

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

*WFK  
RHP by WFK  
JEW*

NO. 2012 KA 1548

STATE OF LOUISIANA

VERSUS

CALVIN WAYNE MITCHELL

Judgment Rendered: MAY 06 2013

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On Appeal from the  
16th Judicial District Court  
In and for the Parish of St. Mary  
State of Louisiana  
Trial Court No. 2006-169650

The Honorable John E. Conery, Judge Presiding

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\* \* \* \* \*

BEFORE: PARRO, WELCH, AND KLINE,<sup>1</sup> JJ.

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<sup>1</sup> Hon. William F. Kline, Jr., retired, is serving as judge *ad hoc* by special appointment of the Louisiana Supreme Court.

**KLINE, J.**

Defendant, Calvin Wayne Mitchell, was charged by bill of information with attempted second degree murder, a violation of La. R.S. 14:30.1 and 14:27 (count one); assault by drive-by shooting, a violation of La. R.S. 14:37.1 (count two); and possession of a firearm by a convicted felon, a violation of La. R.S. 14:95.1 (count three). Defendant pled not guilty to the charges and, following a jury trial, he was found guilty as charged on all three counts. For the attempted second degree murder conviction (count one), he was sentenced to twenty-five years; for the assault by drive-by shooting conviction (count two), he was sentenced to five years; and for the possession of a firearm by a convicted felon conviction (count three), he was sentenced to ten years. The sentences were ordered to run concurrently. The state subsequently filed a habitual offender bill of information. A hearing was held on the matter, and defendant was adjudicated a third-felony habitual offender. The trial court vacated the twenty-five-year sentence for attempted second degree murder and sentenced defendant to fifty years at hard labor. Defendant filed an appeal with this court.

On defendant's earlier appeal, this court affirmed defendant's convictions. However, we vacated defendant's habitual offender adjudication, finding that defendant had been adjudicated a third-felony habitual offender on proof of two predicate convictions that were obtained on the same date, November 18, 2003, in violation of La. R.S. 15:529.1(B).<sup>2</sup> Accordingly, we also vacated defendant's habitual offender sentence. In addition, we vacated defendant's sentence on count two, because the trial court failed to specify whether that sentence was imposed with or without hard labor. Further, we vacated defendant's sentence on count three, because the trial court failed to impose the mandatory fine or to restrict the benefits of parole, probation, or suspension of sentence. We remanded defendant's

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<sup>2</sup> For purposes of habitual offender adjudication, La. R.S. 15:529.1(B) provides that multiple convictions obtained on the same day prior to October 19, 2004, shall be counted as one conviction.

case for readjudication of his habitual offender status and for resentencing on all counts. **State v. Mitchell**, 2009-2124 (La. App. 1 Cir. 6/11/10), 2010 WL 2342839 (unpublished), writ denied, 2010-1605 (La. 1/28/11), 56 So.3d 968.

On remand, the trial court first partially resentenced defendant on August 19, 2010. On count two, the trial court sentenced defendant to five years at hard labor, without benefit of parole, probation, or suspension of sentence. On count three, the trial court sentenced defendant to ten years at hard labor, without benefit of parole, probation, or suspension of sentence, and imposed a \$1,000.00 fine. The trial court ordered these sentences to run concurrently and continued the habitual offender portion of the resentencing until a later date.

After a hearing on January 4, 2012, the trial court readjudicated defendant a second-felony habitual offender, enhancing count one. The trial court imposed a habitual offender sentence of thirty years at hard labor, without benefit of parole, probation, or suspension of sentence. Additionally, the trial court vacated “any previous sentence” and again resentenced defendant on counts two and three. On count two, the trial court imposed a sentence of ten years. On count three, the trial court also imposed a sentence of ten years. The trial court ordered all sentences to run concurrently. Defendant now appeals his resentencing, alleging two assignments of error. For the following reasons, we affirm defendant’s habitual offender adjudication and sentence, but we vacate defendant’s sentences on counts two and three and remand for resentencing on those counts.

## FACTS

This court previously affirmed defendant’s convictions for his participation in a drive-by shooting incident in which one man was shot in his foot in the presence of multiple bystanders. The incident took place on February 28, 2006, in a residential area of Franklin, in St. Mary Parish.

## **ASSIGNMENT OF ERROR #1**

In his first assignment of error, defendant alleges that the trial court erred in resentencing him to ten years for his assault by drive-by shooting conviction, because that term exceeds the statutory maximum sentence for that conviction. The state concurs with defendant's argument, and we also agree.

Under the assault by drive-by shooting provision, defendant is eligible for a sentence of imprisonment for not less than one year nor more than five years, with or without hard labor, and without benefit of suspension of sentence. La. R.S. 14:37.1(B). Clearly, defendant's ten-year sentence for this offense is illegal.<sup>3</sup> Despite the fact that defendant did not file a motion to reconsider any of his new sentences, we may correct this sentencing error, because an illegal sentence may be corrected at any time by an appellate court on review. See La. Code Crim. P. art. 882(A).

Therefore, we vacate defendant's ten-year sentence on count two and remand with instructions to the trial court to comply with La. R.S. 14:37.1(B).

## **ASSIGNMENT OF ERROR #2**

In his second assignment of error, defendant asserts that the trial court abused its sentencing discretion on count one by imposing an excessive habitual offender sentence of thirty years at hard labor, without benefit of parole, probation, or suspension of sentence.

Herein, defendant was readjudicated a second-felony habitual offender on January 4, 2012. He was resentenced under the habitual offender statute on the same date. A thorough review of the record shows that defendant did not make or file a timely oral or written motion to reconsider sentence, pursuant to La. Code Crim. P. art. 881.1, subsequent to his resentencing.

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<sup>3</sup> We note that the trial court attempted to resentence defendant for this offense on August 19, 2010, by sentencing him to five years at hard labor, without benefit of parole, probation, or suspension of sentence, but this first resentencing was subsequently vacated on January 4, 2012. However, we further point out that the initial resentencing would have been illegal due to its unauthorized restriction of the benefit of parole.

Under the clear language of La. Code Crim. P. art. 881.1(E), a failure to make or file a motion to reconsider sentence precludes a defendant from raising an objection to the sentence on appeal. One purpose of the motion to reconsider sentence is to allow the defendant to raise any errors that may have occurred during sentencing while the trial judge still has the jurisdiction to change or correct the sentence. The defendant may point out such errors or deficiencies, or may present argument or evidence not considered in the original sentencing, thereby preventing the necessity of a remand for resentencing. **State v. Mims**, 619 So.2d 1059 (La. 1993) (per curiam).

Defendant's failure to timely make or file a motion to reconsider sentence precludes him from arguing for the first time on appeal that his sentence was excessive. Thus, defendant is procedurally barred from having this assignment of error reviewed. See State v. Felder, 2000-2887 (La. App. 1st Cir. 9/28/01), 809 So.2d 360, 369, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173.

### **REVIEW FOR ERROR**

Under La. Code Crim. P. art. 920(2), which limits our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence, we note a sentencing error with respect to count three.

For his possession of a firearm by a convicted felon conviction, defendant was ultimately resentenced to ten years. On defendant's initial appeal, we found error in the same ten-year sentence, noting that whoever is found guilty of violating the possession of a firearm by a convicted felon provision shall be imprisoned at hard labor for not less than ten nor more than fifteen years without benefit of probation, parole, or suspension of sentence and be fined not less than one thousand dollars nor more than five thousand dollars.<sup>4</sup> See La. R.S.

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<sup>4</sup> We again note that the trial court attempted to correct this error at its partial resentencing on August 19, 2010, by sentencing defendant to ten years at hard labor, without benefit of parole, probation, or suspension of sentence, and imposing a \$1,000.00 fine. However, that initial resentencing was vacated at the January 4, 2012 resentencing.

14:95.1(B) (prior to 2010 amendment). The trial court's resentencing of defendant to the exact sentence previously found to be illegal by this court necessitates that we again vacate defendant's sentence on count three and remand to the trial court for resentencing. On remand, the trial court should impose a sentence in conformity with La. R.S. 14:95.1(B) (prior to 2010 amendment).

**HABITUAL OFFENDER ADJUDICATION AND SENTENCE ON COUNT ONE AFFIRMED; SENTENCES ON COUNTS TWO AND THREE VACATED AND REMANDED FOR RESENTENCING.**