

OCT 18 2017

SUPREME COURT OF LOUISIANA

No. 16-K-0797

STATE OF LOUISIANA

VERSUS

KEITH C. KISACK

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL
FOURTH CIRCUIT, PARISH OF ORLEANS

 PER CURIAM




This case presents the questions of whether defense counsel waived the sentencing delay required by La.C.Cr.P. art. 873, and whether the State proved that less than ten years elapsed between defendant's most recent predicate offense and the present offense as required by La.R.S. 15:529.1(C). Finding that the State carried its burden of proof here, we nonetheless emphasize La.R.S. 15:529.1(C) imposes a requirement on the State to prove beyond a reasonable doubt that the 10-year period has not elapsed in a habitual offender adjudication in the district court. In addition, we direct the Fourth Circuit to join the other courts of appeal in recognizing that the State's failure to carry that burden is an error patent on appeal. However, we also find that the court of appeal disregarded the plain language of Article 873, which requires an explicit waiver of the statutory sentencing delay, by surmising defense counsel "implicitly waived" the delay by participating in the sentencing hearing. Therefore, we vacate the habitual offender adjudication and remand for further proceedings.

The facts of this case are straightforward. An employee of the Orleans Parish Sheriff's Office, while conducting a search of Tier C2 of Orleans Parish Prison, discovered a cell phone secreted in a crevice of the wall of the day room. An investigation, including a warrantless search of the phone's contents, revealed that defendant used the phone to send text messages and take "selfies" while housed on that tier.

Defendant was charged by bill of information with possession of contraband while in a penal institution, La.R.S. 14:402(E)(7). An Orleans Parish jury found defendant guilty as charged. The State filed a habitual offender bill of information, alleging defendant to be a fourth-felony offender. Defendant moved for a new trial and to quash the habitual offender bill, which the trial court denied before commencing the hearing on the habitual offender bill of information. The trial court found defendant to be a fourth-felony offender and sentenced him to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence.

The Fourth Circuit affirmed defendant's conviction and affirmed the sentence as amended.¹ *State v. Kisack*, 15-0083 (La. App. 4 Cir. 3/30/16), 190 So.3d 806. The panel noted that defendant was sentenced on the same date that his motion for new trial was denied. The panel found, however, that the 24-hour statutory sentencing delay was implicitly waived when defense counsel participated in the sentencing hearing. *See Kisack*, 15-0083, p. 3, 190 So.3d at 809 ("[D]efense counsel's argument at the sentencing hearing constituted an implicit waiver of the delay.").

The panel rejected two additional assignments of error pertinent to the

¹ The court of appeal found as an error patent that the trial court erred in denying parole eligibility. Therefore, the court of appeal amended the sentence to delete the prohibition of parole.

present application. First, the panel found that no warrant was required to search the contents of the cell phone. The panel distinguished *Riley v. California*, 573 U.S. —, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014), in which the Supreme Court unanimously held that the warrantless search and seizure of digital contents of a cell phone during an arrest is unconstitutional, on the basis that defendant was incarcerated and therefore had a reduced expectation of privacy. *See Kisack*, 15-0083, p. 5, 190 So.3d at 810 (“[Defendant] had no reasonable expectation of privacy as to a cell phone hidden in a crevice in the day room wall.”). Second, the panel found that 10 years had not elapsed between defendant’s most recent predicate offense (i.e., a federal conviction for being a felon in possession of a firearm) and the present offense. While acknowledging that it is the State’s burden at a habitual offender adjudication to prove the predicate offenses qualify in accordance with La.R.S. 15:529.1(C), and further recognizing that the State did not establish in the district court when defendant was released from federal prison or supervision,² the court of appeal inferred from the limited information available

² The applicable version of La.R.S. 15:592.1(C) provided:

The current offense shall not be counted as, respectively, a second, third, fourth, or higher offense if more than ten years have elapsed between the date of the commission of the current offense or offenses and the expiration of the maximum sentence or sentences of the previous conviction or convictions, or between the expiration of the maximum sentence or sentences of each preceding conviction or convictions alleged in the multiple offender bill and the date of the commission of the following offense or offenses. In computing the intervals of time as provided herein, any period of parole, probation, or incarceration by a person in a penal institution, within or without the state, shall not be included in the computation of any of said ten-year periods between the expiration of the maximum sentence or sentences and the next succeeding offense or offenses.

In *State v. Anderson*, 349 So.2d 311, 313–314 (La. 1977), this court interpreted “expiration of the maximum sentence” as including the date a prisoner is actually discharged from custody. This provision has been amended to specify that the pertinent interval now extends between “the commission of the current offense or offenses and the expiration of the correctional supervision, or term of imprisonment if the offender is not placed on supervision following imprisonment, for the previous conviction or convictions, or between the expiration of the correctional supervision, or term of imprisonment if the offender is not placed on supervision following imprisonment, for each preceding conviction or convictions alleged in the multiple offender bill and the date of the commission of the following offense or offenses.” La.R.S. 15:529.1(C)(1) (as amended by 2017 La. Acts 257 and 2017 La. Acts 282, eff. Nov. 1, 2017).

that the 10-year period could not have expired when defendant committed the present offense. *See Kisack*, 15-0083, p. 7, 190 So.3d at 811–12 (“Accordingly, even if [defendant] was released from federal prison immediately after the sentence was imposed, he would have been on supervised release for three years . . . , and the ten year cleansing period would not have been expired when the present offense was committed . . .”).

Although defendant argues *Riley v. California*, which involved the warrantless search of a cell phone seized during an arrest that flowed from a traffic stop, applies here such that the trial court should have suppressed the results of the warrantless search of the contraband cell phone, it is generally recognized that prisoners have a reduced expectation of privacy. *See, e.g., Hudson v. Palmer*, 468 U.S. 517, 525–26, 104 S.Ct. 3194, 3199–3200, 82 L.Ed.2d 393 (1984) (“[S]ociety is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell.”); *see also State v. Williams*, 490 So.2d 255, 260 (La. 1986) (reaffirming *State v. Patrick*, 381 So.2d 501 (La. 1980), which rejected the notion that a “work-release inmate, while out of prison during the day, has a reasonable expectation of privacy that would require probable cause before deputies can conduct a pat down search of the inmate”). The federal courts have also declined to extend *Riley v. California* to prisoners. *See, e.g., United States v. Boyce*, Criminal Action No. 2014-00029 (D.V.I. 2015), 2015 WL 856943 *6 n.16 (“Accordingly, the Court will not expand the scope of *Riley v. California* to warrantless searches of cell phones confiscated as prison contraband.”). Defendant here offers no convincing reason why this court should do so.

The Fourth Circuit also scrutinized the record in an effort to ascertain

whether too much time had elapsed between the commission of the present offense and the expiration of correctional supervision for the previous conviction. We note that the Fourth Circuit is an outlier with regard to the State's obligation to prove in the district court that too much time has not elapsed, in accordance with La.R.S. 15:529.1(C), before a defendant can be adjudicated as a habitual offender. Because the Fourth Circuit does not view the State's failure to carry its burden of proof as an error patent, the question of whether too much time elapsed is often not addressed unless assigned as error on appeal when the record may be inadequate to answer it.

In contrast with the Fourth Circuit, the First, Second, and Fifth Circuits review the State's proof with regard to the requirements of La.R.S. 15:529.1(C) as an error patent on the face of the record.³ See, e.g., *State v. Robinson*, 47,427, p. 7 (La. App. 2 Cir. 10/3/12), 105 So.3d 751, 755 (State's failure to prove that the cleansing period has not expired is error patent on the face of the record); *State v. Abdul*, 11-0863, pp. 28–29 (La. App. 5 Cir. 4/24/12), 94 So.3d 801, 820–21 (since the sufficiency of the proof of the cleansing period bears on defendant's due process rights, courts can review the issue on appeal as an error patent); *State v. Baker*, 452 So.2d 737, 745–46 (La. App. 1 Cir. 1984) (reviewing defendant's claim that second felony offender sentence was improper without demonstrating the cleansing period; "Since this allegation, if proved, would be error patent on the face of the record under La.C.Cr.P. art. 920, we find it necessary to review this additional allegation.").

We find the approach of the First, Second, and Fifth Circuits more sound. In

³ While not viewing the State's failure to prove that the cleansing period has not expired as an error patent, the Third Circuit has nonetheless found that the State's failure to carry its burden may be considered on appeal in the interests of justice despite the lack of any contemporaneous objection. See *State v. McKithern*, 11-1402, pp. 8–10 (La. App. 3 Cir. 5/2/12), 93 So.3d 684, 692–93.

the Fourth Circuit, prosecutors have less incentive to devote finite resources to proving that the time has not elapsed under La.R.S. 15:529.1(C), and defendants assert less often as a defense that time has run out under La.R.S. 15:529.1(C) until on appeal, when there is no longer an opportunity for the State to present evidence. To remedy this unfortunate situation, we adopt the views of the First, Second, and Fifth Circuits and require the State to prove as an element of the habitual offender adjudication that the time afforded by La.R.S. 15:529.1(C) has not elapsed, and we further find that the absence of such proof in the district court must be recognized as an error patent on appeal.

However, we also find that the State carried its burden of proof in the district court here. Defendant was convicted of possessing contraband in a penal institution between October 11, 2011 and December 26, 2011. The State established at the habitual offender adjudication that defendant pleaded guilty on February 7, 2001, in federal court to the charge of felon in possession of a firearm and was sentenced to 96 months imprisonment in a federal facility plus three years of supervised release. The potential that defendant could have received an early release before October 11, 2001, and also been relieved of his probation obligation by receiving an executive pardon does not suffice to establish a reasonable doubt.

In addition, the Fourth Circuit found that the district court did not observe the sentencing delay required by La.C.Cr.P. art. 873 before sentencing defendant to the maximum term of life imprisonment as a fourth-felony offender for possession of a contraband cell phone while in a penal institution. *See* La.R.S. 14:402(E)(7); La.R.S. 15:529.1(A)(4)(a). Sentencing occurred almost immediately after the denial of defendant's motion for new trial. Article 873 provides (emphasis added):

If a defendant is convicted of a felony, at least three days shall elapse between conviction and sentence. If a motion for a new trial, or in arrest of judgment, is filed, sentence shall not be imposed until at least

twenty-four hours after the motion is overruled. *If the defendant expressly waives a delay provided for in this article or pleads guilty, sentence may be imposed immediately.*

The court of appeal, however, found that “defense counsel’s argument at the sentencing hearing constituted an implicit waiver of the delay.” *Kisack*, 15-0083, p. 3, 190 So.3d at 809.

While some circuits courts, predominantly the Fourth Circuit, have found that the statutory delay may be “implicitly waived” when a defendant announces he is ready for sentencing, *see, e.g., State v. Foster*, 02-0910, p. 2 (La. App. 4 Cir. 12/11/02), 834 So.2d 1188 (“A defendant may implicitly waive the twenty-four hour delay by announcing his readiness for sentencing.”), the waivers under the circumstances presented in those decisions are typically not so much implicit as expressly made (by announcing that defendant is ready to be sentenced) without being as fully articulated as they should perhaps have been. *See, e.g., State v. Celestain*, 13-1262, pp. 11–13 (La. App. 4 Cir. 7/30/14), 146 So.3d 874, 881–82 (finding no error “because Ms. Banks implicitly waived the twenty-four hour delay in her acknowledgment that she was ready for sentencing.”). Here, however, it appears that defense counsel simply participated in the sentencing hearing, which would truly be an implicit waiver if such a waiver were authorized by the Criminal Code. An implicit waiver, however, runs afoul of the plain language of Art. 873 that requires that the waiver be expressly made.

Nonetheless, an error in failing to observe the statutory sentencing delay may still be found harmless. Under the circumstances presented here, in which a defendant who faced a sentencing range of 20 years to life and received the maximum sentence authorized for a fourth-felony offender for possession of a

contraband cell phone, it is difficult to conclude the error is harmless.⁴

Accordingly, we reverse the court of appeal in part to vacate the habitual offender adjudication that immediately followed the failure to observe the statutory sentencing delay and remand this matter to the district court for further proceedings consistent with the views expressed here.

REVERSED IN PART AND REMANDED

⁴ We need not consider defendant's claim that the sentence is excessive given that we vacate the habitual offender adjudication and remand for further proceedings.

STATE OF LOUISIANA

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NO. 2015-KA-0083

VERSUS

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COURT OF APPEAL

KEITH C. KISACK

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FOURTH CIRCUIT

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STATE OF LOUISIANA

* * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 510-800, SECTION "B"
Honorable Tracey Flemings-Davillier, Judge

* * * * *

Judge Daniel L. Dysart

* * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Daniel L. Dysart, Judge
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**CONVICTION AFFIRMED; SENTENCE
AFFIRMED, AS AMENDED**

MARCH 30, 2016

A-9

Keith Kisack was charged by bill of information with possession of contraband while in a penal institution, a violation of La. R.S. 14:402 E(7). Following a jury trial, he was found guilty as charged. The State filed a multiple bill of information, alleging Kisack to be a fourth felony offender. Kisack moved for a new trial and to quash the multiple bill of information, both of which were denied by the trial court. The trial court adjudicated Kisack to be a fourth felony offender, and sentenced him to life imprisonment without benefit of parole, probation or suspension of sentence. Kisack now appeals both *pro se* and through appellate counsel.

For the reasons that follow, we affirm the conviction and sentence, as amended.

BACKGROUND:

On December 27, 2011, an employee of the Orleans Parish Sheriff's Office, while conducting a search of Tier C2, discovered a cell phone in a crevice of the wall of the day room. Michael Martin, the officer who discovered the phone,

testified that he pulled a black sock out of the crevice and discovered a cell phone and charger concealed inside. Martin turned over the phone and charger to his ranking officer.

It was established through testimony that Kisack was housed on Tier C2, and had access to the day room. Corporal Walters testified that he was trained in unlocking cell phones and retrieving the information on the phone. He identified text messages and photographs, some of which were “selfies,” found on the phone. Some of the text messages indicated that Keith or K.K. was the sender.

Deputy Ernest Newman, a member of the Sheriff’s Special Operations Division, conducted an investigation to determine the cell phone’s owner. He testified that the pictures indicated that they were taken in both the House of Detention and in Orleans Parish Prison. Some of the photographs show Kisack in the day room of Tier C2. Deputy Newman testified that Keith Kisack was the only “Keith” on Tier C2 at that time, and that he used the nickname of K.K.

Jason Williams, who was Kisack’s attorney at the time the phone was found, was called to testify as there were texts to and from him on the phone. Williams denied knowing that the texts were being sent from a phone inside the prison, although he admitted that he knew his client was in prison at the time he received and responded to the text messages. While still representing Kisack, he learned that the phone had been found and that Kisack had been charged with possession of contraband.

DISCUSSION:

Error Patent and Counsel's Assignment of Error No. 2:

Our review of the record reveals that the trial court sentenced Kisack on the same date that it denied his motion for new trial. Kisack argues that because he did not waive the delay for sentencing, his sentence should be vacated and the matter remanded for resentencing.

Kisack filed a motion for new trial at the sentencing and multiple bill hearing on October 2, 2014. The trial court denied the motion for new trial, and defense counsel objected. Kisack then sought to quash the multiple bill, which the trial court also denied. The court immediately commenced a hearing on the multiple bill, and adjudicated Kisack to be a fourth felony offender. Argument as to sentencing was heard, and the trial court sentenced Kisack to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence.

We find that defense counsel's argument at the sentencing hearing constituted an implicit waiver of the delay. *See State v. Canales*, 14-0663 (La.App. 4 Cir. 12/10/14), 156 So.3d 1183, writ denied, 15-0048 (La. 11/6/15), 180 So.3d 306 (Defense counsel presented character evidence after trial court denied motion for new trial.); *State v. Celestain*, 13-1262 (La.App. 4 Cir. 7/30/14), 146 So.3d 874 (Trial court denied motions for new trial and post-verdict judgment of acquittal, then considered correspondence from defendant's family concerning leniency. When asked, the defense stated it was ready for sentencing.); *State v. Jackson*, 04-293 (La.App. 5 Cir. 7/27/04), 880 So.2d 69 (Defendant implicitly

waived twenty-four hour delay by proceeding with argument after trial court denied motion for new trial.).

Our review of the record reveals that the trial court did err in prohibiting Kisack's eligibility for parole. Neither La. R.S. 14:402 or La. R.S. 15:529.1 A(4)(a) preclude his eligibility for parole. Thus, we amend the sentence to delete the prohibition of parole. *See State v. Ladd*, 13-1663 (La.App. 4 Cir. 7/2/14), 146 So.3d 642.¹

Counsel's Assignment of Error No. 1:

Kisack argues that the trial court erred in denying his motion to suppress the photographs and text messages obtained from the cell phone. It is argued that a search warrant was required before downloading the photographs and text messages.

We review motions to suppress *de novo*. *State v. Wells*, 08-2262, pp. 4-5 (La. 7/6/10), 45 So.3d 577, 580-81. Further, we will not upset a trial court's decision absent an abuse of discretion. *Wells, supra*; *State v. Cureaux*, 12-0335, p. 6 (La.App. 4 Cir. 5/1/13), 116 So.3d 833, 837.

Kisack's counsel relies on the recent United States Supreme Court decision in *Riley v. California*, ___ U.S. ___, 134 S.Ct. 2473 (2014), in which the Court held that police officers must generally secure a search warrant before conducting a search of data contained in a defendant's cell phone. However, we do not find

¹ An additional error patent is noted in that the trial court failed to impose a fine as required by La. R.S. 14:402, which provides that Kisack should have been fined "not less than two hundred fifty dollars and not more than two thousand dollars." However, as Kisack was subsequently sentenced as a multiple offender, it was proper for the trial court not to impose the fine.

Riley applicable as it did not involve a defendant who was incarcerated. In this case, Kisack was an inmate in Orleans Parish Prison at the time of the discovery of the cell phone, and was therefore not entitled to the full expectation of privacy afforded by the Fourth Amendment.

In *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194 (1984), the Supreme Court held that prisoners had limited expectations of privacy. While acknowledging that prisons “are not beyond the reach of the Constitution,” ... “imprisonment carries with it the circumscription or loss of many significant rights.” *Id.*, 468 U.S. at 523, 524, 104 S.Ct. at 3198-99.

Notwithstanding our caution in approaching claims that the Fourth Amendment is inapplicable in a given context, we hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell. The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions.

Id., 468 U.S. at 525-26, 104 S.Ct. at 3200; *also see State v. Draughter*, 13-0914, pp. 14-15 (La. 12/10/13), 130 So.3d 855, 866-67; *State v. Dauzat*, 364 So.2d 1000, 1003 (La. 1978).

Here, Kisack had no reasonable expectation of privacy as to a cell phone hidden in a crevice in the day room wall. As explained in *Hudson, supra*, if the cell phone had been found on Kisack’s person or in his cell, he would not have had any reasonable expectation of privacy as to the contents of the cell phone; therefore, there is a lower expectation of privacy considering that the phone was

abandoned outside of Kisack's prison cell. There is no expectation of privacy once items are abandoned, and police officers may seize any such items without search warrants. *See State v. Britton*, 93-1990 (La. 1/27/94), 633 So.2d 1208; *State v. Belton*, 441 So.2d 1195 (La. 1983); *State v. Cureaux*, *supra*; *State v. Williams*, 07-0700 (La.App. 4 Cir. 2/13/08), 977 So.2d 1101.

Thus, the officers did not need to obtain a search warrant prior to downloading the digital data found on the cell phone. The trial court did not abuse its discretion when it denied the motion to suppress. This assignment is without merit.

Counsel's Assignment of Error No. 3:

Kisack argues that the State failed to prove that the ten-year cleansing period between his most recent predicate offense and the present offense had not lapsed. He contends that the State did not meet its burden of proving that less than ten years expired between the date of his discharge from a prior federal conviction and sentence in 2001 (felon in possession of a weapon) and the present offense.

Louisiana Revised Statute 15:529.1 C provides in pertinent part:

The current offense shall not be counted as, respectively, a second, third, fourth or higher offense if more than ten years have elapsed between the date of the commission of the current offense or offenses and the expiration of the maximum sentence or sentences of the previous conviction or convictions.

This Court discussed the State's burden of proving the cleansing period has not expired in *State v. Robair*, 13-0337, pp. 5-6 (La.App. 4 Cir. 1/15/14), 133 So.3d 96, 100-101, *writ denied*, 14-0322 (La. 9/12/14), 147 So.3d 705:

The State has the burden of proving that the predicate convictions fall within the ten year "cleansing period" under La. R.S. 15:529.1(C). *State v. Tatten*, [20]12-0443, p. 9 (La. App. 4 Cir. 5/1/13), 116 So.3d 843, 849, writ

denied, [20]13–1236 (La.12/2/13), 126 So.3d 498 (citing State v. Brown, 598 So.2d 565, 575 (La. App. 4 Cir.1992); and State v. Falgout, 575 So.2d 456, 457 (La. App. 4 Cir.1991)). The “cleansing period” commences from the date the defendant is “actually discharged from state custody and supervision.” Tatten, supra (citing State v. Anderson, 349 So.2d 311, 314 (La.1977); and State v. Thomas, 04–1341, p. 15 (La. App. 5 Cir. 5/31/05), 904 So.2d 896, 906).

The Louisiana Supreme Court has held that “the expiration of a previous sentence is determined by the date of the actual discharge from supervision by the Department of Corrections.” Tatten, supra (citing State ex rel. Wilson v. Maggio, 422 So.2d 1121, 1123 (La.1982); and Anderson, supra). The Supreme Court has further held that “ ‘[d]ischarge from supervision can take place earlier than the theoretical date on which the initial sentence would have terminated, because of a pardon, commutation, or good time credit. Or it can take place later because of parole revocation.’ ” Tatten, supra (quoting State ex rel. Wilson v. Maggio, 422 So.2d at 1123).

In State v. Turner, 365 So.2d 1352 (La.1978), the Louisiana Supreme Court addressed a defendant's claim that the evidence presented at his multiple offender hearing failed to establish the date of discharge from his prior conviction and thus was insufficient. Rejecting this claim, the Supreme Court reasoned that “while the record did not affirmatively establish that the time period had or had not elapsed, the showing indicates that more probably than not, the cleansing period had not elapsed between the crimes.” Turner, 365 So.2d at 1355.

In the present case, the State alleged that Kisack was a fourth felony offender. The most recent predicate offense was a federal conviction for being a felon in possession of a weapon. The certified pack from the conviction indicates that the offense occurred on June 12, 2000, that the defendant pled guilty to the charge and was sentenced on February 7, 2001. The federal court imposed a sentence of ninety-six months (eight years), followed by three years of supervised release. The certified pack does not indicate the date Kisack was released from federal prison. The present offense was committed in October 2011. Accordingly, even if Kisack was released from federal prison immediately after the sentence was imposed, he would have been on supervised release for three years (2001-2004), and the ten year cleansing period would not have been expired when the present offense was committed in October 2011. Thus, the evidence presented by the State

was sufficient to prove that the cleansing period had not elapsed between the crimes.

This assignment is without merit.

Counsel's Assignment of Error No. 4:

Defense counsel also argues that the trial court imposed an excessive sentence, life imprisonment without benefit of parole, probation or suspension of sentence.

Louisiana Revised Statute 15:529.1 provides in pertinent part:

A. Any person who, after having been convicted within this state of a felony, or who, after having been convicted under the laws of any other state or of the United States, or any foreign government of a crime which, if committed in this state would be a felony, thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows:

* * * *

4) If the fourth or subsequent felony is such that, upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life then:²

(a) The person shall be sentenced to imprisonment for the fourth or subsequent felony for a determinate term not less than the longest prescribed for a first conviction but in no event less than twenty years and not more than his natural life;

A trial judge has broad discretion when imposing a sentence and an appellate court may not set aside a sentence absent a manifest abuse of discretion. *State v. Smith*, 01-2574, pp. 5-6 (La. 1/14/03), 839 So.2d 1, 4. Thus, we must determine whether the trial court adequately complied with the sentencing guidelines set forth in La. Code Crim. Proc. art. 894.1, and whether the sentence is warranted in light of the particular circumstances of the case. *State v. Soco*, 441

² Kisack's fourth felony is the subject offense, which provides for imprisonment for not more than five years. La. R.S. 14:402 G.

So.2d 719 (La. 1983). If there is adequate compliance with Article 894.1, we must also determine if the sentence imposed is too severe in light of the particular defendant, as well as the particular circumstances of the case, “keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged.” *State v. Landry*, 03-1671, p. 8 (La.App. 4 Cir. 3/31/04), 871 So.2d 1235, 1239.

Here, Kisack was adjudicated a fourth felony offender. The predicate offenses included a conviction in 1992 for illegal discharge of a weapon, a conviction in 1995 for aggravated battery and a conviction in 2001 for being a felon in possession of a weapon. In sentencing Kisack, the trial court also took note of his other arrests and convictions, which included arrests for simple battery and aggravated assault in 1991. In 1992, Kisack was arrested for simple kidnapping, two counts of armed robbery, attempted first degree murder, attempted armed robbery, second degree battery, flight from an officer, illegal use of a weapon and first degree murder. In 1993, he was arrested for resisting an officer, illegal use of a weapon, aggravated assault, two counts of possession of stolen property, possession of an unregistered firearm, possession of a firearm with an obliterated serial number, possession of concealed weapon, and armed robbery. Additional arrests include aggravated battery in 1994, and being a felon in possession of a firearm in 1995. In 1996, Kisack was arrested for illegal possession of stolen things, aggravated battery, aggravated assault and two counts of being a felon in possession of a weapon. Arrests in 1997 include being a felon in possession of a weapon, simple battery, two counts of simple robbery, illegal possession of stolen things, simple kidnapping and conspiracy to commit simple robbery. In 1998, Kisack was arrested for first degree murder, and in 1999 was

convicted of simple kidnapping. In 2000, arrests included conspiracy to commit armed robbery, battery, and reckless operation of a motor vehicle.

In 2008, Kisack was convicted of aggravated assault causing bodily injury in Tennessee. In 2009, he had a fugitive from justice attachment from Georgia, and he was arrested in Louisiana for second degree murder. The 2009 charge for second degree murder was pending when the cell phone was found, and Kisack was charged with the subject charge. The trial court concluded that in light of Kisack's extensive conviction and arrest record, as well as the fact that he had been a fugitive, the appropriate sentence was life imprisonment at hard labor.

On the surface, life imprisonment for possession of a cell phone is seemingly "too severe" in light of the particular circumstances of the case; however, when considering Kisack's long criminal history, and that he was incarcerated at the time of this offense awaiting trial for second degree murder, we cannot conclude that the trial court was manifestly erroneous in handing down a life sentence for this fourth felony conviction. In fact, we could conclude the possession of a cell phone in prison poses a clear opportunity for a threat to prison security.

This assignment is without merit.

Pro Se Assignment of Error No. 1:

Kisack, *pro se*, argues that the trial court erred in denying his motion to quash the multiple bill of information. He suggests that the State improperly used the 2000 federal conviction for being a felon in possession of a weapon as a predicate offense.

Louisiana Revised Statute 15:529.1A generally provides that the state may enhance the defendant's sentence on the basis of convictions from another state or under federal law only for offenses which "if committed in this state would be a

felony.” The statute requires Louisiana courts to determine the analogous crime according to the nature of the act involved, not the penalty provided for the offense in the foreign jurisdiction. *State v. Carouthers*, 618 So.2d 880, 882 (La. 1993); *State v. Berndt*, 416 So.2d 56 (La.1982).

Here, the defendant’s federal conviction was for being a felon in possession of a firearm pursuant to 18 U.S.C. §922. The statute provides in pertinent part that “ [i]t shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” 18 U.S.C §922(g) (1). The penalty for violating this statute includes a fine and/or imprisonment at not more than ten years. 18 U.S.C §924.

At the time of the defendant’s federal conviction in 2001, Louisiana’s similar statute concerning the possession of firearms by convicted felons, La. R.S. 14: 95.1, provided in pertinent part:

A. It is unlawful for any person who has been convicted of a crime of violence as defined in R.S. 14:2(B) which is a felony . . . to possess a firearm or carry a concealed weapon.

B. Whoever is found guilty of violating the provisions of this Section shall be imprisoned at hard labor for not less than ten nor more than fifteen years without the benefit of probation, parole, or suspension of sentence and be fined not less than one thousand dollars nor more than five thousand dollars.

Thus, as La. R.S. 14:95.1 incorporates the same elements of the federal offense and provides for imprisonment at hard labor, it falls within the definition of a felony under La. R.S. 14:2. In the federal conviction, Kisack was determined to be a felon due to his prior conviction in 1999 for simple kidnapping. Under La.

R.S. 14:2(B), simple kidnapping is a crime of violence. Thus, the federal conviction was appropriately used to enhance the defendant's sentence under the multiple offender statute. The trial court did not err when it denied the defendant's motion to quash.

We find this assignment to be without merit.

Pro Se Assignment of Error No. 2:

Kisack also argues that the trial court abused its discretion in allowing use as predicate offenses his 1992 conviction for illegal discharge of a weapon and 1995 conviction for aggravated battery. The defendant contends that at the time of these prior convictions, they could not be used to enhance a sentence under the multiple offender statute.

We find no merit to this assignment of error. In *State v. Parker*, 03-0924, p. 9 (La. 4/14/04), 871 So.2d 317, 322, the Court held that the defendant's status as a habitual offender is to be determined as of the date he commits the charged crime. See also *State v. LeBlanc*, 14-0163 (La. 1/9/15), 156 So.3d 1168. Thus, the determination of whether the predicate offenses could be used to enhance his present conviction is determined by the statute in existence at the time of the present offense, i.e. October 2011. Under the version of La. R.S. 15:529.1 in effect at that time, Kisack's prior offenses of illegal use of a weapon and aggravated battery could be used to enhance his sentence as a multiple offender.

Pro Se Assignment of Error No. 3:

In his last pro se assignment of error, Kisack suggests that the appellate record is incomplete in that it does not include his *pro se* motion to reconsider sentence, which prevents a complete review of his conviction and sentence.

In Louisiana, as in the federal courts, an appeal from a felony conviction is an absolute right. La. Const. art. VII, s 10 (1921); La. Const. art. V, s 5(D) (2) (1974); *Coppedge v. United States*, 369 U.S. 438, 82 S.Ct. 917 (1962).

Although Kisack's *pro se* motion to reconsider sentence was not located in a review of the appellate record, the record does reveal that defense counsel filed a motion to reconsider on October 9, 2014. The trial court denied the motion on July 31, 2015. Therefore, the lack of the *pro se* motion to reconsider sentence does not affect this Court's ability to review the merits of the defendant's appeal.

CONCLUSION:

Accordingly, we affirm Keith Kisack's conviction. His sentence is hereby amended to delete the parole ineligibility, and the sentence is affirmed, as amended.

**CONVICTION AFFIRMED; SENTENCE
AFFIRMED, AS AMENDED**