

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

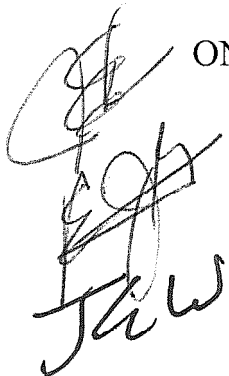
2006 KA 1006

STATE OF LOUISIANA

VERSUS

CARL JOHNSON

DATE OF JUDGMENT: November 3, 2006

 ON APPEAL FROM THE TWENTY FIRST JUDICIAL DISTRICT COURT
(NUMBER 110102 "B"), PARISH OF TANGIPAHOA
STATE OF LOUISIANA

THE HONORABLE BRUCE C. BENNETT, JUDGE

* * * * *

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and
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Carl Johnson

* * * * *

BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

**Disposition: HABITUAL OFFENDER ADJUDICATION AFFIRMED; SENTENCE AMENDED,
AND AS AMENDED, AFFIRMED.**

KUHN, J.

The defendant, Carl Johnson, was charged by the Twenty-First Judicial District Court (Tangipahoa Parish) bill of information # 110102 with one count of possession with intent to distribute cocaine, a violation of La. R.S. 40:967(A)(1), and pleaded not guilty. Following a jury trial, he was found guilty as charged by unanimous verdict. He was sentenced to thirty years at hard labor to run consecutively to the sentence imposed under the Twenty-First Judicial District Court (Livingston Parish) Docket # 18519. He appealed his conviction and sentence to this Court, and we affirmed the conviction and sentence. **State v. Johnson**, 2005-1272 (La. App. 1st Cir. 3/24/06), 925 So.2d 771 (Table). While the appeal was pending in this Court, the State filed an habitual offender bill of information against the defendant alleging he was a fifth-time felony habitual offender. The defense moved to quash the habitual offender bill of information and to correct the illegal sentence. Following a hearing, the motion was denied, the defendant was adjudged a habitual offender with four or more prior felony convictions, the thirty-year sentence on the instant offense was vacated, and the defendant was sentenced to natural life at hard labor without benefit of probation, parole, or suspension of sentence. He now appeals, designating one assignment of error. We affirm the habitual offender adjudication, amend the sentence, and affirm the sentence as amended.

ASSIGNMENT OF ERROR

1. The lower court erred in sentencing the defendant to imprisonment in contravention of a previously made plea and sentencing agreement. The lower court also erred by contravening a previously agreed multi-bill preclusion.

FACTS

The instant appeal concerns only the habitual offender adjudication and sentence. This Court set forth the facts of the instant offense in *Johnson*, 2005-1272 at pp. 2-3.

THE PLEA AGREEMENT

In his sole assignment of error, the defendant contends his sentencing in the instant case violated the terms of the plea agreement he entered into under the Twenty-First Judicial District Court (Livingston Parish) Docket # 18519.

In determining the validity of agreements not to prosecute or of plea agreements, the courts generally refer to rules of contract law. *State v. Canada*, 2001-2674, p. 4 (La. App. 1st Cir. 5/10/02), 838 So.2d 784, 787. A long-standing rule of contract law is that consent of both parties is required for a valid contract. La. Civ. Code art. 1927. Consent may be vitiated by error, fraud, or duress. La. Civ. Code art. 1948. Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party. La. Civ. Code art. 1949. Error may concern a cause when it bears on the nature of the contract, or the thing that is the contractual object or the law, or any other circumstance that the parties regarded, or should in good faith have regarded, as a cause of the obligation. La. Civ. Code art. 1950; *Canada*, 2001-2674 at p. 3, 838 So.2d at 786-87.

Contractual principles may be helpful by analogy in deciding disputes involving plea agreements. However, the criminal defendant's constitutional right to fairness may be broader than his or her rights under contract laws. Moreover, commercial contract law can do no more than to serve as an analogy or point of

departure, since plea agreements are constitutional contracts. *Canada*, 2001-2674 at p. 4, 838 So.2d at 787.

The party demanding performance of a contract has the burden of proving its existence. *Id.* A lawful cause is also necessary to the existence of a contract. La. Civ. Code art. 1966. The cause is the reason why a party obligates himself. La. Civ. Code art. 1967.

On August 23, 2004, in connection with the Twenty-First Judicial District Court (Livingston Parish) Docket # 18519, the defendant pled guilty to possession with intent to distribute cocaine on February 15, 2004. The plea was entered pursuant to a plea agreement. The transcript of the guilty plea indicates that Judge Bruce C. Bennett set forth the terms of the plea agreement as follows:

You understand the plea bargain is a five-year sentence, you plead as charged, and a five-year sentence over in Amite on other pending charges over there to run concurrent.

Additionally, at the conclusion of the guilty plea hearing, William Quin, defense counsel; the State; and the court made the following comments:

[Defense]: Your Honor, I understand that the State has agreed not to multi-bill him.

[State]: That's true.

[Court]: The State has agreed not to bill you as a multiple offender. Good Luck.

On September 26, 2005, in connection with the Twenty-First Judicial District Court (Tangipahoa Parish) Docket # 110102, the State instituted habitual offender proceedings against the defendant. Prior to the habitual offender hearing, the defense moved to quash the habitual offender bill of information and to correct illegal sentence. In the motion, citing the plea agreement in the Twenty-First

Judicial District Court (Livingston Parish) Docket # 18519, the defense contended the habitual offender bill of information should be quashed and the thirty-year sentence imposed in the Twenty-First Judicial District Court (Tangipahoa Parish) Docket # 110102 should be amended to five years to run concurrently with the sentence imposed in the Twenty-First Judicial District Court (Livingston Parish) Docket # 18519.

At the hearing on the motion to quash the habitual offender bill, defense counsel Albert Bensabat presented the arguments made in the motion. The State responded that any challenge to the legality of the sentence had to be raised in the Twenty-First Judicial District Court (Livingston Parish) Docket # 18519 rather than Twenty-First Judicial District Court (Tangipahoa Parish) Docket # 110102.

The following colloquy also transpired between the State and Judge Bennett:

[State]: And if I can recall the court's – I refresh the court's – the history of this case is such that [the defendant] had been at large for some period of time. He was subsequently arrested on a new charge in Livingston Parish and got back into the system.

As that charge proceeded in Livingston Parish he made an appearance over here and Mr. Quin had either orally, if not in writing, filed a motion to quash two (2) or three (3) several very old charges. Thereafter he went to Livingston Parish and stood ready for trial. Mr. Quin discussed with [the defendant] those charges, and I believe pursuant to pretrial conference with the court, made the court aware of those charges and the defenses that they had, specifically, 701, failure to speedy trial, motion to quash. And it was on that basis and that understanding with Ms. Hebert – Ms. Herbert, rather – Mr. Quin and the court, that the agreement was made by the State that any charges that he had pending over here would have been concurrent with the Livingston plea.

Unbeknownst to everyone but [the defendant], who conveniently failed to bring it to the court's attention in Livingston Parish, he had a new charge pending in Tangipahoa Parish, which (sic) was unaware of through (sic) Mr. Quin who represented him, to the Court, and to Ms. Herbert, and it was on that basis that the plea was entered.

Subsequently, it was determined that a new charge existed over here. A hearing was held prior to the trial of [the defendant] back in December or November of 2004 – the date escapes me, Your Honor – where this very issue was raised and the Court in looking at the circumstances and based upon the presentations of Mr. Quin as a member of the bar and before this court, it was determined that these charges were not known nor considered as a part of the sentencing and plea agreement in Livingston Parish. [The defendant] then proceeded to trial and was convicted and sentence was imposed.

Based on those facts and circumstances, this agreement did not involve or contemplate the charges which stand before this court today on a multiple offender hearing. But if the court would require testimony from Mr. Quin to that effect, or if the court feels necessary for record purposes to reiterate – or iterate, I guess, its memory and impressions of that event, I would welcome that as far as the evidentiary record concern for appeal.

[Court]: The record is complete. The record has already been made prior to sentencing in this case, and I'll take judicial notice of the entire record in that regard.

I've heard the arguments. In my view, the motion to correct illegal sentence is filed in the wrong court and in the wrong venue, it should be addressed to the other matter. But notwithstanding that, the motion is denied.

The party demanding performance of a contract has the burden of proving its terms. *See State v. Givens*, 99-3518 (La. 1/17/01), 776 So.2d 443, 455. Based on the record before us, we find defendant has not established that the habitual offender sentencing in the instant case violated the plea agreement entered into under the Twenty-First Judicial District Court (Livingston Parish) Docket # 18519. The record does not support the defendant's claim that the Twenty-First Judicial District Court (Tangipahoa Parish) Docket # 110102 was part of the plea agreement in the Twenty-First Judicial District Court (Livingston Parish) Docket # 18519, or that a particular disposition of the Twenty-First Judicial District Court (Tangipahoa Parish) Docket # 110102 was a cause of the plea agreement in the

Twenty-First Judicial District Court (Livingston Parish) Docket # 18519.
Accordingly, we find this assignment of error is without merit.

SENTENCING ERROR

The defendant was sentenced to natural life at hard labor without benefit of probation, parole, or suspension of sentence. The trial court's denial of parole for more than two years was not authorized under the underlying statute, the habitual offender law, or any other provision. See La. R.S. 40:967(B)(4)(b), 15:529.1(A)(1)(c)(i) & 15:529.1(G).

An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review. La. Code Crim. P. art. 882(A). Accordingly, we hereby amend the sentence to natural life at hard labor, the first two years of the sentence without parole, and the entire sentence without benefit of probation or suspension of sentence.

HABITUAL OFFENDER ADJUDICATION AFFIRMED; SENTENCE AMENDED, AND AS AMENDED, AFFIRMED.