

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 KA 2075

STATE OF LOUISIANA

VERSUS

MILTON JOSEPH KIEF, III

—
**On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, Louisiana
Docket No. 535908, Division "J"
Honorable William J. Knight, Judge Presiding**
—

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**Attorneys for Appellee
State of Louisiana**

and

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**Attorney for
Defendant-Appellant
Milton Joseph Kief, III**

**Milton Joseph Kief, III
Covington, LA**

**Defendant-Appellant
In Proper Person**

BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

Judgment rendered _____

JUL 11 2014

*RHP
by JM
EGD
by JM*

PARRO, J.

Defendant, Milton Joseph Kieff, III, was charged by bill of information with illegal possession of stolen things valued between \$500 and \$1500, a violation of LSA-R.S. 14:69(B)(2). He initially pled not guilty, but he later withdrew that plea and entered a plea of guilty as charged.¹ Pursuant to a sentencing agreement, defendant also admitted that he was a third-felony habitual offender in exchange for a habitual offender sentence of ten years at hard labor.² Thereafter, the trial court actually sentenced defendant to ten years at hard labor, without benefit of parole, probation, or suspension of sentence. The trial court ordered this sentence to be served concurrently with all other sentences imposed on defendant. Defendant filed a *pro se* omnibus motion for judgment notwithstanding the verdict and for reconsideration of sentence, which the trial court denied. He now appeals, alleging two *pro se* assignments of error, and no counseled assignments of error. For the following reasons, we affirm defendant's conviction and habitual offender adjudication. We amend his sentence and affirm that sentence as amended. Additionally, we grant defense counsel's motion to withdraw.

FACTS

Because defendant pled guilty, the facts of his offense were not developed at a trial. When asked for a factual basis for defendant's plea, the state replied that open file discovery, as well as pretrial discussions, would establish a factual basis for the plea. The bill of information alleged that defendant possessed stolen things valued between \$500 and \$1500 on or about December 1, 2012. The bill alleged that defendant knew the property had been stolen from a John Valero.

PRO SE ASSIGNMENT OF ERROR NUMBER ONE

In his first *pro se* assignment of error, defendant alleges that the trial court failed to quash his bill of information on the basis of double jeopardy. He appears to allege

¹ The St. Tammany Parish docket number relevant to defendant's instant appeal is 535908. On the same date as his plea in docket number 535908, defendant also pled guilty under St. Tammany Parish docket number 535909 to theft of goods under \$500 (count one), possession of a theft alarm deactivation device (count two), and simple criminal damage to property (count three). Those convictions are not at issue in the instant appeal.

² The predicate offenses alleged in defendant's habitual offender bill of information were a conviction of simple burglary under St. Tammany Parish docket number 434791 and a conviction of distribution of a schedule II controlled dangerous substance under St. Tammany Parish docket number 369285.

that the stolen objects from the instant case were the same objects he was alleged to have stolen in another case.

In his brief, defendant appears to represent that he had been convicted of theft of a bicycle from a David Allen under St. Tammany Parish docket number 531711. He further appears to allege that the predicate offenses in his habitual offender bill of information also involve the same conduct or objects.

After a review of the record, it is impossible to determine whether defendant's first *pro se* assignment of error has any merit. The record is devoid of any facts regarding defendant's conviction in St. Tammany Parish docket number 531711. The only apparent mention of that offense is in defendant's commitment order, where docket number 531711 is listed as one of the docket numbers (along with 535909) with which defendant's instant habitual offender sentence is to run concurrently. Further, nothing on the face of the allegations in the instant bill of information (that defendant possessed property stolen from a John Valero) comports with defendant's assertion that the instant property is the bicycle that he apparently stole from David Allen. The factual basis stipulated to at defendant's plea also does not support that conclusion.

Similarly, we are unable to fully evaluate defendant's same double jeopardy contentions regarding his predicate offenses because of a lack of facts. The only predicate offense that might involve the same property from his instant offense is defendant's conviction for simple burglary under docket number 434791. However, the record contains no facts regarding that offense.

Defendant's first *pro se* assignment of error is without merit, or is otherwise unreviewable by this court on appeal.

PRO SE ASSIGNMENT OF ERROR NUMBER TWO

In his second *pro se* assignment of error, defendant asserts that his habitual offender sentence was not individualized or tailored and was actually unconstitutionally excessive.

Prior to his plea, defendant engaged in a colloquy with the trial court. During that colloquy, the trial court asked defendant if he understood that he would be sentenced to ten years in exchange for his plea and subsequent admission to his status

as a third-felony habitual offender. Defendant asked if his sentence would be “ten flat [years],” to which the trial court responded that the sentence would run concurrently with any other sentences he was serving. At the time defendant was sentenced as a third-felony habitual offender, the trial court imposed a sentence of ten years at hard labor, without the benefit of parole, probation, or suspension of sentence.

Before addressing defendant’s assignment of error, we note that defendant’s sentence, as it was stated by the trial court at defendant’s sentencing, is illegal. Whoever commits the crime of illegal possession of stolen things, when the value of the stolen things is between \$500 and \$1500, shall be imprisoned with or without hard labor, for not more than five years, or may be fined not more than \$2000, or both. See LSA-R.S. 14:69(B)(2). Thus, this underlying statute does not restrict the possibility of parole. Similarly, defendant’s instant and predicate offenses do not combine in a manner to restrict the possibility of parole as a habitual offender. See LSA-R.S. 15:529.1(A)(3)(b) (setting out combinations of instant and predicate offenses requiring the restriction of parole).

In stating at the time of defendant’s sentencing that defendant’s sentence was to be served without the benefit of parole, the trial court clearly imposed an illegal sentence. However, we note that this statement appears to be an instance of an accidental misstatement by the trial court. The minute entry of defendant’s sentencing and his commitment order both state the correct sentence of ten years at hard labor without the benefit of probation or suspension of sentence. In general, where there is a discrepancy between the minutes and the transcript, the transcript must prevail. See **State v. Lynch**, 441 So.2d 732, 734 (La. 1983). However, to allow the transcript to prevail in the instant case would result in an illegal sentence. Therefore, out of an abundance of caution, we exercise our authority under LSA-C.Cr.P. art. 882(A) to delete the trial court’s stated restriction of parole on defendant’s habitual offender sentence. Because the minute entry and commitment order both correctly state the sentence as amended by this court, we need not remand for correction of those documents.

Turning now to defendant’s second *pro se* assignment of error, we find that defendant’s sentence is unreviewable. 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. See LSA-C.Cr.P. art. 881.2(A)(2). In the instant case, defendant's sentence was clearly negotiated pursuant to a plea agreement, and it was imposed in conformity with that agreement. Any error in the trial court's imposition of that negotiated sentence by restricting the benefit of parole has been remedied by this court's deletion of that restriction.

This assignment of error is without merit, or is otherwise unreviewable by this court on appeal.

ANDERS BRIEF

The defense counsel's brief contains no assignments of error and sets forth that it is filed to conform with **State v. Jyles**, 96-2669 (La. 12/12/97), 704 So.2d 241 (per curiam), wherein the Louisiana Supreme Court approved the procedures outlined in **State v. Benjamin**, 573 So.2d 528 (La. App. 4th Cir. 1990). **Benjamin** set forth a procedure to comply with **Anders v. California**, 386 U.S. 738, 744, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493 (1967), in which the United States Supreme Court discussed how appellate counsel should proceed when, upon conscientious review of a case, counsel finds an appeal would be wholly frivolous. **Benjamin** has repeatedly been cited with approval by the Louisiana Supreme Court. See **Jyles**, 704 So.2d at 241; **State v. Mouton**, 95-0981 (La. 4/28/95), 653 So.2d 1176, 1177 (per curiam); **State v. Royals**, 600 So.2d 653 (La. 1992).

In the instant case, defense counsel reviewed the procedural history of the case in her brief. She set forth that, after a review of the record in this case, she has found no non-frivolous issues to present on appeal. Defense counsel specifically notes that she considered whether to raise the issue of excessiveness, but ultimately concluded that such a claim would be frivolous. Accordingly, defense counsel requested that she be relieved from further briefing, and she has filed a motion to withdraw.

This court has performed an independent, thorough review of the pleadings, minute entries, bill of information, and transcript in the appellate record. Our independent review reveals no non-frivolous issues or trial court rulings that arguably support his appeal. Accordingly, defendant's conviction and habitual offender

adjudication are affirmed. His sentence is amended and affirmed as amended. Defense counsel's motion to withdraw, which has been held in abeyance pending disposition of this matter, is granted.

**CONVICTION AND HABITUAL OFFENDER ADJUDICATION AFFIRMED;
SENTENCE AMENDED AND AFFIRMED AS AMENDED; MOTION TO WITHDRAW
GRANTED.**