NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 KA 2324

STATE OF LOUISIANA

VERSUS

CHRISTOPHER JOHNSON

Judgment Rendered: May 7, 2010

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Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa, Louisiana
Trial Court Number 63,346

Honorable Robert H. Morrison, Judge

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BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

WELCH, J.

The defendant, Christopher Johnson, was charged by grand jury indictment with two counts of aggravated rape, a violation of La. R.S. 14:42, and two counts of armed robbery, a violation of La. R.S. 14:64. He initially pled not guilty. However, on April 27, 1992, pursuant to a plea agreement, the defendant pled guilty to the amended charges of two counts of forcible rape, a violation of La. R.S. 14:42.1, and to two counts of armed robbery. The plea agreement provided for the imposition of a sentence of forty years at hard labor on each count of forcible rape, with "at least" two years of each sentence to be served without benefit of probation, parole, or suspension of sentence, and forty years at hard labor on each count of armed robbery, with "at least" five years of each sentence to be served without benefit of probation, parole, or suspension of sentence. On May 4, 1992, the defendant was sentenced, in accordance with the plea agreement, to forty years at hard labor on each count of forcible rape, with "at least" two years of each sentence to be served without benefit of probation, parole, or suspension of sentence, and forty years at hard labor on each count of armed robbery, with "at least" five years of each sentence to be served without benefit of probation, parole, or suspension of sentence. All of the sentences were ordered to be served concurrently. On December 5, 1994, the defendant filed a "Motion for Correction of an Illegally Lenient Sentence." The trial court denied the motion on March 13, 1995. The court reasoned, "Article 881.2 of the Code of Criminal Procedure provides that the defendant cannot 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." Thereafter, on April 7, 1997, this court granted a writ filed by the defendant and stated:

> **WRIT GRANTED**. The sentence imposed upon relator was illegally lenient in that La. R.S. 14:64 B requires the entire sentence imposed for armed robbery shall be without benefit of parole.

> Pursuant to defendant's motion for correction of illegal sentence, the trial court was required to correct the illegal sentence, regardless of whether or not the sentence was negotiated pursuant to a plea bargain. See La. C.Cr.P. art. 882; **State v. Cabanas**, 552 So.2d 1040, 1046-47 (La. App. 1st Cir. 1989), **writ denied**, 556 So.2d 41 (La. 1990). In the view of the law, an illegal sentence is as though no sentence at all had been imposed. **State v. Johnson**, 220 La. 64, 55 So.2d 782, 783-84 (La. 1951). Correction of an illegal sentence does not fall within the contemplation of the La. C.Cr.P. art. 881.2 A(2) prohibition against a defendant appealing or seeking review of a sentence imposed in conformity with a plea agreement set forth in the record at the time of the plea. Accordingly, the sentences imposed for relator's convictions for armed robbery are hereby vacated; and this matter is remanded to the trial court for resentencing to correct the illegal sentences. If the provision that at least five years of the sentences be served without benefit of parole, leaving open the possibility of parole after that period, was part of the negotiated plea bargain, legal sentences cannot be imposed under La. R.S. 14:64 in conformity with the plea bargain. In that case, if relator's guilty pleas were induced in part by the provision regarding parole, relator must be given an opportunity to withdraw his guilty pleas to the armed robbery charges. See **State v. Dixon**, 449 So.2d 463, 465 (La. 1984); **State v. Cabanas**, 552 So.2d at 1047.

State v. Johnson, 97-0240 (La. App. 1st Cir. 4/7/97)(*unpublished writ action*).

On April 13, 1998, the defendant was resentenced to concurrent terms of ten years at hard labor without benefit of probation, parole, or suspension of sentence on each of the armed robbery convictions. The court ordered that the other sentences stand as originally imposed. On March 2, 1999, the defendant filed a motion seeking modification of his forcible rape sentences. In this motion, the defendant requested modification of the sentences based upon "the transformation [he] has made since his confinement in prison." The motion was denied as untimely on March 4, 1999. Thereafter, on June 28, 1999, the defendant filed a "Motion and Order for Offense and Sentence Clarification." In response to this motion, the trial court ordered that the defendant be provided a certified copy of the minutes of his April 13, 1998 resentencing.

On February 1, 2002, the trial court ordered that the minute entry from April 13, 1998 be amended as follows:

> As to (2) cts of armed robbery, sentence as follows: Accused is to

> serve (10) years at hard labor with the Department of Corrections each count to run concurrent with each other to be served without the benefit of probation, parole or suspension of sentence; as to forcible rape (2) cts court ordered the defendant to serve (40) years at hard labor with the Department of Corrections to run concurrent with each other and with the armed robbery charges.

On May 19, 2004, the defendant filed a "Motion for Clarification of Sentence." In this motion, the defendant challenged the court's February 1, 2002 amendment of the forcible rape sentences. He noted that the amended forcible rape sentences did not reflect that "at least two years of the sentence imposed shall be without the benefit of probation, parole or suspension of sentence." On May 24, 2004, the trial court denied the motion and stated, "Mover has already served over two years."

On July 17, 2008, the defendant filed another "Motion to Correct an Illegal Indetermine Sentence." In this motion, the defendant argued that the sentences imposed on the forcible rape convictions, as set forth in the amended February 1, 2002 minutes, were not in compliance with the statutory requirements of La. R.S. 14:42.1(B). On July 22, 2008, the trial court denied the defendant's motion and reasoned, "[t]he sentence is not illegal – none of the sentence imposed was suspended." The defendant sought review of the trial court's ruling in this court. In **State v. Johnson**, 2008-1904 (La. App. 1st Cir. 1/9/09)(*unpublished writ action*), the defendant's writ was granted with the following language:

> **WRIT GRANTED**. Relator's sentences for forcible rape are illegal because they do not contain a provision as to the length of the sentences which are to be served without benefit of parole. La. R.S. 14:42.1(B) provides that at least two years of the sentence imposed shall be without benefit of probation, parole, or suspension of sentence. Since the correction of these illegal sentences involves sentencing discretion, we remand to the district court with instructions to vacate the forcible rape sentences and resentence in accordance with La. R.S. 14:42.1(B). See **State v. Tabor**, 2007-0058 (La. App. 1st Cir. 6/8/07), 965 So.2d 427.

On remand, the trial court issued an order (filed January 26, 2009) noting that the sentences imposed on the forcible rape convictions were never illegal. The

court noted:

> This Court has reviewed the record in this proceeding, and attaches [sic] a copy of the transcript of the original sentencing on May 4, 1992. As is seen by that transcript, the sentence of the Court actually ***did*** impose at least two years on the forcible rape charge, without benefit of probation, parole or suspension of sentence (Page 3, Lines 10-13). Further the original sentencing minutes from May 4, 1992, likewise reflect that the sentence contained the provision that at least two years be imposed without benefit of probation, parole or suspension of sentence.

The trial court concluded, because the sentences were not illegal, that the matter required only an amendment of the minutes. The court ordered the minutes to be amended as follows:

> As to FORCIBLE RAPE, (2) CTS, COURT ORDERED THE DEFENDANT TO SERVE 40 YEARS AT HARD LABOR WITH THE DEPARTMENT OF CORRECTIONS, TO RUN CONCURRENT WITH EACH OTHER AND WITH THE ARMED ROBBERY CHARGES. AT LEAST 2 YEARS OF THE FORCIBLE RAPE SENTENCES TO BE SERVED WITHOUT BENEFIT OF PROBATION, PAROLE OR SUSPENSION OF SENTENCE.

Thereafter, on February 7, 2009, in response to the defendant's complaint that the sentences imposed were indefinite, the trial court issued an order, again amending the defendant's sentences. This time, the court ordered:

> **IT IS ORDERED**, that the sentence and minutes be amended, to provide that on the armed robbery conviction, the Defendant be sentenced to a term of imprisonment at hard labor for five years, without benefit of probation, parole or suspension of sentence, and that as to the forcible rape convictions, the Defendant be sentenced to a term of imprisonment at hard labor for forty years on each forcible rape count, to run concurrent with each other, and to run concurrent with the sentence for armed robbery, and that two years of each sentence for forcible rape be served without benefit of probation, parole or suspension of sentence.

In response, the defendant filed a "Motion to Vacate Sentences, Alternative Motion to Correct a Clear Legal Error," wherein he argued that the trial court erred in simply amending the minutes rather than vacating the forcible rape sentences and resentencing him. The trial court denied the motion as "Moot." Relator sought supervisory review of the trial court's ruling in this court. In **State v.**

Johnson, 2009-0349 (La. App. 1st Cir. 6/22/09)(*unpublished writ action*), this court granted the defendant's writ:

> **WRIT GRANTED.** The district court failed to comply with this Court's action in 2008 KW 1904, issued on January 9, 2009, instructing the court to vacate the forcible rape sentences and resentence relator. We note that although the district court ordered that the forcible rape sentences and minute entries be amended to provide that "two years of each sentence for forcible rape be served without benefit of probation, parole or suspension of sentence," the district court failed to conduct this felony resentencing in relator's presence. Article 835 of the Code of Criminal Procedure provides in pertinent part, "In felony cases the defendant shall always be present when sentence is pronounced. ... If a sentence is improperly pronounced in the defendant's absence, he shall be resentenced when his presence is secured." Accordingly, we remand this matter to the district court with instructions that it comply with this Court's instructions in 2008 KW 1904, issued January 9, 2009, and that the resentencing be conducted in relator's presence. We further instruct the district court to send the Department of Public Safety and Corrections a copy of the minute entry and criminal commitment form reflecting relator's resentencing for the forcible rape convictions.

On July 7, 2009, when the matter came before the trial court on remand, the court vacated the sentences pronounced on May 4, 1992, in their entirety, and resentenced the defendant as follows:

> All right, in accordance with the orders of the First Circuit [Court] of Appeal in this matter, dated January 9, 2009 and June 22, 2009, I will vacate the sentence as originally pronounced in this matter on May 4, 1992. Will re-sentence Mr. Johnson at this time, and the sentence of the Court is that as to each count of armed robbery for which you were convicted, that you serve forty years at hard labor with the Department of Corrections, at hard labor. Those sentences to run concurrent with each other, and likewise to run concurrent with the present conviction that Mr. Johnson had at the time of the original sentencing. At least five years of those sentences to be served without benefit of probation, parole or suspension of sentence.
>
> As to the forcible rape charge, the sentence of the Court is that you serve forty years at hard labor with the Department of Corrections to run concurrent with the preceding sentence, and any other sentence for which you were serving at that time. At least two years of that sentence is to be served without benefit of probation, parole or suspension of sentence.

On July 8, 2009, the defendant moved for reconsideration of the sentences as excessive. The trial court denied the motion on September 30, 2009. On that same

date, the defendant filed another "Motion to Correct an Illegal and Indetermined Sentence." The trial court denied the motion and noted, "Sentence is not legally excessive."

The defendant now appeals, urging the following assignments of error:

1. The trial court erred in denying the defendant's motion to correct his sentences.

2. The trial court erred in denying the defendant's motion to reconsider his sentences.

FACTS

Because the defendant pled guilty, the facts of the offenses were never fully developed on the record. The factual basis for the guilty pleas, as stated by the prosecutor, provided that on or about September 19, 1991 through September 21, 1991, the defendant committed forcible rape and armed robbery of two female victims.

DENIAL OF MOTION TO CORRECT SENTENCE AND MOTION FOR RECONSIDERATION OF SENTENCE

In two assignments of error, the defendant challenges all four of his sentences as illegal. He further argues that since the sentences imposed were illegal, it was legal error for the trial court to refuse to reconsider them. The defendant claims that the sentences are illegal in two major ways. First, he notes that La. R.S. 14:64(B) requires the entire sentence for armed robbery to be served without benefit of probation, parole, or suspension. He claims that he was incorrectly advised that he would be eligible for parole on the armed robbery sentences after serving five years. This advice, he claims, was part of the inducement for his entering into the initial plea bargain. Next, he argues that the sentences, as re-imposed by the trial court, are illegally indeterminate because a sentence of "at least" a certain amount of time is not a determinate sentence as required by La. C.Cr.P. art. 879. Considering these errors, and the fact that he was

originally sentenced over eighteen years ago and the sentences remain uncorrected, the defendant asks this court to exercise its authority under La. C.Cr.P. art. 881.4 and order the trial court to vacate the existing sentences and resentence him to the sentences provided in the February 7, 2009 minute entry.[1] The defendant argues that these sentences provided a fair resolution of this error in that they gave the defendant the benefit of his bargain on the armed robbery sentences and provided determinate sentences for the forcible rape convictions. In response, the State argues that the 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," and therefore, the defendant is not entitled to review of his claims. La. C.Cr.P. art. 881.2(A)(2).[2]

Initially, we note that the State is incorrect in asserting that the defendant is not entitled to review of his sentencing claims. As stated by this court in a prior writ action in this case, an illegal sentence is as though no sentence at all had been imposed. See **State v. Johnson**, 220 La. 64, 55 So.2d 782, 783-84 (1951). Thus, the trial court is required to correct an illegal sentence, regardless of whether the sentence was negotiated pursuant to a plea bargain. See La. C.Cr.P. art. 882; **State v. Cabanas**, 552 So.2d 1040, 1046-47 (La. App. 1st Cir. 1989), writ denied, 556 So.2d 41 (La. 1990). Correction of an illegal sentence does not fall within the contemplation of the La. C.Cr.P. art. 881.2(A)(2) prohibition against a defendant appealing or seeking review of a sentence imposed in conformity with a plea agreement set forth in the record at the time of the plea. Consequently, we will review the unusual sentencing situation presented by this case.

The record reflects that the trial court initially imposed indeterminate

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[1] As previously noted, the sentences imposed in the February 7, 2009 minute entry were improperly pronounced in the defendant's absence.

[2] In its brief, the State quotes the language of La. C.Cr.P. art. 881.2(A)(2), but cites it as La. C.Cr.P. art. 881.2(B).

sentences when it ordered that "at least" five years of the defendant's sentences for armed robbery and "at least" two years of the defendant's sentences for forcible rape be served without benefit of probation, parole, or suspension of sentence. Under the sentencing provisions for forcible rape, the trial judge may order all or a portion, but at least two years, of the sentence to be served without benefit of probation, parole, or suspension of sentence. La. R.S. 14:42.1(B). The sentencing provision for armed robbery does not allow for any portion of the sentence to be imposed with benefits. La. R.S. 14:64(B). Under La. C.Cr.P. art. 879, which mandates imposition of a determinate sentence, the court must specify the restrictive term. See **State v. Cedars**, 2002-861, p. 2 (La. App. 3rd Cir. 12/11/02), 832 So.2d 1191, 1193; **State v. Trosclair**, 584 So.2d 270, 282 (La. App. 1st Cir.), writ denied, 585 So.2d 575 (La. 1991). Therefore, all four sentences were indeterminate and the armed robbery sentences were also illegally lenient.

However, we further note that in resentencing the defendant (on April 13, 1998) to ten years for each of the armed robbery convictions (all without benefits), the trial court corrected the illegality as to those sentences. Therefore, those sentences are now legal and final. Insofar as the defendant claims that his pleas were induced by the belief that he would be eligible for parole after five years, we note that the defendant should have raised this challenge prior to his April 13, 1998 resentencing. In the April 7, 1997 writ action (when this court remanded the matter for resentencing), this court specifically ordered, "if relator's guilty pleas were induced in part by the provision regarding parole, relator must be given an opportunity to withdraw his guilty pleas to the armed robbery charges." **State v. Johnson**, 97-0240.

We further note that the armed robbery sentences, which were then final, were not before the trial court at the July 7, 2009 resentencing. The matter was on remand from this court on the forcible rape sentences only. Thus, when the trial

court vacated all of the sentences imposed on May 4, 1992, it did so in error. Accordingly, we vacate the new sentences imposed on the armed robbery convictions on July 7, 2009, and reinstate the armed robbery sentences imposed on April 13, 1998.[3]

On the forcible rape convictions, the sentences remain indeterminate. As the defendant correctly notes, in imposing the July 7, 2009 forcible rape sentences, the trial court again used the terms "at least" when restricting parole eligibility. Thus, correction of these sentences is in order. Because it is clear from the record that the trial court intended to restrict the least amount of time on these sentences (as evidenced by the restriction of only two years when it amended the minutes on February 7, 2009), we amend the defendant's sentences on the forcible rape convictions to order that two years of the sentences be without benefit of probation, parole, or suspension of sentence. We affirm the sentences as amended.

CONCLUISION

We remand this matter to the trial court for correction of the minutes and commitment order to reflect the amended forcible rape sentences and the reinstated armed robbery sentences.

ARMED ROBBERY SENTENCES IMPOSED ON JULY 7, 2009 VACATED. ARMED ROBBERY SENTENCES IMPOSED BY THE TRIAL COURT ON APRIL 13, 1998 REINSTATED. FORCIBLE RAPE SENTENCES AMENDED TO RESTRICT PAROLE ELIGIBILITY ON THE FIRST TWO YEARS ONLY. REMANDED TO THE TRIAL COURT FOR CORRECTION OF THE MINUTES AND COMMITMENT ORDER.

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[3] On April 13, 1998, the defendant was resentenced to concurrent terms of ten years at hard labor without benefit of probation, parole, or suspension of sentence on each of the armed robbery convictions. The court ordered that the other sentences stand as originally imposed.