STATE OF LOUISIANA

VERSUS

WILLIE J. ELLISON, JR.

NO. 17-KA-319

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 07-6289, DIVISION "P"
HONORABLE LEE V. FAULKNER, JR., JUDGE PRESIDING

December 13, 2017

SUSAN M. CHEHARDY
CHIEF JUDGE

Panel composed of Judges Susan M. Chehardy,
Robert A. Chaisson, and Hans J. Liljeberg

SENTENCES AFFIRMED; REMANDED

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CHEHARDY, C.J.

Defendant Willie J. Ellison, Jr. appeals his multiple offender sentence of fifty years imprisonment at hard labor as a fourth felony offender. For the reasons that follow, we affirm defendant's sentence and remand the matter for correction of the Uniform Commitment Order.

This is defendant's fifth appeal and this Court's third opinion in this case.[1] This matter has returned twice to the district court for resentencing and defendant has been sentenced five times[2] on the underlying conviction that forms the basis of these several appeals. This tortuous history belies the simplicity of the matter at issue: the imposition of a multiple offender sentence in accordance with a plea agreement. Below we reprise the history of this case.

PROCEDURAL HISTORY

On October 31, 2007, the Jefferson Parish District Attorney filed a bill of information charging defendant with possession with intent to distribute heroin, a violation of La. R.S. 40:966(A) (count one), and possession with intent to distribute cocaine, a violation of La. R.S. 40:967(A) (count two). On August 23, 2010, defendant pled guilty as charged, and sentencing was set for September 22, 2010. At the time of his guilty plea, defendant was advised that if he reported to the home incarceration office and then appeared for sentencing on September 22, he would receive two concurrent fifteen-year sentences as a second felony offender. He was further advised that if he failed to report to the home incarceration office and failed to appear for sentencing on September 22, he would be multiple billed as a fourth felony offender and would be facing a sentence of fifty years to life imprisonment. Defendant verbally indicated that he understood

[1] *See State v. Ellison*, 12-910 (La. App. 5 Cir. 6/27/13), 121 So.3d 139, *writ denied*, 13-1829 (La. 2/14/14), 132 So.3d 411; *State v. Ellison*, 14-790 (La. App. 5 Cir. 2/25/15), 168 So.3d 862, *writ denied*, 15-559 (La. 1/25/16), 184 So.3d 1288, *writ granted*, *rev'd in part*, 15-612 (La. 1/25/16), 186 So.3d 634.

[2] Defendant was sentenced on September 28, 2010, October 16, 2013, May 22, 2014, February 25, 2016, and March 10, 2017.

these conditions and his waiver of rights form reflected the same.

Despite these warnings, defendant failed to report to the home incarceration office and failed to appear for sentencing on September 22. He later appeared in court on September 28, 2010, where he filed a motion to withdraw his guilty pleas, which the court denied that day. In accordance with the court's prior warning, defendant was sentenced to fifty years imprisonment: thirty years on count one and twenty years on count two, to be served consecutively. Also that day, the State filed a multiple offender bill of information alleging defendant to be a fourth felony offender, but later withdrew it.

More than a month later, on October 29, 2010, defendant filed a motion to reconsider sentence and a motion for appeal. Defendant's motion for appeal was granted and his appeal was lodged in this Court under Case No. 11-KA-377, but was later removed from the docket and remanded to the district court for consideration as an out-of-time appeal. On remand, defendant's motion for an out-of-time appeal was granted.

Back before this Court on appeal, defendant argued that the district court erred by denying his motion to withdraw his guilty pleas. This Court found no merit to this argument, but did find that the district court had erred in failing to sentence defendant in conformity with his plea agreement, since his fifty-year sentence was the result of two consecutive underlying sentences and not the result of adjudication as a fourth felony offender. *State v. Ellison*, 12-910 (La. App. 5 Cir. 6/27/13), 121 So.3d 139, 146, *writ denied*, 13-1829 (La. 2/14/14), 132 So.3d 411. Accordingly, this Court affirmed defendant's convictions, but vacated his sentences and remanded the matter. *Id.*

On remand on October 16, 2013, the district court resentenced defendant to imprisonment for fifteen years at hard labor on each of the two counts, to be served concurrently. Thereafter, on October 22, 2013, the State filed a multiple offender

bill of information alleging defendant to be a fourth felony offender. On May 22, 2014, the court adjudicated defendant a fourth felony offender, vacated his original sentence on count one, and resentenced defendant to thirty years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, to be served concurrently with his fifteen-year sentence on count two.

Defendant appealed, challenging his multiple offender adjudication and enhanced sentence. *State v. Ellison*, 14-790 (La. App. 5 Cir. 2/25/15), 168 So.3d 862. This Court determined that one of defendant's predicate convictions had erroneously been used to adjudicate defendant a fourth felony offender because the plea colloquy of that conviction established that he was not advised of, nor waived, his right against self-incrimination. *Id.* at 868-69. Accordingly, this Court vacated defendant's adjudication as a fourth felony offender, rendered judgment adjudicating defendant a third felony offender, and remanded the matter for resentencing. *Id.* at 869. On count two, finding in an errors patent review that the district court had improperly restricted sentence benefits, this Court amended defendant's sentence on count two and affirmed that sentence as amended. *Id.* at 870.

Both defendant and the State sought writs of certiorari. The Louisiana Supreme Court declined review of defendant's writ, *State v. Ellison*, 15-559 (La. App. 5 Cir. 1/25/16), 184 So.3d 1288, but granted the State's and found that this Court had erred in vacating defendant's adjudication as a fourth felony offender. *State v. Ellison*, 15-612 (La. 1/25/16), 186 So.3d 634. The supreme court reversed this Court's ruling and reinstated defendant's fourth felony offender adjudication. *Id.* The court did not, however, reinstate defendant's thirty-year enhanced sentence, agreeing with the State that it was illegally lenient. *Id.* As a result, the matter was remanded to the district court for resentencing on defendant's fourth felony offender adjudication. *Id.*

On remand on February 25, 2016, the district court sentenced defendant as a fourth felony offender on count one to twenty years imprisonment at hard labor without benefit of probation or suspension of sentence, to be served concurrently with his sentence on count two. Defendant filed a motion to reconsider sentence and a motion for appeal on February 29, 2016. The district court granted defendant's motion for appeal and issued a rule to show cause on his motion to reconsider. On March 18, 2016, the State filed a motion to reconsider and/or correct illegally lenient sentence. The court referred the State's motion to the rule to show cause hearing.

The matter was continued over the next several months, during which time, on September 30, 2016, defendant filed a motion in this Court seeking to dismiss his appeal on the grounds that he and the State were engaged in negotiations. This Court dismissed defendant's appeal under Case No. 16-KA-280 on October 4, 2016.

Finally, on March 10, 2017, the district court held the hearing on defendant's motion to reconsider and on the State's motion to reconsider and/or correct illegally lenient sentence. Defendant withdrew his motion to reconsider. Without issuing a ruling on the State's motion and without vacating defendant's twenty-year enhanced sentence on count one,[3] the court sentenced defendant as a fourth felony offender to fifty years at hard labor without benefit of probation or suspension of sentence, to be served concurrently with his sentence on count two. Then, apparently acting in an abundance of caution, but without vacating defendant's sentence on count two, the court sentenced defendant on count two to

[3] While the transcript does not reflect that the court vacated defendant's enhanced sentence on count one before resentencing defendant, the March 10, 2017 commitment/minute entry does.

fifteen years at hard labor to be served concurrently with his sentence on count one.[4]

Defense counsel orally moved to reconsider defendant's fifty-year enhanced sentence on count one and orally moved for an appeal. A written motion for appeal followed on March 31, 2017, which the court granted on April 4, 2017. Defendant's written motion to reconsider followed on April 10, 2017. On April 26, 2017, defendant filed a motion to correct illegal sentence as to his enhanced sentence on count one. These motions were heard and denied on May 25, 2017. Defendant has appealed the denials of these motions.

ASSIGNMENTS OF ERROR

On appeal, defendant assigns two errors: (1) the district court erred in its denial of his motion to reconsider sentence; and (2) the district court erred in its denial of his motion to correct illegal sentence.

PRELIMINARY ISSUE

Before addressing defendant's assignments of error, we first consider the effect of the district court's failure to vacate defendant's previous sentences before resentencing him on March 10, 2017.

Generally, in cases where a trial court fails to vacate a defendant's original sentence before imposing an enhanced sentence pursuant to a multiple bill, this Court has considered the original sentence to be still in effect, vacated the enhanced sentence as null and void, and remanded for resentencing with the instruction to vacate the original sentence before imposing the enhanced sentence. *See State v. Wise*, 13-247 (La. App. 5 Cir. 11/19/13), 128 So.3d 1220, 1224, *writ denied*, 14-253 (La. 9/12/14), 147 So.3d 703; *State v. Netter*, 11-202 (La. App. 5 Cir. 11/29/11), 79 So.3d 478, 484, *writ denied*, 12-32 (La. 8/22/12), 97 So.3d 357.

[4] Neither the transcript nor the March 10, 2017 commitment/minute entry reflects that the court vacated defendant's sentence on count two before resentencing defendant.

However, in a case where the commitment/minute entry reflected that the trial court had vacated an original sentence before imposing an enhanced sentence and the transcript did not, on certiorari review the Louisiana Supreme Court did not follow "the transcript prevails" directive of *Lynch*,[5] and found the enhanced sentence valid. *See State v. Mayer*, 99-3124 (La. 3/31/00), 760 So.2d 309. The court explained:

> To the extent that the…commitment/minute entry reflects that the trial judge vacated the defendant's original sentence and thereby eliminated any possible confusion as to the terms of the defendant's confinement, the failure of the transcript of the multiple offender hearing to show that the court did so before sentencing the defendant as a multiple offender did not affect the substantial rights of the defendant.

Id. at 310; *see also State v. Stewart*, 10-389 (La. App. 5 Cir. 5/10/11), 65 So.3d 771, 783 (citing *Mayer*, *supra*).

In the present case, unlike the foregoing, the issue is not the district court's failure to vacate an original sentence before imposing an enhanced sentence, but, as to count one, the court's failure to vacate a previous enhanced sentence before imposing a more severe enhanced sentence, and, as to count two, the court's failure to vacate a previous original sentence before imposing the same sentence again.

Although the present case is procedurally distinguishable from *Mayer*, we find the rationale in *Mayer* equally applicable here. Because the March 10, 2017 commitment/minute entry reflects that the district court vacated defendant's twenty-year enhanced sentence on count one before imposing the fifty-year enhanced sentence, like *Mayer*, we find there is no possible confusion as to the terms of defendant's confinement on count one. And as to count two, although neither the March 10, 2017 commitment/minute entry nor the transcript reflects that the court vacated defendant's sentence on count two before resentencing him,

[5] *See State v. Lynch*, 441 So.2d 732, 734 (La. 1983) (holding that when there is a discrepancy between the minutes and the transcript, the transcript must prevail).

because the court re-imposed the same sentence, we similarly find there is no possible confusion as to the terms of defendant's confinement on count two.

It is clear that defendant's sentence on count one is fifty years imprisonment at hard labor without benefit of probation or suspension of sentence and defendant's sentence on count two is fifteen years imprisonment at hard labor, of which the first two years are without benefit of probation, parole, or suspension of sentence.[6] We now consider defendant's assignments of error.

DISCUSSION

Although defendant assigns as error the district court's denials of his motion to reconsider sentence and his motion to correct illegal sentence, his brief presents one argument that his fifty-year sentence is excessive because it was imposed as retribution for exercising his right to appeal.

In a motion to correct an illegal sentence, a defendant may only raise claims relating to the legality of the sentence itself under the applicable sentencing statutes. *See State v. Parker*, 98-256 (La. 5/08/98), 711 So.2d 694, 695. When a defendant fails to point to a claimed illegal term in his sentence, he does not raise a claim cognizable in a motion to correct an illegal sentence. *See id.*

In defendant's April 26, 2017 motion to correct illegal sentence, he argued that his enhanced sentence of fifty years on count one was excessive because it was imposed as retribution for exercising his right to appeal. This argument fails to point to a claimed illegal term in defendant's sentence under the applicable sentencing statutes and is therefore not cognizable in a motion to correct an illegal sentence. In any event, as the following demonstrates, defendant's fifty-year sentence on count one is legal under the applicable sentencing statutes.

[6] Although on March 10, 2017 the district court failed to specify that the first two years of defendant's sentence on count two are to be served without benefit of probation, parole, or suspension of sentence in accordance with La. R.S. 40:967(B), this restriction of benefits is imposed by operation of law pursuant to La. R.S. 15:301.1(A). *See State v. Williams*, 00-1725 (La. 11/28/01), 800 So.2d 790, 798-99.

Defendant was adjudicated a fourth felony offender on the basis of his conviction for possession with intent to distribute heroin. At the time of that offense (October 19, 2007), La. R.S. 40:966 carried a penalty of imprisonment for not less than five nor more than fifty years at hard labor at least five years of which shall be served without benefit of probation or suspension of sentence. And as a fourth felony offender, La. R.S. 15:529.1[7] carried a penalty of not less than fifty years at hard labor without the benefit of probation or suspension of sentence. Defendant's enhanced sentence on count one of fifty years at hard labor without benefit of probation or suspension of sentence complies with the applicable sentencing statutes. This argument is without merit.

In defendant's April 10, 2017 motion to reconsider sentence, he moved the district court to reconsider his sentence pursuant to La. C.Cr.P. art. 881.1 due to its "excessive and harsh nature." In his brief on appeal, defendant argues that his fifty-year sentence is excessive because it was imposed as retribution for exercising his right to appeal.

Where a defendant's motion to reconsider sentence alleges mere excessiveness, the reviewing court is limited to a review of whether the sentence is constitutionally excessive. La. C.Cr.P. art. 881.1; *State v. Mims*, 619 So.2d 1059 (La. 1993). However, when the sentence imposed is the product of a plea agreement, a defendant is precluded from raising a claim of excessiveness on appeal. *State v. Cross*, 06-866 (La. App. 5 Cir. 4/11/07), 958 So.2d 28, 30. Under La. C.Cr.P. art. 881.2(A)(2), "[a] defendant cannot appeal or seek review of a sentence imposed in conformity with a plea agreement which was set forth in the record at the time of the plea."

[7] A defendant should be sentenced in accordance with the version of La. R.S. 15:529.1 in effect at the time of the commission of the charged offense. *State v. Parker*, 03-924 (La. 04/14/04), 871 So.2d 317, 326.

For example, in *State v. Roche*, 09-684 (La. App. 5 Cir. 3/23/10), 39 So.3d 706, 707, *writ denied*, 10-930 (La. 11/19/10), 49 So.3d 396, the defendant pled guilty to distribution of cocaine and was warned in open court that if he failed to appear for sentencing he would not receive the agreed-upon ten-year sentence with a boot camp recommendation, but would face a possible maximum sentence of up to sixty-five years and additionally could be multiple billed by the State. The defendant indicated he understood, but he failed to appear for sentencing. *Id.* at 708. As a result, he was sentenced to thirty years at hard labor. *Id.* On appeal, he argued this sentence was excessive, but this Court found the defendant was precluded from challenging the excessiveness of his sentence on appeal because his sentence was imposed in conformity with a plea agreement that was set forth in the record at the time of the plea. *Id.* at 709. This Court noted that the "[d]efendant was clearly informed of the two possible sentences, which were dictated by his actions, when he entered his plea." *Id.*

The present case is similar. Defendant pled guilty as charged and was advised that he would receive two concurrent fifteen-year sentences as a second felony offender if he complied with the terms of home incarceration and appeared for sentencing. He was also warned that if he did not comply with the terms of home incarceration and not appear for sentencing, he would be multiple billed as a fourth felony offender and would face a sentencing range of fifty years to life imprisonment. Defendant indicated that he understood and agreed to these conditions.

But defendant failed to appear and, as promised, was sentenced to a term of fifty years (consecutive sentences of thirty and twenty years on counts one and two, respectively). However, because those sentences were inconsistent with the plea agreement in that the fifty years did not result from a fourth felony offender adjudication, this Court vacated the sentences and remanded the matter. *State v.*

Ellison, 12-910 (La. App. 5 Cir. 6/27/13), 121 So.3d 139, 146, *writ denied*, 13-1829 (La. 2/14/14), 132 So.3d 411. On remand, as promised, defendant was multiple billed and adjudicated a fourth felony offender on count one. Thereafter, defendant received two illegally lenient enhanced sentences on count one before his plea agreement was eventually satisfied when he was sentenced to fifty years at hard labor as a fourth felony offender on March 10, 2017. Because defendant's enhanced sentence on count one was imposed in conformity with his plea agreement, he cannot now challenge it as excessive on appeal.

Defendant's assignments of error are without merit.

ERRORS PATENT REVIEW

The record was reviewed for errors patent, according to La. C.Cr.P. art. 920; *State v. Oliveaux*, 312 So.2d 337 (La. 1975); and *State v. Weiland*, 556 So.2d 175 (La. App. 5 Cir. 1990). The following matter requires corrective action.

The Uniform Commitment Order incorrectly reflects the adjudication date for count one as September 28, 2010. Accordingly, this matter is remanded to the district court to amend the Uniform Commitment Order to reflect the correct adjudication date on count one as the date of defendant's guilty pleas, August 23, 2010. The Clerk of Court for the 24th Judicial District Court is ordered to transmit the original of the amended Uniform Commitment Order to the officer in charge of the institution to which defendant has been sentenced and to the Department of Corrections' Legal Department. *See State v. Long*, 12-184 (La. App. 5 Cir. 12/11/12), 106 So.3d 1136, 1142.

DECREE

For the foregoing reasons, defendant's sentences are affirmed and the matter is remanded for correction of the Uniform Commitment Order.

SENTENCES AFFIRMED; REMANDED

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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 2-16.4 AND 2-16.5** THIS DAY **DECEMBER 13, 2017** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU
CLERK OF COURT

17-KA-319

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