

STATE OF LOUISIANA

NO. 15-KA-263

VERSUS

FIFTH CIRCUIT

RENE S. WILLIAMS

COURT OF APPEAL

STATE OF LOUISIANA


ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 12-4838, DIVISION "N"
HONORABLE STEPHEN D. ENRIGHT, JR., JUDGE PRESIDING

COURT OF APPEAL
FIFTH CIRCUIT

November 19, 2015

FILED NOV 19 2015

MARC E. JOHNSON
JUDGE


CLERK
Cheryl Quirk Landreau

Panel composed of Judges Marc E. Johnson,
Robert A. Chaisson, and Robert M. Murphy

MURPHY, J., DISSENTS WITH REASONS

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CONVICTIONS AND SENTENCES AFFIRMED; REMANDED
FOR CORRECTION OF COMMITMENT ORDERS;
MOTION TO WITHDRAW GRANTED

MSJ
RAC

Defendant, Rene S. Williams, appeals his convictions and sentences for possession with intent to distribute heroin, and possession of a firearm by a convicted felon from the 24th Judicial District Court, Division “N”. For the following reasons, we affirm Defendant’s sentences and convictions and remand the matter for correction of the hard labor commitment and the Uniform Commitment Order. Additionally, we grant appellate counsel’s motion to withdraw.

FACTS AND PROCEDURAL HISTORY

On November 21, 2012, the Jefferson Parish District Attorney filed a bill of information charging Defendant, Rene S. Williams, with possession with intent to distribute heroin in violation of La. R.S. 40:966(A) (count one); possession with intent to distribute marijuana in violation of La. R.S. 40:966(A) (count two); and possession of a firearm by a convicted felon in violation of La. R.S. 14:95.1 (count three). Defendant was arraigned on December 3, 2012, and pleaded not guilty. On January 3, 2013, Defendant filed a “Motion for Competency Examination,” which the trial judge granted. Thereafter, on January 23, 2013, a competency hearing was

held, after which the trial judge found Defendant competent to stand trial. On March 5, 2013, the trial judge denied Defendant's motion to suppress statement and granted his motion to suppress evidence. On March 14, 2013, Defendant's motion to quash was denied.

On March 19, 2013, a jury trial began; however, before opening statements, Defendant withdrew his not guilty pleas and pleaded guilty as charged on counts one and three.¹ Because Defendant pleaded guilty, the underlying facts were not fully developed at a trial. Nevertheless, the State alleged in the bill of information that on or about September 18, 2012, Defendant violated La. R.S. 40:966(A) in that he did knowingly or intentionally possess with intent to distribute a controlled dangerous substance, to wit: heroin (count one), and that on September 18, 2012, defendant violated La. R.S. 14:95.1, in that he did have in his possession a firearm, having been previously convicted of the crime of possession of cocaine in violation of La. R.S. 40:967(C) under case number 10-5931, Division "H", in the 24th Judicial District Court in the Parish of Jefferson (count three). Also on March 19, 2013, the State entered a *nolle prosequi* on count two. The trial judge sentenced Defendant to imprisonment at hard labor for fifteen years without benefit of probation or suspension of sentence on count one and imprisonment at hard labor for fifteen years without benefit of parole, probation, or suspension of sentence on count three, with those sentences to run concurrently.² The trial judge also ordered Defendant to pay a \$1,000.00 fine in connection with count three.

Additionally, on March 19, 2013, the State filed a habitual offender bill of information alleging Defendant to be a second felony offender, to which Defendant stipulated. On that same date, the trial judge vacated the original sentence on

¹ Defendant also pleaded guilty to the misdemeanor offense of resisting an officer.

² The trial judge sentenced Defendant on the misdemeanor conviction to six months in parish prison to run concurrently with the sentences on counts one and three.

count one and resentenced Defendant under the habitual offender statute to imprisonment at hard labor for twenty-five years without benefit of probation or suspension of sentence to run concurrently with the sentence the sentence on count three and the sentence in district court case number 12-5747. On April 5, 2013, Defendant filed a “Notice of Appeal to Withdraw Plea” and “Motion for Appointment of Counsel,” that were denied. On November 21, 2014, Defendant filed an Application for Post-Conviction Relief (APCR), which the trial judge construed as an out-of-time appeal and granted. The instant appeal followed. Defendant filed another APCR on January 16, 2015, which was denied as premature.

ASSIGNMENT OF ERROR

On appeal, Defendant seeks review of his convictions and sentences in conformity with the procedures outlined in *State v. Jyles*, 96-2669 (La. 12/12/97); 704 So.2d 241 (per curiam).

LAW AND ANALYSIS

Under the procedure adopted by this Court in *State v. Bradford*, 95-929 (La. App. 5 Cir. 6/25/96); 676 So.2d 1108, 1110-11,³ appointed appellate counsel has filed a brief asserting that he has made a conscientious and thorough review of the entire appellate record, including the procedural history and facts, and has not found any non-frivolous issues to raise on appeal.⁴ Accordingly, appointed counsel requests permission to withdraw as counsel of record.

After receiving appellate counsel’s brief and motion to withdraw, this Court performed a full examination of all the appellate record to determine whether the

³In *Bradford*, *supra*, this Court adopted the procedures outlined in *State v. Benjamin*, 573 So.2d 528, 530 (La. App. 4th Cir. 1990), which were sanctioned by the Louisiana Supreme Court in *State v. Mouton*, 95-0981 (La. 4/28/95); 653 So.2d 1176, 1177 (per curiam).

⁴On June 11, 2015, this Court notified Defendant of his right to file a *pro se* supplemental brief in this appeal. Defendant failed to file a supplemental brief.

appeal is frivolous in accordance with *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) and *State v. Jyles, supra*. Our independent examination of the record supports appellate counsel's assertion that there are no non-frivolous issues to be raised on appeal.

The bill of information properly charged Defendant and plainly and concisely stated the essential facts constituting the offenses charged. It also sufficiently identified Defendant and the crimes charged. *See* La. C.Cr.P. arts. 462-66. Further, the minute entries reflect that Defendant and his counsel appeared at all crucial stages of the proceedings against him, including his arraignment, guilty pleas, and sentencing. As such, there are no appealable issues surrounding defendant's presence.

Further, Defendant pleaded guilty in this case. Generally, when a defendant pleads guilty, he normally waives all non-jurisdictional defects in the proceedings leading up to the guilty plea, and review of such defects either by appeal or post-conviction relief is precluded. *State v. Turner*, 09-1079 (La. App. 5 Cir. 7/27/10); 47 So.3d 455, 459. Here, Defendant entered unqualified guilty pleas, and therefore, all non-jurisdictional defects are waived. No rulings were preserved for appeal under the holding in *State v. Crosby*, 338 So.2d 584 (La. 1976).

Also, once a Defendant is sentenced, only those guilty pleas that are constitutionally infirm may be withdrawn by appeal or post-conviction relief. A guilty plea is constitutionally infirm if it is not entered freely and voluntarily, if the *Boykin*⁵ colloquy is inadequate, or when a defendant is induced to enter the plea by a plea bargain or what he justifiably believes was a plea bargain and that bargain is not kept. *State v. McCoil*, 05-658 (La. App. 5 Cir. 2/27/06); 924 So.2d 1120, 1124.

⁵ *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

A review of the record reveals no constitutional infirmity in Defendant's guilty pleas to the underlying charges. The record shows that Defendant was aware he was charged with and pleading guilty to the crimes of possession with intent to distribute heroin and possession of a firearm by a convicted felon. On the waiver of rights form and during the colloquy with the trial judge, Defendant was advised of his right to a jury trial, his right to confrontation, and his privilege against self-incrimination as required by *Boykin v. Alabama, supra*. Defendant signed the waiver of rights form, indicating that he understood he was waiving these rights by pleading guilty. During the colloquy with the trial judge, Defendant also indicated that he understood those rights.

During his guilty plea colloquy and in his waiver of rights form, Defendant indicated that he had not been forced, coerced, or threatened into entering his guilty pleas. Defendant was informed during the colloquy, and in the waiver of rights form, of the maximum and minimum sentences and of the actual sentences that would be imposed if his guilty pleas were accepted. After the colloquy with Defendant, the trial court accepted Defendant's pleas as knowingly, intelligently, freely, and voluntarily made.

A review of the record also reveals no constitutional infirmity in Defendant's stipulation to the habitual offender bill. During the colloquy, Defendant indicated that his counsel had provided him with the habitual offender bill alleging him to be a second felony offender. Defendant also indicated that his attorney had reviewed the habitual offender bill with him. The trial judge advised Defendant of the rights he was waiving, which Defendant indicated he understood. Defendant was advised by the trial judge of the maximum and minimum enhanced sentence he could receive and of the actual enhanced sentence he would receive, which Defendant indicated he understood. Defendant also indicated he had not

been forced, threatened, or coerced into stipulating to the habitual offender bill.

Afterward, the trial judge accepted his stipulation to the habitual offender bill as knowingly, intelligently, freely, and voluntarily made by Defendant. The habitual offender waiver of rights form further indicates that Defendant was advised of the foregoing rights, sentencing ranges, and actual sentence.

With regard to Defendant's sentences, La. C.Cr.P. art. 881.2(A)(2) precludes a defendant from seeking review of a sentence imposed in conformity with a plea agreement which was set forth in the record at the time of the plea. *State v. Washington*, 05-211 (La. App. 5 Cir. 10/6/05); 916 So.2d 1171, 1173. Here, Defendant's sentences were imposed in accordance with the terms of the plea agreement set forth in the record at the time of the pleas.

Nevertheless, Defendant's sentences fall within the sentencing ranges set forth in the statutes. *See* La. R.S. 14:95.1; La. R.S. 40:966(A); La. R.S. 15:529.1. Moreover, Defendant's plea agreement was beneficial to him in that he received a fifteen-year sentence on count three when he could have received twenty years, a fifteen-year sentence on count one when he could have received fifty years, and a twenty-five-year enhanced sentence as a second felony offender when he could have received one hundred years. Defendant's plea agreement was also beneficial in that the sentences were ordered to run concurrently, and the State dismissed count two. Additionally, the plea agreement was beneficial in that the State agreed to only file a habitual offender bill alleging Defendant to be a second felony offender. Also, the State pointed out that it could have filed a habitual offender bill alleging him to be a third or fourth felony offender, which would have increased his enhanced sentence significantly.

Because appellate counsel's brief adequately demonstrates by full discussion and analysis that he reviewed the trial court proceedings and cannot identify any

basis for a non-frivolous appeal, and an independent review of the record supports counsel's assertion, we affirm Defendant's convictions and sentences.

However, we note the following error found during our review for errors patent.

There is an inconsistency between the transcript and the commitments. The transcript indicates that the enhanced sentence was to run concurrently with the sentence on count three and with the sentence on the misdemeanor conviction (case number 12-5747). However, the hard labor commitment and the Uniform Commitment Order only show that the enhanced sentence was to run concurrently with the sentence in case number 12-5747. The transcript prevails. *State v. Lynch*, 441 So.2d 732, 734 (La. 1983).

Therefore, we order the trial court to correct the commitments to reflect that the enhanced sentence is to run concurrently with the sentences on count three and in case number 12-5747. We also order the clerk of the trial court to transmit the new commitments to the officer in charge of the institution to which Defendant has been sentenced and to the Department of Corrections' legal department. *See* La. C.Cr.P. art. 892(B)(2); *State ex rel. Roland v. State*, 06-0244 (La. 9/15/06); 937 So.2d 846 (per curiam).

DECREE

For the foregoing reasons, the convictions of Defendant, Rene S. Williams, are affirmed. We also grant appellate counsel's motion to withdraw. Additionally, we remand the matter for correction of the hard labor commitment and the Uniform Commitment Order pursuant to the instructions provided in this opinion.

**CONVICTIONS AND SENTENCES AFFIRMED;REMANDED
FOR CORRECTION OF COMMITMENT ORDERS;
MOTION TO WITHDRAW GRANTED**

STATE OF LOUISIANA
VERSUS
RENE S. WILLIAMS

NO. 15-KA-263
FIFTH CIRCUIT
COURT OF APPEAL
STATE OF LOUISIANA

 **MURPHY, J., DISSENTS WITH REASONS**

I have considered the opinion of the majority, and respectfully dissent from its decision to grant appellate counsel's motion to withdraw.

Pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), *reh'g denied*, 388 U.S. 924, 87 S. Ct. 2094, 18 L. Ed. 2d 1377 (1967), and *State v. Jyles*, 96-2669 (La. 12/12/97), 704 So.2d 241 (*per curiam*), appellate counsel's mandate, in part, is to demonstrate to the appellate court, by full discussion and analysis, that he has cast an advocate's eye over the trial record. The U.S. Supreme Court also recognized in *Anders, supra*, how crucial the role of appointed counsel is, one that cannot be replaced by an appellate court:

Independent review of the record by the appellate court, or the opportunity of the defendant to file his own brief, while providing important and necessary safeguards, cannot substitute for the essential equal protection requirement that appointed counsel representing an indigent defendant "act in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*."¹

In this instance, counsel's brief does not provide a full analysis of a felony conviction for which defendant received a 15-year sentence without the benefits of probation, parole or suspension of sentence.

Furthermore, defendant filed a Notice of Appeal [sic] To Withdraw Guilty Plea on April 5, 2013, in which he alleged four errors: an involuntary plea, ineffective assistance of counsel, no factual basis for his convictions and the trial court's violation of his "rights." The trial court denied defendant's motion on May 16, 2013. Defendant thereafter filed an application for post-conviction relief

¹ *Anders v. California, supra*, at 1400.

(APCR) on November 25, 2014, in which he alleged a lack of evidence to support his conviction for distribution of heroin, ineffective assistance of trial counsel, and an excessive habitual offender sentence. The trial court did not address the merits of the APCR, and instead interpreted it to be a motion for an out of time appeal, which it granted on December 4, 2014. As part of its order, the trial court appointed the Louisiana Appellate Project to represent defendant on appeal. Otherwise, defendant's APCR was dismissed without prejudice. On January 16, 2015, defendant filed another APCR in which he asserted that he received ineffective assistance of trial counsel with respect to his guilty pleas. The merit of this claim was not considered, however, as the trial court deemed the APCR premature in light of defendant's current pending appeal.

While the *Anders* brief before us acknowledges defendant's post-conviction filings, the brief also contains no analysis of them. I note that, in other *Anders* appeals before this Court, appointed counsel has undertaken a review of a defendant's post-conviction claims for the purpose of determining whether or not they could form the basis of an appeal. *See State v. McKenzie*, 09-893 (La. App. 5 Cir. 02/15/11); 61 So.3d 54, 57, ("Counsel also addresses potential issues argued below by defendant in a June 2008 Application for Post-Conviction Relief (APCR) and in a February 2009 *pro se* notice of intent to seek appeal.") *See also State v. Cole*, 04-615 (La. App. 5 Cir. 03/01/05), 900 So.2d 15, wherein appointed counsel addressed defendant's post-conviction claim of ineffective assistance of counsel in her *Anders* brief.

In summary, I find that the majority's willingness to grant counsel's motion to withdraw is not of benefit to defendant in ensuring his constitutional right to equal protection, as noted above. Even though the majority opinion does not find fault with the omissions in counsel's brief, I believe that counsel should not be excused from the duty and standards of representation merited by the trial court's

appointment as set forth in *Anders, supra*, and *Jyles, supra*. Accordingly, I would deny the motion to withdraw at this time and order counsel to specifically brief whether defendant's conviction and sentence for being a felon in possession of a firearm, as well as any of defendant's post-conviction claims, present any non-frivolous appealable issues.

SUSAN M. CHEARDY
CHIEF JUDGE

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **Uniform Rules - Court of Appeal, Rule 2-20** THIS DAY **NOVEMBER 19, 2015** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

A handwritten signature in cursive script, appearing to read "Cheryl Q. Landrieu", written over a horizontal line.

CHERYL Q. LANDRIEU
CLERK OF COURT

15-KA-263

E-NOTIFIED

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