STATE OF LOUISIANA

VERSUS

CHARLES E. NELSON

NO. 17-KA-191

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 15-7082, DIVISION "P"
HONORABLE LEE V. FAULKNER, JR., JUDGE PRESIDING

November 29, 2017

STEPHEN J. WINDHORST
JUDGE

Panel composed of Judges Jude G. Gravois,
Robert A. Chaisson, and Stephen J. Windhorst

CONVICTIONS AND SENTENCES AFFIRMED;
MOTION TO WITHDRAW GRANTED

SJW
JGG
RAC

COUNSEL FOR PLAINTIFF/APPELLEE,
STATE OF LOUISIANA
Paul D. Connick, Jr.
Terry M. Boudreaux
Darren A. Allemand

COUNSEL FOR DEFENDANT/APPELLANT,
CHARLES E. NELSON
Gwendolyn K. Brown

DEFENDANT/APPELLANT,
CHARLES E. NELSON
In Proper Person

WINDHORST, J.

On appeal, defendant's appointed appellate counsel filed an Anders[1] brief on defendant's behalf asserting that there are no non-frivolous issues to raise on appeal. Defendant filed a *pro se* supplemental brief arguing one assignment of error. For the following reasons, defendant's convictions and sentences are affirmed. We further grant appellate counsel's motion to withdraw as counsel of record.

Procedural History

On February 1, 2016, the Jefferson Parish District Attorney filed a bill of information charging defendant, Charles E. Nelson, with possession with intent to distribute cocaine in violation of La. R.S. 40:967 A (count one); possession with intent to distribute hydrocodone in violation of La. R.S. 40:967 A (count two); possession with intent to distribute Alprazolam in violation of La. R.S. 40:969 A (count three); and simple criminal damage to property in violation of La. R.S. 14:56 (count four).[2] Defendant was arraigned and pled not guilty. On February 12, 2016, defendant filed omnibus motions, including motions to suppress evidence and statement. On February 16, 2016, the State filed a notice of intent to use other crimes evidence. On February 25, 2016, after a hearing, the trial court granted the State's notice of intent to use other crimes evidence and denied defendant's motions to suppress evidence and statement.

On March 21, 2016, the State amended count four of the bill of information to allege that the criminal damage to property amounted "to $500.00 to $50,000" and the case proceeded to trial. However, after the jury was selected, defendant withdrew his not guilty pleas and pled guilty as charged. Defendant was sentenced to imprisonment at hard labor for twenty-two years with the first two years of the

[1] Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

[2] The bill of information alleged that defendant violated La. R.S. 14:56 "in that he did commit simple criminal damage to a vehicle, with the damage amounting to $500.00 to $5,000.00, belonging to Jefferson Parish Sheriff's Office."

sentence to be served without benefit of parole, probation, or suspension of sentence on count one; imprisonment at hard labor for five years on count two; imprisonment at hard labor for five years on count three; and imprisonment at hard labor for one year on count four.

Thereafter, the State filed a habitual offender bill of information on count one contending defendant was a second felony offender to which he stipulated. The trial court vacated the original sentence on count one and resentenced defendant under the habitual offender statute to imprisonment at hard labor for twenty-two years with the first two years of the sentence to be served without benefit of parole, probation, or suspension of sentence and the remainder of the sentence to be served without benefit of probation or suspension of sentence. The trial court also ordered defendant's sentence to run concurrently with the sentences on counts two, three, and four and with the sentences in case numbers 13-1528 and 16-518. Additionally, the trial court ordered defendant to pay restitution to the victim in the amount of $3,007.34.

On January 6, 2017, defendant filed an Application for Post-Conviction Relief requesting an out-of-time appeal which was granted on January 17, 2017.

Facts

Because defendant entered guilty pleas, the underlying facts were not fully developed at a trial. Nevertheless, the State contended in the amended bill of information that on November 19, 2015, defendant violated La. R.S. 40:967 A in that he knowingly or intentionally possessed with intent to distribute cocaine (count one); that on November 19, 2015, defendant violated La. R.S. 40:967 A in that he knowingly or intentionally possessed with intent to distribute hydrocodone (count two); that on November 19, 2015, defendant violated La. R.S. 40:969 A in that he knowingly or intentionally possessed with intent to distribute Alprazolam (count three); and that on November 19, 2015, defendant violated La. R.S. 14:56 in that he

committed simple damage to a vehicle with the damage amounting "to $500.00" belonging to the Jefferson Parish Sheriff's Office (count four).

Additionally, the State provided the following factual basis for the pleas:

> If the State were to proceed, well, if the State were to continue with trial against Charles Nelson in 15-7082, the State would prove beyond a reasonable doubt that on November 19th, 2015, while in the confines of Jefferson Parish, the defendant committed three separate violations of Title, well, two separate vacations [sic] of Title 40, Section 967.A and that he did knowingly possess cocaine and knowingly possessed hydrocodone with the intent to distribute both of those substances. The State would further prove as alleged in count thee [sic] the defendant violated Revised Statute Title 40, Section 969.A and that he did knowingly possess Alprazolam with the intent to distribute it. And finally, the State would prove as alleged in count four that on that same date in Jefferson Parish the defendant violated Title 14, Section 56 and that he did commit simple criminal damage to a vehicle with the damage amounting to five-hundred dollars or more, but less than fifty-thousand dollars, and that vehicle belonged to the Jefferson Parish Sheriff's Office.

Defendant stated he understood and agreed with the factual basis.

Discussion

Under the procedure adopted by this Court in State v. Bradford, 95-929 (La. App. 5 Cir. 06/25/96), 676 So.2d 1108, 1110-11,[3] appointed appellate counsel filed a brief asserting that she thoroughly reviewed the trial court record and cannot find any non-frivolous issues to raise on appeal. Accordingly, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) and State v. Jyles, 96-2669 (La. 12/12/97), 704 So.2d 241 (*per curiam*), appointed counsel requests permission to withdraw as counsel of record.

In Anders, supra, the United States Supreme Court stated that appointed appellate counsel may request permission to withdraw if she finds her case to be wholly frivolous after a conscientious examination of it.[4] The request must be

[3] In Bradford, supra, this Court adopted the procedures outlined in State v. Benjamin, 573 So.2d 528, 530 (La. App. 4 Cir. 1990), which were sanctioned by the Louisiana Supreme Court in State v. Mouton, 95-0981 (La. 04/28/95), 653 So.2d 1176, 1177 (*per curiam*).

[4] The United States Supreme Court reiterated Anders in Smith v. Robbins, 528 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000).

accompanied by "a brief referring to anything in the record that might arguably support the appeal" so as to provide the reviewing court "with a basis for determining whether appointed counsel have fully performed their duty to support their clients' appeals to the best of their ability" and to assist the reviewing court "in making the critical determination whether the appeal is indeed so frivolous that counsel should be permitted to withdraw." McCoy v. Court of Appeals of Wisconsin, Dist. 1, 486 U.S. 429, 439, 108 S.Ct. 1895, 1902, 100 L.Ed.2d 440 (1988).

In Jyles, 704 So.2d at 241, the Louisiana Supreme Court stated that an Anders brief need not tediously catalog every meritless pretrial motion or objection made at trial with a detailed explanation of why the motions or objections lack merit. The Supreme Court explained that an Anders brief must demonstrate by full discussion and analysis that appellate counsel "has cast an advocate's eye over the trial record and considered whether any ruling made by the trial court, subject to the contemporaneous objection rule, had a significant, adverse impact on shaping the evidence presented to the jury for its consideration." Id.

When conducting a review for compliance with Anders, an appellate court must conduct an independent review of the record to determine whether the appeal is wholly frivolous. Bradford, 676 So.2d at 1110. If, after an independent review, the reviewing court determines there are no non-frivolous issues for appeal, it may grant counsel's motion to withdraw and affirm the defendant's conviction and sentence. Id. However, if the court finds any legal point arguable on the merits, it may either deny the motion and order the court-appointed attorney to file a brief arguing the legal point(s) identified by the court, or grant the motion and appoint substitute appellate counsel. Id.

Defendant's appellate counsel asserts that after a detailed review of the record, she could find no non-frivolous issues to raise on appeal. She states that although a motion to suppress was filed and ruled upon, the pleas were entered without any

reservation of rights to review the adverse rulings. Thus, any argument that the rulings were in error has been waived. Appellate counsel contends that prior to defendant's decision to change his pleas from not guilty to guilty, the trial court thoroughly explained, and made sure defendant understood, the trial rights he would be waiving by pleading guilty. She further contends that the trial court reviewed the sentences available under the statutes and the sentences it would impose.

Appellate counsel asserts that defendant indicated that he understood the terms of the sentences, that the pleas were being entered of his own volition, and that he was satisfied with the representation that his attorney afforded him. The trial court sentenced defendant in accordance with the terms to which defendant agreed. Appellate counsel also states that the trial court reviewed with defendant his habitual offender rights. She contends that although the trial court did not articulate on the record his right to remain silent at the habitual offender hearing, it informed him that the rights previously articulated with respect to the underlying charges still applied to him. Defendant affirmed his understanding of these rights. She further contends that the trial court stated the terms of the enhanced sentence it would impose and defendant stated he understood the terms.

Appellate counsel maintains that defendant affirmed on the record he was stipulating to his status as a habitual offender of his own accord. She also asserts that after the trial court vacated the sentence on count one and imposed the enhanced sentence as agreed upon, defendant did not object to the sentence. Accordingly, appellate counsel argues that defendant is now restricted by law from appealing his sentences. She notes, however, that while the evidence to support the charges of possession of cocaine and simple criminal damage to property were developed at the suppression hearing, the record did not provide a factual basis for the "with the intent to distribute" element of count one or the factual basis for counts two or three.

Appellate counsel filed a motion to withdraw as attorney of record which stated that she notified defendant that she filed an Anders brief and that defendant had the right to file a *pro se* brief in this appeal. Additionally, this Court sent defendant a letter by certified mail informing him that an Anders brief had been filed and that he had until May 27, 2017, to file a *pro se* supplemental brief, which he timely filed with this Court.

Our independent review of the record supports appellate counsel's assertion that there are no non-frivolous issues to be raised on appeal.

The amended indictment properly charged defendant, and plainly and concisely stated the essential facts constituting the offenses charged. It also sufficiently identified defendant and the crimes charged. See La. C.Cr.P. arts. 462-466. Further, as reflected in the minute entries, defendant and his counsel appeared at all crucial stages of the proceedings against him, including his arraignment on the original bill of information, guilty pleas, habitual offender bill stipulation, and sentencing. Thus, there are no appealable issues regarding defendant's presence.

Further, defendant pled guilty in this case. Generally, when a defendant pleads guilty, he normally waives all non-jurisdictional defects in the proceedings leading up to the guilty plea and precludes review of such defects either by appeal or post-conviction relief. State v. Turner, 09-1079 (La. App. 5 Cir. 07/27/10), 47 So.3d 455, 459. Defendant entered unqualified guilty pleas, and therefore, all non-jurisdictional defects were waived. No rulings were preserved for appeal under the holding in State v. Crosby, 338 So.2d 584 (La. 1976), including the trial court's denial of defendant's motions to suppress evidence and statement.

Once a defendant is sentenced, only those guilty pleas that are constitutionally infirm may be withdrawn by appeal or post-conviction relief. State v. McCoil, 05-658 (La. App. 5 Cir. 02/27/06), 924 So.2d 1120, 1124. A guilty plea is constitutionally infirm if it is not entered freely and voluntarily, if the Boykin

colloquy is inadequate, or when a defendant is induced to enter the plea by a plea bargain or what he justifiably believes was a plea bargain and that bargain is not kept. Id.

A review of the record reveals no constitutional infirmity in defendant's guilty pleas. Defendant was aware he was pleading guilty to the crimes of possession with intent to distribute cocaine (count one), possession with intent to distribute hydrocodone (count two), possession with intent to distribute Alprazolam (count three), and simple criminal damage to property (count four). In the waiver of rights form and during the colloquy with the trial court, defendant was advised of his right to a jury trial, his right to confrontation, and his privilege against self-incrimination as required by Boykin.[5] Defendant signed the waiver of rights form, indicating that he understood he was waiving these rights by pleading guilty. During the colloquy with the trial court, defendant also stated that he understood those rights.

During his guilty plea colloquy and on his waiver of rights form, defendant indicated that he had not been forced, coerced, or threatened into entering his guilty pleas. He was informed during the colloquy and on the waiver of rights form of the maximum sentences on all four counts and of the actual sentences that would be imposed if his guilty pleas were accepted.[6] After the colloquy with defendant, the

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

[6] The trial court did not inform defendant of the minimum sentences on all four counts; however, it is noted that the minimum sentence is zero for counts two, three, and four. La. R.S. 40:967 B(4)(b) provides for a sentencing range of imprisonment at hard labor for not less than two years nor more than thirty years, with the first two years being without benefit of parole, probation, or suspension of sentence (count one). La. R.S. 40:967 B(5) provides for a sentence of imprisonment at hard labor of not more than ten years (count two). La. R.S. 40:969 B(2) provides for a sentence of imprisonment at hard labor of not more than ten years (count three). Under La. R.S. 14:56 B(2), where the damage amounts to five hundred dollars but less than fifty thousand dollars, the offender shall be fined not more than one thousand dollars or imprisoned with or without hard labor for not more than two years, or both (count four). Based on the colloquy and the waiver of rights form, defendant pled guilty to and was sentenced under La. R.S. 14:56 B(2).

La. C.Cr.P. art. 556.1 A(1) provides that, prior to accepting a guilty plea, the trial court must personally inform the defendant of the nature of the charge to which the plea is offered, any mandatory minimum penalty, and the maximum possible penalty. "Any variance from the procedures required by this Article which does not affect substantial rights of the accused shall not invalidate the plea." La. C.Cr.P. art. 556.1 E. Violations of La. C.Cr.P. art. 556.1 that do not rise to the level of Boykin violations are subject to harmless error analysis. State v. Craig, 10-854 (La. App. 5 Cir. 05/24/11), 66 So.3d 60, 64. In this case, any violation of Article 556.1 did not cause prejudice since defendant knew the sentences he would receive, and he received those sentences. Advisement of the agreed upon sentences was sufficient for compliance with La. C.Cr.P. art. 556.1. See Craig, 66 So.3d at 64; State v. Broadway, 40,569 (La. App. 2 Cir. 01/25/06), 920 So.2d 960, 963.

trial court accepted defendant's pleas as knowingly, intelligently, freely, and voluntarily made.

A review of the record also reveals no constitutional infirmity in defendant's stipulation to the habitual offender bill. The waiver of rights form indicates that defendant was advised of his right to a hearing at which the State would have to prove his habitual offender status and of his right to remain silent throughout the hearing. During the colloquy, the trial court advised defendant that he had the right to a hearing with regard to the allegations contained in the habitual offender bill. However, the trial court did not advise defendant during the colloquy that he had the right to remain silent throughout the hearing. Nevertheless, although defendant was not completely advised of his habitual offender rights during the colloquy, the waiver of rights form, which was signed by defense counsel, the trial court, and defendant, reflects that defendant was advised of his right to remain silent prior to his stipulation as a habitual offender. Further, the trial court specifically mentioned the waiver of rights form prior to his acceptance of defendant's stipulation. See State v. Jamison, 17-49 (La. App. 5 Cir. 05/17/17), 222 So.3d 908.

During the colloquy and in the waiver of rights form, defendant was also advised of the potential sentencing range as a second felony offender and the sentence that would be imposed. Defendant indicated in the waiver of rights form and during the colloquy that he had not been forced, coerced, or threatened into stipulating to the habitual offender bill. The trial court accepted the stipulation as being knowingly, intelligently, freely, and voluntarily made by defendant. A stipulation to a habitual offender bill bars a defendant from asserting on appeal that the State failed to produce sufficient proof at the habitual offender bill hearing. See State v. Crawford, 14-364 (La. App. 5 Cir. 12/23/14), 166 So.3d 1009, 1019; State v. Schaefer, 97-465 (La. App. 5 Cir. 11/25/97), 704 So.2d 300, 304.

With regard to defendant's sentences, La. C.Cr.P. art. 881.2 A(2) precludes a defendant from seeking review of a sentence imposed in conformity with a plea agreement which was set forth in the record at the time of the plea. State v. Washington, 05-211 (La. App. 5 Cir. 10/06/05), 916 So.2d 1171, 1173. Additionally, this Court has consistently recognized that La. C.Cr.P. art. 881.2 precludes a defendant from seeking review of an enhanced sentence to which the defendant agreed. State v. Williams, 12-299 (La. App. 5 Cir. 12/11/12), 106 So.3d 1068, 1075, writ denied, 13-109 (La. 06/21/13), 118 So.3d 406. Here, defendant's original sentences and enhanced sentence were imposed in accordance with the terms of the plea agreement set forth in the record at the time of the pleas and stipulation.

Even if we were to review defendant's sentences, they fall within the sentencing ranges set forth in the statutes. See La. R.S. 40:967 B(4)(b); La. R.S. 40:967 B(5); La. R.S. 40:969 B(2); La. R.S. 14:56 B(2); La. R.S. 15:529.1. Moreover, defendant's plea agreement was beneficial to him in that the State agreed to file a habitual offender bill alleging defendant to be a second felony offender, even though defendant was actually a fourth felony offender, which would have increased defendant's sentencing exposure.

Defendant's appointed counsel argues that while the evidence to support the charges of possession of cocaine and simple criminal damage to property were developed at the suppression hearing, the record did not provide a factual basis for the "with the intent to distribute" aspect of count one or the factual basis for counts two or three. However, the record reflects that the State provided a factual basis for all counts during the colloquy. Moreover, the trial court was not required to ascertain a factual basis before accepting the guilty pleas. When a guilty plea is otherwise voluntary, there is no necessity to ascertain a factual basis for that plea unless the accused protests his innocence or for some other reason the trial court is put on notice

that there is a need for such an inquiry. State v. Autin, 09-995 (La. App. 5 Cir. 04/27/10), 40 So.3d 193, 196-197, writ denied, 10-1154 (La. 12/10/10), 51 So.3d 725. Only in that event does due process require a judicial finding of significant factual basis for the defendant's plea. State v. Smith, 09-769 (La. App. 5 Cir. 03/09/10), 38 So.3d 894, 896 n.1, writ denied, 10-843 (La. 11/5/10), 50 So.3d 812. Furthermore, defendant did not enter his guilty pleas pursuant to North Carolina v. Alford, 400 U.S. 25, 30, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), which would have required a factual basis to support the pleas.

Because appellate counsel's brief adequately demonstrates by full discussion and analysis that she reviewed the trial court proceedings and cannot identify any non-frivolous issues to raise on appeal, and an independent review of the record supports counsel's assertion, appellate counsel's motion to withdraw as attorney of record is granted.

***Pro Se* Assignment of Error**

In his *pro se* brief, defendant contends that his "guilty plea is constitutionally infirm." He argues five issues under that assignment: (1) Whether "appellant counsel" should be allowed to withdraw from this case; (2) Whether the appellant's guilty plea was knowingly and intelligently made; (3) Whether there was a factual basis for his pleas; (4) Whether the twenty-two (22) year sentence imposed in this case was disproportionate and unreasonable; and (5) Whether this Court should authorize a downward departure from the mandatory minimum sentence.

Defendant argues that counsel's brief "does not provide a full analysis of a felony conviction for which this Appellant received a 22-year sentence without the benefits of probation, parole or suspension of sentence." He further argues that it would not benefit him in ensuring his constitutional right to equal protection to grant counsel's motion to withdraw. Defendant contends that counsel should not be excused from the duty and standards of representation merited by the trial court's

appointment as set forth in Anders v. California, supra, and State v. Jyles, supra. He further contends, therefore, that this Court should deny the motion to withdraw at this time and order counsel to specifically brief whether his convictions and sentence present any non-frivolous appealable issues.

As discussed above, our review of the record reveals no constitutional infirmity in defendant's guilty pleas to the underlying charges or in his stipulation to the habitual offender bill. Also, our review supports appellate counsel's assertion that there are no non-frivolous issues to raise on appeal.

Further, as previously explained, defendant is precluded from seeking review of his enhanced sentence as it was imposed in conformity with the plea agreement which was set forth in the record at the time of the plea. Moreover, the trial court is not required to comply with La. C.Cr.P. art. 894.1, when a defendant pleads guilty and agrees to the sentence imposed, as occurred in this case. See State v. Dickerson, 11-236 (La. App. 5 Cir. 11/15/11), 80 So.3d 510, 521.

Errors Patent Discussion

Defendant requests an errors patent review. However, this Court routinely reviews the record for errors patent in accordance with the mandates of La. C.Cr.P. art. 920; State v. Oliveaux, 312 So.2d 337 (La. 1975); and State v. Weiland, 556 So.2d 175 (La. App. 5 Cir. 1990) regardless of whether defendant makes such a request. Our review reveals there are no errors patent that require corrective action.

Conclusion

For the reasons stated above, defendant's convictions and sentences are affirmed. We further grant appellate counsel's motion to withdraw as counsel of record.

CONVICTIONS AND SENTENCES AFFIRMED;
MOTION TO WITHDRAW GRANTED

FIFTH CIRCUIT
101 DERBIGNY STREET (70053)
POST OFFICE BOX 489
GRETNA, LOUISIANA 70054
www.fifthcircuit.org

(504) 376-1400
(504) 376-1498 FAX

NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **NOVEMBER 29, 2017** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU
CLERK OF COURT

17-KA-191

E-NOTIFIED
24TH JUDICIAL DISTRICT COURT (CLERK)
HON. LEE V. FAULKNER, JR. (DISTRICT JUDGE)
GWENDOLYN K. BROWN (APPELLANT)
TERRY M. BOUDREAUX (APPELLEE)

MAILED
HON. PAUL D. CONNICK, JR.(APPELLEE)
DARREN A. ALLEMAND (APPELLEE)
ASSISTANT DISTRICT ATTORNEYS
TWENTY-FOURTH JUDICIAL DISTRICT
200 DERBIGNY STREET
GRETNA, LA 70053

CHARLES E. NELSON #369630
(APPELLANT)
WINN CORRECTIONAL CENTER
P. O. BOX 1435
WINNFIELD, LA 71483