Code of Criminal Procedure article 930.8(C) provides that, at the time of sentencing, the trial court shall inform the defendant of the prescriptive period for applying for post-conviction relief. However, this Article contains merely precatory language and does not bestow an enforceable right upon an individual defendant. **State v. Godbolt**, 06-0609 (La. App. 1st Cir. 11/3/06), 950 So.2d 727, 732. While LSA-C.Cr.P. art. 930.8(C) directs the trial court to inform the defendant of the prescriptive period at the time of sentencing, a failure to do so on the part of the trial court has no bearing on the sentence and is not grounds to reverse the sentence or remand the case for re-sentencing, and the Article does not provide a remedy for an individual defendant who is not told of the limitations period. In the instant case, the record reflects that the trial court did advise the defendant of the two-year limitation for applying for post-conviction relief. However, the two-year prescriptive period begins to run when the conviction and sentence have become final. In any event, as the issue has been raised in this case, it is apparent that the defendant has notice of the correct limitation period and/or has an attorney that is in the position to provide him with such notice. Out of an abundance of caution and in the interest of judicial economy, we again note that LSA-C.Cr.P. art. 930.8(A) generally provides that no application for post-conviction relief, including applications which seek an out-of-time appeal, shall be considered, if it is filed more than two years after the judgment of conviction and sentence have become final under the provisions of LSA-C.Cr.P. arts. 914 or 922. See **Godbolt**, 950 So.2d at 732.

**CONVICTION AND SENTENCE AFFIRMED.**