NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0822

STATE OF LOUISIANA

VERSUS

NORMAN ALLEN BYRD

Judgment Rendered: October 29, 2010

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On Appeal from the 22nd Judicial District Court
In and For the Parish of St. Tammany
Trial Court Number 443431, Div. "J"

Honorable William J. Knight, Judge Presiding

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Walter P. Reed District Attorney Covington, LA	Counsel for Appellee State of Louisiana
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Normand Allen Byrd St. Gabriel, LA	Defendant/Appellant In Proper Person

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BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

HUGHES, J.

The defendant, Norman Allen Byrd, was charged by bill of information with distribution of oxycodone, a violation of LSA-R.S. 40:967(A)(1). The defendant pled not guilty and, following a jury trial, was found guilty as charged. The defendant was sentenced to twenty-two years at hard labor, with the first two years of the sentence to be served without benefit of parole, probation, or suspension of sentence. Subsequently, the State filed a multiple offender bill of information. At the habitual offender hearing, the defendant was adjudicated a fourth-felony habitual offender. His original twenty-two-year sentence was vacated and he was resentenced to life imprisonment without benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating one counseled assignment of error and two pro se assignments of error. We affirm the conviction and habitual offender adjudication, amend the sentence and affirm as amended, and remand for correction of the commitment order, if necessary.

FACTS

On October 2, 2007 at about 4:00 p.m., the defendant drove to the McDonald's and Blockbuster parking lot at LA Highway 25 and U.S. Highway 190 in Covington. There, he met St. Tammany Parish Sheriff's Office Detectives Cheryl Kaprielian and Daniel Chauvin, both of whom were working in an undercover capacity as drug buyers. The drug buy had been pre-arranged. Detective Kaprielian and the defendant had exchanged phone calls earlier and agreed that they would meet at this location where the defendant would sell them five 80-milligram pills of oxycodone for $150.

In the parking lot, the defendant remained alone in his vehicle. Detective Chauvin approached the driver's side and Detective Kaprielian approached the passenger's side of the defendant's vehicle. Detective Kaprielian had on her person a small pinhole camera and an audio device to record the transaction. The

audio of the transaction was monitored by Sergeant Richard O'Keefe, the case agent with the St. Tammany Parish Sheriff's Office. Sergeant O'Keefe and other police officers were nearby in surveillance positions in undercover vehicles. Sergeant O'Keefe's plan was a "buy/bust," wherein a signal by the undercover officer that the transaction was complete would be immediately followed by the apprehension and arrest of the defendant.

As Detective Chauvin approached the defendant on his driver's side window, the defendant handed him a pill bottle containing five oxycodone tablets. Detective Chauvin gave the defendant about $60 and gave the signal. As a stall tactic to allow backup to arrive, Detective Chauvin pretended to count out the rest of the money he owed the defendant. The defendant was then removed from his vehicle and arrested.

COUNSELED ASSIGNMENT OF ERROR

In this assignment of error, the defendant argues that the trial court erred in denying his motion to quash the bill of information.[1] Specifically, the defendant

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[1] In his brief, the defendant asserts that the trial court erred in failing to grant his pro se motion to quash the bill of information. On October 19, 2009, the defendant filed a pro se pleading entitled "Objection," a "Motion for Supplemental Briefing" to dismiss and/or quash for failure to provide a speedy trial, and a "Brief in Support" of that motion. The objection, motion, and brief in support of the motion argued that the trial court committed error and prejudiced the defendant's defense by allowing the State to amend the date of the offense in the bill of information. The defendant also filed pro se motions to recuse the assistant district attorney and the judge (Judge William Knight). Defense counsel filed similar motions. At the hearing on the motion to recuse the judge, the defendant argued that Judge Knight should not have allowed the State to amend the bill of information. The defendant also asserted that, while Judge Knight ruled on his "objection," Judge Knight did not "even look at [his] motion." Presumably, the defendant was referring to his motion to quash since that motion and the "objection" were filed on the same day. Judge Knight testified that he overruled the defendant's objection to the amended bill of information, but also granted the defendant a continuance to allow him additional time to prepare for trial because of the amendment to the date of offense. Judge Knight further explained:

> The objection, slash, motion in my mind was one in the same thing because in the event that I overruled the objection, then that denies the motion. It's one in the same. So while in my mind I was ruling on both the motion and the objection, perhaps Mr. Byrd did not understand it that way. If so, that's fine. But the fact of the matter is in overruling of the objection to the amendment there's a denial of the motion. So it's one in the same.

The court ruled that there were no grounds for recusing Judge Knight and that the amendment to the bill of information was proper. Several days later during pretrial motions, shortly before the start of voir dire, Judge Knight addressed the defendant's pro se "Objection" motion and stated:

> All right. This is an objection to the amendment of the bill of information which has been the subject of much discussion already during the course of this case. While the

contends that the trial court erred in allowing the State to amend the bill of information to change the date of the offense, which was prejudicial to him. The defendant also argues that the trial court erred in failing to re-arraign him following the amendment to the bill of information.

The bill of information stated that the defendant was being charged with distribution of oxycodone. It listed the date of offense as August 27, 2007, which was typed. This date is struck through by a single line, and underneath it, a new date of October 2, 2007 is handwritten in. A handwritten notation on the bill by Assistant District Attorney Scott Gardner indicates that the bill of information was "amended as to date only" on July 9, 2009. In his brief, the defendant asserts that his defense was prejudiced because for approximately fourteen months, his defense was prepared by "finding evidence and witnesses to support his contention that [he] was not involved in any illegal drug transaction on August 27, 2007."

The date or time of the commission of an offense need not be alleged in the indictment, unless the date or time is essential to the offense. LSA-C.Cr.P. art. 468. The court may cause an indictment to be amended at any time with respect to a defect of form. LSA-C.Cr.P. art. 487(A). A mistake respecting the date on which the offense occurred has been held to be such a defect of form when not essential to the offense. **State v. Dye**, 384 So.2d 420, 422 (La. 1980). See **State v. Lawson**, 393 So.2d 1260, 1263 (La. 1981). The date of the offense is not essential to the offense of distribution of oxycodone. See LSA-R.S. 40:967(A)(1). Therefore, the mistake respecting the date on which the offense occurred was one of form, which may be amended at any time. See **State v. Myles**, 616 So.2d 754, 755-56 n.1 (La. App. 1st Cir.), writ denied, 629 So.2d 369 (La. 1993). See also **State v. Trotter**, 37,325, pp. 4-5 (La. App. 2d Cir. 8/22/03), 852 So.2d 1247,

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court certainly understands Mr. Byrd's consternation relative to that amendment, the amendment was done properly under the Code. So the objection is overruled.

1250-51, writ denied, 2003-2764 (La. 2/13/04), 867 So.2d 689. Accordingly, the State was entitled to amend the bill of information.

Moreover, after the trial court ruled that the State's amendment to the bill was proper, it nevertheless granted the defendant a continuance to prepare for trial.[2] The bill of information was amended on July 9, 2009. Trial did not commence until November 12, 2009. Therefore, the defendant had four months to adjust his defense to address an October 2, rather than an August 27, alleged date of offense. Furthermore, over one and one-half years prior to the commencement of trial, the defendant was aware that he had been arrested on October 2, 2007 for a drug violation on that date. In the State's discovery responses, filed on April 25, 2008, the State provided the defendant with an arrest report, which contained the following narrative:

> On October 02, 2007 Detective Richard S. O'Keefe Jr. of the St. Tammany Parish Sheriff's Office Narcotics Division concluded an investigation of Norman Byrd.
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> The conclusion of the investigation resulted in the arrest of a white male identified as Norman Byrd. Norman Byrd was arrested in the McDonald's parking lot in Covington located at Louisiana Highway 25 and Highway 190.

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[2] The defendant filed a Motion to Continue on July 10, 2009. In requesting a continuance, the motion stated, in pertinent part:

> I.
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> This matter is currently set for trial on July 13, 2009.
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> II.
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> On July 10, 2009, defense counsel Michael Capdeboscq spoke to Assistant District Attorney Scott Gardner. Assistant District Attorney Scott Gardner advised defense counsel that he had amended the bill of information on July 9, 2009 to change the date of offense from August 27, 2007 to October 2, 2007.
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> III.
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> In the discovery provided to defense counsel it is alleged that the offense occurred on more than one date.
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> IV.
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> Defendant is prejudiced both materially and adversely as this affects defendant's defense.

The defendant has failed to demonstrate that he was surprised or that his defense was prejudiced as a result of the amendment to the bill. The trial court did not err in overruling the defendant's objection to the amendment. See **State v. Mason**, 447 So.2d 1134, 1137 (La. App. 1st Cir. 1984).

Regarding the issue of re-arraignment, neither the record nor the minutes indicate that the defendant was re-arraigned after the prosecutor amended the bill of information. Nevertheless, failure to re-arraign the defendant was waived because he did not object by filing a motion before trial. See LSA-C.Cr.P. art. 555; see also **State v. Ross**, 95-1240, p. 2 n.2 (La. App. 1st Cir. 5/10/96), 674 So.2d 489, 491 n.2. This assignment of error is without merit.

SENTENCING ERROR

The defendant asks this court to examine the record for error under LSA-C.Cr.P. art. 920(2). This court routinely reviews the record for such errors, whether or not such a request is made by a defendant. Under LSA-C.Cr.P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we have found a sentencing error. See **State v. Price**, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

The sentence for a conviction of distribution of oxycodone is necessarily at hard labor. See LSA-R.S. 40:967(B)(4)(b). Accordingly, the defendant's life sentence under the Habitual Offender Law must also be at hard labor. See **State v. Bruins**, 407 So.2d 685, 687 (La. 1981). In sentencing the defendant, the trial court failed to provide that his life sentence was to be served at hard labor.[3] Inasmuch as an illegal sentence is an error discoverable by a mere inspection of the proceedings

[3] The minutes reflect that the trial court sentenced the defendant to life at hard labor under LSA-R.S. 15:529.1. When there is a discrepancy between the minutes and the transcript, the transcript prevails. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

without inspection of the evidence, LSA-C.Cr.P. art. 920(2) authorizes consideration of such an error on appeal. Further, LSA-C.Cr.P. art. 882(A) authorizes correction by the appellate court.[4] We find that correction of this illegally lenient sentence does not involve the exercise of sentencing discretion and, as such, there is no reason why this court should not simply amend the sentence. See **Price**, 2005-2514 at pp. 21-22, 952 So.2d at 124-25. Accordingly, since a sentence at hard labor was the only sentence that could be imposed, we correct the sentence by providing that it be served at hard labor.

PRO SE ASSIGNMENTS OF ERROR

In his first pro se assignment of error, the defendant argues that the trial court erred in allowing the bill of information to be amended and in not re-arraigning him. In his pro se second assignment of error, the defendant asks, "Did the trial court error [sic] by not granting my motion for Speedy Trial?" The defendant makes no argument in his brief regarding a speedy trial. Instead, the entirety of his argument is confined to the issues raised in his first assignment of error. These issues have already been addressed in the counseled assignment of error and have been found to be meritless.

The only new issue raised within the body of the defendant's argument is that no arrest warrant was utilized for his arrest. The scenario set up by police officers was a "buy/bust," in which, following the transaction, the defendant would be arrested on the spot. On October 2, 2007, after the defendant sold the oxycodone to Detective Chauvin, he was immediately arrested. LSA-C.Cr.P. art. 213(1) authorizes a peace officer to make an arrest without a warrant when the person to be arrested has committed an offense in his presence. See **State v. Peebles**, 376 So.2d 149 (La. 1979). As such, an arrest warrant, with a supporting affidavit, was not required. The pro se assignments of error are also without merit.

[4] "An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review." LSA-C.Cr.P. art. 882(A).

CONVICTION AND HABITUAL OFFENDER ADJUDICATION AFFIRMED; SENTENCE AMENDED TO PROVIDE THAT IT BE SERVED AT HARD LABOR, AND AFFIRMED AS AMENDED; REMANDED FOR CORRECTION OF COMMITMENT ORDER, IF NECESSARY.