NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 KA 0814

PMC
JEW
RHP

STATE OF LOUISIANA

VERSUS

GILBERT FRANKLIN

Judgment Rendered: OCT 31 2008

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On Appeal from the Nineteenth Judicial District Court
In and For the Parish of East Baton Rouge
State of Louisiana
Docket No. 11-05-0271

Honorable Mike Erwin, Judge Presiding

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Hon. Doug Moreau
District Attorney
Dylan C. Alge
Larry McAlpine
Assistant District Attorneys
Baton Rouge, Louisiana

Counsel for Appellee
State of Louisiana

Prentice L. White
Baton Rouge, Louisiana

Counsel for Defendant/Appellant
Gilbert Franklin

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BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

McCLENDON, J.

The defendant, Gilbert Franklin, was charged by bill of information with illegal possession of a weapon while in possession of a controlled dangerous substance (count one), a violation of LSA-R.S. 14:95(E); illegal possession of a firearm by a convicted felon (count two), a violation of LSA-R.S. 14:95.1; and possession of a Schedule II drug (count three), a violation of LSA-R.S. 40:967(C). He initially pled not guilty. The defendant subsequently withdrew his not guilty plea and pled guilty as charged. Following a **Boykin** examination, the trial court accepted the defendant's guilty plea. The defendant subsequently was sentenced to imprisonment at hard labor for two years on count one; ten years at hard labor without the benefit of probation, parole, or suspension of sentence on count two; and five years at hard labor on count three. The defendant now appeals. Finding no merit in the assigned errors, we affirm the defendant's convictions and sentences.

FACTS

Because the defendant pled guilty, the facts of the offense were not fully developed at trial. The following facts were gleaned from the transcript of the **Boykin** hearing.

> In reference to docket number 11-05-0271, on or about September 20th of 2005, law enforcement was executing a search warrant at 2728 Chippewa. Upon entering the premises, they found narcotics throughout the premises. Mr. Franklin was found in the premises, where cocaine was present. One thousand three hundred thirty-seven ($1,337.00) dollars was recovered on the defendant's person, as well as .61 grams of cocaine from a sock that he was wearing at the time. Mr. Franklin indicated which room was his, police searched that room, other narcotic drugs were found in that room, as well as a pistol, that was under the mattress of the bed in which the defendant was sleeping. The defendant has previously been convicted of possession of cocaine and was not allowed to possess firearms.

ASSIGNMENT OF ERROR ONE

In this assignment, the defendant contends that the trial court erred in denying his pro se motion to withdraw his guilty plea. Specifically, the defendant contends that the guilty plea in this case is not valid because the trial court failed to mention the possession of a firearm by a convicted felon offense during the

Boykin examination. The defendant further asserts that the trial court erred in denying his motion without a hearing.

Because a plea of guilty waives a criminal defendant's fundamental right to a jury trial, right to confront his accusers, and his privilege against self-incrimination, due process requires, as a prerequisite to its validity, that the plea be a voluntary and intelligent relinquishment of known rights. There must be an affirmative showing in the record that the defendant was informed of the constitutional privilege against self-incrimination, the right to trial by jury, and the right to confront his accusers and that he knowingly and intelligently waived them. **Boykin v. Alabama,** 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

Louisiana Code of Criminal Procedure article 559 gives the district court judge the discretion to permit a withdrawal of a guilty plea at any time prior to sentencing. LSA-C.Cr.P. art 559(A). Although a defendant does not have an absolute right to withdraw his plea of guilty, the court's discretion cannot be exercised arbitrarily, and abuse of discretion can be corrected on appeal. **State v. Calhoun**, 96-0786, p. 6 (La. 5/20/97), 694 So.2d 909, 912; **State v. Lewis**, 633 So.2d 318, 320 (La.App. 1 Cir. 1993). However, as a general rule, a denial of a motion to withdraw a guilty plea will not be reversed on appeal if the record clearly shows that the defendant was informed of his rights and the consequences of his plea, and that the plea was entered voluntarily. **State v. King**, 99-1348, p. 4 (La.App. 5 Cir. 5/17/00), 761 So.2d 791, 793, writ denied, 2000-1824 (La. 6/29/01), 794 So.2d 822. In ruling on a motion to withdraw a guilty plea, a trial court is not limited to the guilty plea colloquy, and may order an evidentiary hearing. **State v. Lewis**, 633 So.2d at 320.

The record before us reflects that the defendant pled guilty on October 24, 2006, under Nineteeth Judicial District Court docket numbers 08-06-0578 (an unrelated case)[1] and 11-05-0271 (the instant case). In the unrelated case, the defendant pled guilty to DWI, fourth offense. Subsequently, on November 9,

[1] See **State v. Franklin**, 2008-0815, also rendered this date.

2006, the defendant filed a pro se motion to withdraw the guilty plea in the unrelated case. Although the defendant's motion contains the docket number of the instant case, the body of the motion only references the guilty plea to DWI in the unrelated case. Thus, the motion did not request withdrawal of the guilty pleas to any of the offenses connected with this case.

At a hearing initially called for sentencing in both cases, defendant's counsel was allowed to argue the motion to withdraw. In the oral argument, counsel noted that defendant also wished to withdraw the plea on the "gun charge." However, no argument was made on the issue of whether the defendant, Mr. Franklin, was aware of the charge of illegal possession of a weapon by a convicted felon. After hearing the arguments, the trial court found that Mr. Franklin had understood what was going on at the **Boykin** hearing, and the court denied the motion. On appeal, counsel for the defendant raised the issue of whether Mr. Franklin was aware of the possession by a convicted felon charge.

While the record does reveal that the bill of information listed the wrong felony for the charge of possession by a convicted felon, the bill was later amended to include the correct felony and the defendant was re-arraigned without objection at the preliminary examination. Earlier at that same hearing, the trial court had specifically discussed the charge of possession of a firearm by a convicted felon. Subsequently, at the **Boykin** hearing, the trial court recited the facts of the underlying charges, including the charge at issue, and Mr. Franklin pled guilty to all charges. At sentencing, the trial court specifically denoted the charge of possession of a firearm by a convicted felon. Again, Mr. Franklin did not object to the charge as recited or claim that he had not meant to plead guilty to that charge. From our review, we cannot say that the trial court abused its discretion in refusing to allow Mr. Franklin to withdraw his plea. This assignment lacks merit.

ASSIGNMENT OF ERROR TWO

The record reflects that, on October 24, 2006, pursuant to a plea agreement, the defendant withdrew his previous plea and entered a plea of "guilty as charged" on all counts. The plea agreement provided for the imposition of a total sentence on all offenses not to exceed "ten years concurrent." Later, prior to the conclusion of the **Boykin** hearing, the trial court reiterated its intent to impose the concurrent ten year sentence stating, "[a]nd note that I'm going to give him ten years." The trial court subsequently imposed sentence in accordance with this agreement. The defendant did not move for reconsideration of the sentence. On appeal however, the defendant asserts that the trial court erred in imposing excessive sentences.

The procedural requirements for objecting to a sentence are provided in LSA-C.Cr.P. art. 881.1, which provides, in pertinent part, as follows:

> A. (1) In felony cases, within thirty days following the imposition of sentence or within such longer period as the trial court may set at sentence, the state or the defendant may make or file a motion to reconsider sentence.
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> B. The motion shall be oral at the time of sentence or shall be in writing thereafter and shall set forth the specific grounds on which the motion is based.
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> E. Failure to make or file a motion to reconsider sentence or to include a specific ground upon which a motion to reconsider sentence may be based, including a claim of excessiveness, **shall preclude the state or the defendant from raising an objection to the sentence or from urging any ground not raised in the motion on appeal or review**. (Emphasis added).

The defendant did not file a motion to reconsider the sentences imposed in this particular case and did not orally move for consideration at the time of the sentencing. Therefore, the defendant is procedurally barred by LSA-C.Cr.P. art. 881.1(E) from raising any objection to the sentences on appeal, including a claim of excessiveness. **State v. Felder**, 2000-2887, p. 10 (La.App. 1 Cir. 9/28/01), 809 So.2d 360, 369, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173;

State v. Duncan, 94-1563, p. 2 (La.App. 1 Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam).

Furthermore, LSA-C.Cr.P. art. 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, p. 5 (La. 10/15/96), 680 So.2d 1171, 1174; **State v. Fairley**, 97-1026, pp. 4-5 (La.App. 1 Cir. 4/8/98), 711 So.2d 349, 352.

Based upon the record before us, we find that the defendant voluntarily entered into a plea agreement wherein he agreed, along with the trial judge and the prosecutor, that he would receive concurrent sentences not to exceed ten years. Therefore, we find LSA-C.Cr.P. art. 881.2(A)(2) precludes the defendant from appealing his sentences imposed in conformity with a plea agreement set forth in the record at the time of his plea.

For the foregoing reasons, we find the defendant's sentences are not subject to review by this court.

CONVICTIONS AND SENTENCES AFFIRMED.