NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 KA 0705

STATE OF LOUISIANA

VERSUS

CHARLES LEE WICKER

Judgment Rendered: October 29, 2010

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case Number 3-09-0181
Honorable Richard D. Anderson, Presiding

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* * * * * *

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Hughes, J., concurs.

GUIDRY, J.

The defendant, Charles Lee Wicker, was charged by bill of information with one count of fourth-offense driving while intoxicated (DWI), a violation of La. R.S. 14:98(A) and (E), and pled not guilty.[1] He waived his right to a jury trial and, following a bench trial, was found guilty as charged. He moved for a post-verdict judgment of acquittal, but the motion was denied. He was sentenced to seventeen years at hard labor, with the first three years of the sentence to be served without benefit of probation, parole, or suspension of sentence.[2] He was also fined $5,000, and the court ordered the seizure, impoundment, and sale at auction of his vehicle, which he was operating at the time of the instant offense. He now appeals, contending that the trial court erred in denying the motion for post-verdict judgment of acquittal.

FACTS

On January 2, 2009, the Zachary Police Department operated a DWI checkpoint on Plank Road, north of Louisiana Highway 64. According to Zachary Police Department Reserve Officer Michael Kimble, the defendant drove up to the checkpoint, was asked if he had consumed any alcoholic drinks that evening, and answered affirmatively. Officer Kimble also detected an odor of alcohol coming from the defendant's vehicle. Officer Kimble ordered the defendant to turn off his vehicle and walked with him to Zachary Police Department Officer Shane White, who was in a nearby parking lot, for field sobriety testing.

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[1] Predicate #1 was set forth as the defendant's January 25, 2006 conviction, under Nineteenth Judicial District Court Docket #10-05-0077, for DWI on July 4, 2005. Predicate #2 was set forth as the defendant's April 3, 2002 conviction, under Twenty-ninth Judicial District Court Docket #02-0181, for DWI on January 23, 2002. Predicate #3 was set forth as the defendant's December 19, 2005 conviction, under Twenty-third Judicial District Court Docket #10064, for DWI on November 10, 1996.

[2] The sentencing minutes are inconsistent with the sentencing transcript concerning the portion of the sentence imposed without benefit of probation, parole, or suspension of sentence. When there is a discrepancy between the minutes and the transcript, the transcript must prevail. State v.

Officer White noticed the defendant walked with a "little sway" or "little arc." He also detected a strong odor of an alcoholic beverage on the defendant's breath. Officer White administered the horizontal gaze nystagmus test to the defendant and observed all six clues of intoxication, as well as the fact that the defendant swayed as he stood. The defendant repeatedly started the walk-and-turn test before being instructed to start. He also failed to touch his heel to his toe during the test, took the wrong number of steps, and stepped off the line three times. Additionally, he repeatedly tried to start the one-leg stand test too early, and then put his foot down three times within ten seconds. Officer White also noticed that the defendant's speech was "somewhat slurred." Officer White arrested the defendant for suspicion of DWI and transported him to the Zachary Police Department. According to Officer White, the defendant refused to sign the form for chemical testing of his breath for alcohol. The defendant also indicated he was taking blood thinners for his "heart and fluid and lungs." He then claimed he had not been drinking.

Officer White indicated that in his personal life, he had been around individuals who had consumed alcoholic beverages, and in his career as a law enforcement officer, he had made DWI arrests; based on his personal and professional experience, the defendant was intoxicated on the night in question.

The defendant also testified at trial. He denied drinking any alcoholic beverages on the day of the DWI checkpoint. He also denied telling any police officers that he had consumed alcoholic beverages. He claimed he performed poorly on the field sobriety tests because of circulation problems in his legs and because the police did not allow him to get his walking stick. He also claimed he was willing to submit a breath sample for testing, but the police told him to "forget it."

Lynch, 441 So. 2d 732, 734 (La. 1983).

PREDICATES #1 AND #2-- PROOF OF IDENTITY

In his sole assignment of error, the defendant contends the State failed to prove his identity as the same person convicted in predicates #1 and #2. He does not contest his identity as the person convicted in predicate #3.

In Louisiana, proof that a person of the same name has been previously convicted does not constitute prima facie evidence that the two persons are the same. The State must offer additional proof that the accused is the same person as the defendant previously convicted. Various methods may be used to prove that the defendant on trial is the same person whose name is shown as the defendant in the evidence of a prior conviction, such as by testimony of witnesses, by expert opinion as to the fingerprints of the accused when compared with those of the person previously convicted, by photographs contained in a duly authenticated record, or by evidence of identical driver's license number, sex, race, and date of birth. The mere fact that the defendant on trial and the person previously convicted have the same name does not constitute sufficient evidence of identity. See State v. Pitre, 532 So.2d 424, 426 (La. App. 1st Cir. 1988), writ denied, 538 So. 2d 590 (La. 1989).

A thorough review of the record indicates that the State sufficiently established the defendant was the same person convicted in predicates #1 and #2. The bill of information filed in the instant offense identified the defendant as "Charles Lee Wicker[,] B/M[,] DOB: 12/26/1954[,] driver's license #: LA 3630866," and listed his address as 23817 Plank Road, Zachary, Louisiana, 70791. Further, Officer White indicated that when the defendant stopped at the DWI checkpoint, he stated he was coming from his home at 23817 Plank Road. Additionally, the defendant's mother testified at trial that her address was 23817 Plank Road, Zachary, and that the defendant had lived with her "all of his life."

In connection with predicate #1, the State introduced into evidence a bill of information, a minute entry, and a transcript concerning a January 25, 2006 guilty plea to second-offense DWI in the 19th Judicial District Court, Docket #10-05-0077 (Judge Erwin). The predicate #1 bill of information identified the defendant charged as "Charles Lee Wicker[,] B/M[,] DOB: 12/26/54[,]" and listed his address as 23817 Plank Road, Zachary, Louisiana 70791.

In connection with predicate #2, the State introduced into evidence a bill of information, a rights-waiver/guilty plea form, and minutes concerning an April 3, 2002 guilty plea to third-offense DWI under the Twenty-ninth Judicial District Court, Docket #02-0181.[3] The predicate #2 bill of information identified the defendant charged as "CHARLES WICKER ... DOB: 12/26/1954[,]" and listed his address as 23817 Plank Road, Zachary, Louisiana 70791.

Further, during his testimony at trial, the defendant conceded he had pled guilty to DWI before "Judge Erwin right down the hall." The State asked the defendant if it needed to approach him and show him the documentation concerning predicate offenses #1, #2, and #3. The defendant replied, "No, ma'am, I remember." The State then asked the defendant if he was admitting that "these are all you[,]" and he replied, "Yes, ma'am."

This assignment of error is without merit.

REVIEW FOR ERROR

Initially, we note that our review for error is pursuant to La. C.Cr.P. art. 920, which provides that the only matters to be considered on appeal are errors designated in the assignments of error and "error that is discoverable by a mere

[3] Neither the bill of information nor the rights-waiver/guilty plea forms were marked with a docket number. However, the minutes, which were marked with the docket number, correctly matched the defendant, the offense, the sentence, and the filing date of those documents.

inspection of the pleadings and proceedings and without inspection of the evidence." La. C.Cr.P. art. 920(2).

The trial court did not wait twenty-four hours after denying the motion for a post-verdict judgment of acquittal before imposing a sentence. See La. C.Cr.P. art. 873; State v. Wilson, 526 So. 2d 348, 350 (La. App. 4th Cir. 1988), writ denied, 541 So.2d 851 (La. 1989) ("[La.] C.Cr.P. art 873 refers to both motions for a new trial and in arrest of judgment when it requires the twenty-four hour delay. Thus, the trial court's failure to delay after denying ... a motion for post-verdict judgment of acquittal should be analogously treated."). However, the issue was neither assigned as error, nor was the sentence challenged, nor does the defendant cite any prejudice resulting from the court's failure to delay sentencing. Thus, any error that occurred is not reversible. See State v. Augustine, 555 So. 2d 1331, 1334 (La. 1990).

CONVICTION AND SENTENCE AFFIRMED.