

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 KA 2435

STATE OF LOUISIANA

VERSUS

HERBERT W. MURRAY

Judgment rendered: December 28, 2006

**On Appeal from the 23rd Judicial District Court
Parish of Assumption, State of Louisiana
No. 03-64**

The Honorable Thomas J. Kliebert, Jr., Judge Presiding

**Arthur L. Harris, Sr.
New Orleans, LA**

**Counsel for Appellant
Herbert W. Murray**

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**Counsel for Appellee
State of Louisiana**

BEFORE: PETTIGREW, DOWNING AND HUGHES, JJ.

Hughes, J., concurs with reasons.

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DOWNING, J.

The defendant, Herbert W. Murray, was charged by bill of information with possession with intent to distribute a schedule II controlled dangerous substance (cocaine), a violation of La. R.S. 40:967(A)(1) (count 1); possession with intent to distribute a schedule I controlled dangerous substance (marijuana), a violation of La. R.S. 40:966(A)(1) (count 2); being a convicted felon possessing a firearm or carrying a concealed weapon, a violation of La. R.S. 14:95.1 (count 3); and illegal carrying of weapons, a violation of La. R.S. 14:95(E) (count 4).¹ The defendant pled not guilty. The defendant filed a motion to reveal the identity of the confidential informant and a motion to suppress the evidence. Following a hearing, the trial court denied the motions. On the day of trial, the defendant withdrew his not guilty plea and entered a plea of guilty. The defendant informed the court that he was making a **Crosby** plea and that he intended to appeal the denial of the motion to suppress. Following a **Boykin** hearing, the defendant was found guilty of the four charges against him. The defendant was sentenced to ten (10) years at hard labor, with the first two years of the sentence to be without benefit of probation, parole, or suspension of sentence, for the conviction of possession with intent to distribute cocaine (count 1); eight (8) years at hard labor and a \$1,000.00 fine for the conviction of possession with intent to distribute marijuana (count 2); twelve (12) years at hard labor without benefit of probation, parole, or suspension of sentence and a \$1,000.00 fine for the conviction of being a convicted felon possessing a firearm or carrying a concealed weapon (count 3); and eight (8) years at hard labor without benefit or probation, parole, or

¹ The defendant was also charged with one count of possession of a schedule II controlled dangerous substance (cocaine), a violation of La. R.S. 40:967(C), and one count of distribution of a schedule II controlled dangerous substance (cocaine), a violation of La. R.S. 40:967(A)(1). Both of these counts were nol-prossed by the State.

suspension of sentence and a \$1,000.00 fine for the conviction of illegal carrying of weapons (count 4). The court ordered the sentences received for counts 1, 2 and 3 to run consecutively to each other. The court further ordered the sentence received for count 4 to run concurrently with the sentence received for count 2 only. The defendant filed a motion to reconsider sentence, which was denied. The defendant now appeals, designating six assignments of error. We affirm the convictions and sentences.

FACTS

Because the defendant pled guilty, the facts were not fully developed at a trial. The factual basis for the guilty plea, provided by the prosecutor during the **Boykin** hearing, is as follows:

On or about March 15, 2003, in the Parish of Assumption, officers of the Louisiana State Police executed a search warrant on the residence of Herbert Murray. Officers found Murray in the possession of 54 grams [of] a schedule II controlled dangerous substance with intent to distribute to wit: cocaine, possession of 54 grams of a schedule I controlled dangerous substance with intent to distribute to wit: marijuana, and possession of several firearms after being convicted of a felony in (sic) July 7, 1993, in State of California, bearing docket number: 930324; and while being in possession of controlled dangerous substances.

ASSIGNMENTS OF ERROR NOS. 1 & 2

In his first two assignments of error, the defendant argues the court erred in denying his motion for recusal of the trial judge.

When the defendant pled guilty, he informed the court that, pursuant to **Crosby**, he intended to appeal the court's denial of the motion to suppress. See State v. Crosby, 338 So.2d 584 (La. 1976). The defendant did not reserve for appellate review any other specified pre-plea error. Accordingly, the defendant has failed to reserve his right to appeal the

court's denial of the motion for recusal of the trial judge.² See State v. Joseph, 2003-315 (La. 5/16/03), 847 So.2d 1196 (per curiam); State v. Garcia, 519 So.2d 788, 791 (La. App. 1st Cir. 1987), writ denied, 530 So.2d 85 (La. 1988).

These assignments of error are without merit.

ASSIGNMENTS OF ERROR NOS. 3, 4 & 5

In these assignments of error, the defendant argues the court erred in denying the motion to suppress the evidence seized pursuant to the search of his residence. Specifically, the defendant contends that the court erred in denying his motion to reveal the identity of the confidential informant used in the controlled drug buy.

It was established at the motion to suppress the evidence that a confidential informant was used by the Assumption Parish Sheriff's Office to purchase cocaine from the defendant at the defendant's residence. As a general rule the State is not required to divulge the name of a confidential informant to the accused. However, an exception is made when the confidential informant was a participant in an illegal drug transaction. State v. Buffington, 452 So.2d 1313 (La. App. 1st Cir. 1984). The defendant contends that since the confidential informant was a participant in the controlled drug buy, and the drug buy was the source of probable cause for the search warrant, the name of the confidential informant must be divulged.³

² Moreover, there was no pre-plea ruling by the court to preserve for appeal. The defendant's first motion for recusal of judge, which was filed July 7, 2004, was never ruled on by the court. It appears from the record the defendant filed a motion for continuance seeking more time to investigate the recusal issue. The defendant filed an amended motion for recusal of judge on November 12, 2004, which the court denied as untimely. Finally, on July 15, 2005, the court held a hearing on the defendant's motion to recuse and denied the motion. However, the order of appeal was entered on June 20, 2005. Therefore, the court did not have jurisdiction on July 15, 2005, to rule on the motion to recuse. See La. Code Crim. P. art. 916.

³ The defendant maintains that the confidential informant may not have been trustworthy, e.g., the cocaine belonged to the confidential informant, or that he may have been "a fiction of the police, confected to provide a basis for a search warrant they could not otherwise obtain." Other than the baseless allegations

The defendant is correct that the information provided to law enforcement officers by the confidential informant regarding his drug transaction with the defendant established the probable cause for the search warrant to search the defendant's residence.⁴ However, the charges in this case were based on the evidence seized in the search of the defendant's

regarding the confidential informant's trustworthiness, the defendant provides nothing in his brief to support his position. On the contrary, the record clearly establishes the confidential informant's trustworthiness. At the motion to suppress hearing, Trooper Cy Landry of the Louisiana State Police testified as follows:

- Q. And then you set up some controlled buys?
A. Yes, sir.
Q. How many buys were done?
A. One. Well, two was attempted, one was successful.
Q. Okay. And who was the purchase made from?
A. The successful purchase was made from Mr. Murray.
Q. Okay. And who were you working with as far as all the other officers who were involved?
A. I was working with Capt. B.J. Roque, Agent Hayes Coddou, Tpr. Craig Rose, Tpr. Travis Columbell, Sgt. Dana Harrison.
Q. Okay. And was the CI reliable in the past?
A. Yes, he was.
Q. Okay.
A. He was an Assumption Parish CI.
Q. And also, did the CI make the purchase by himself or was he monitored by a cover team?
A. He was monitored by a cover team.
Q. Okay. And prior to the CI beginning the attempt to buy was he searched?
A. Yes, sir.
Q. And did he have any contraband on his person?
A. No, sir, he didn't.
Q. Okay. And was a constant contact kept with the CI during the entire attempt to buy process?
A. Yes, sir. We had audio transmission coming from him the entire time.
Q. Yes, sir. And after the CI left Mr. Murray's residence was a constant contact, visual contact kept on him as soon as he left the residence?
A. Yes, sir.
Q. Was he able to go anywhere else other than meeting up with the officers?
A. No, sir.
Q. When he met back with the officers after leaving Mr. Murray's home what did he have in his possession?
A. He had approximately two grams of suspected cocaine.
Q. Okay. And was that cocaine taken from the CI?
A. Yes, sir.
Q. Was it placed into evidence?
A. Yes, sir.
* * * * *
Q. The person you called this confidential informant, had you received information at other times from that person, credible and reliable information, that you were previously able to use before?
A. Capt. B.J. Roque and Agent Hayes Coddou had used him several times before.

⁴ Trooper Landry testified at the motion to suppress as follows:

- Q. Isn't it so that the reason for including the information regarding this confidential informant on the affidavit was to seek a search warrant; is that not true?
A. Yes, ma'am.
Q. That affidavit was presented to the Judge in order to get a search warrant to search Mr. Murray's residence; isn't that right?
A. Yes, ma'am.
* * * * *
Q. However, you used the -- according to your affidavit you indicated that there was a controlled buy by a confidential informant and you used that information to include in an affidavit to support a search warrant; am I correct?
A. Yes, ma'am.

residence, not on the evidence seized from the controlled drug buy between the confidential informant and the defendant.⁵ The confidential informant did not play a crucial role in the transaction that led to the defendant's arrest because he played no part in the execution of the search warrant and the subsequent search.⁶ See State v. Clark, 2005-61, pp. 13-14 (La. App. 5th Cir. 6/28/05), 909 So.2d 1007, 1015-1016, writ denied, 2005-2119 (La. 3/17/06), 925 So.2d 538. See also State v. Diliberto, 362 So.2d 566, 567-568 (La. 1978); State v. Jackson, 94-1500, pp. 7-8 (La. App. 4th Cir. 4/26/95), 654 So.2d 819, 823, writ denied, 95-1281 (La. 10/13/95), 661 So.2d 495. At the motion to suppress, Trooper Landry testified about the confidential informant's limited role:

Q. Did the confidential informant play any role in the execution of the search warrant?

A. No, sir. No, sir.

Q. Other than establishing the probable cause was the CI used for any other reason in the case?

A. No, sir.

Accordingly, the State was not required to divulge the name of the confidential informant. The court did not err in denying the defendant's

⁵ The bill of information contains the six original charges against the defendant. However, the two charges based on the drug buy (possession of cocaine (original count 2) and distribution of cocaine (original count 5) were nol-prossed. At the motions hearing, which included the defendant's motion to reveal the identity of the confidential informant and the motion to suppress the evidence, the prosecutor informed the court that the confidential informant had nothing to do with the charges the defendant was presently being charged with: "Your Honor, the second set of motions will be a Motion to Reveal Identity of Informants and Reveal the Deal. Your Honor, there is no deal and informants were not used as part of anything that Mr. Murray is charged with so --." During the motion to suppress, it was again brought to the attention of the defendant that the only charges against him were those based on the evidence found pursuant to the search of his residence:

The Court: He's only being charged with the evidence that was found as a result of the search warrant, correct? That's what you're saying?

[Prosecutor]: That's correct. That's what I'm saying, Your Honor.

* * * * *

[Prosecutor]: The State is not going forward with Count 5 of the Bill of Information.

Following the court's denial of the motion to suppress, the prosecutor informed the court that he was going to nol-prosse count 5 (distribution of cocaine). Although count 2 (possession of cocaine) was also dropped as one of the charges against the defendant, it is not clear from the record when the prosecution nol-prossed this count. At the guilty plea, the defendant pled guilty to the four remaining counts against him. These counts related to the evidence, namely weapons and drugs, that was discovered pursuant to the search of his residence. The other two counts that were dropped (counts 2 & 5) were not part of the defendant's re-arraignment and subsequent guilty plea.

⁶ In his brief, the defendant does not raise any issue regarding the contents of the search warrant or the search warrant affidavit.

motion to reveal the identity of the confidential informant. Further, the court did not err in denying the defendant's motion to suppress the evidence.

These assignments of error are without merit.

ASSIGNMENT OF ERROR NO. 6

In his sixth assignment of error, the defendant argues the trial court erred in denying his motion to reconsider sentence.

The defendant was sentenced on May 17, 2005. At the conclusion of the sentencing hearing, the court advised defense counsel that all (post-sentence) motions were to be filed in a timely fashion. The defendant filed a motion to reconsider sentence on June 17, 2005, alleging excessiveness and infliction of pain and suffering.

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. La. Code Crim. P. art. 881.1(A)(1). The defendant's motion, which was filed thirty-one days following the imposition of sentence, was untimely.⁷ Accordingly, the defendant is precluded from urging his claim of excessive sentence on appeal.

This assignment of error is without merit.

DECREE

For the foregoing reasons, we affirm the defendant's convictions and sentences.

CONVICTIONS AND SENTENCES AFFIRMED

⁷ June 16, 2005, the last day on which the defendant's filing would have been timely, was a Thursday. A review of La. R.S. 1:55 and the Louisiana District Court Rules indicates that June 16 is not a holiday in Assumption Parish.

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HUGHES, J., concurring.

I respectfully concur with the result, although I am concerned that sentence was imposed in contravention of Code of Criminal Procedure article 673, and in my opinion the confidential informant should have been disclosed as a “participant,” although the C.I. was not necessary to the finding of probable cause for the search warrant. I would also at least consider the excessive sentence issue.