NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 KA 0724

STATE OF LOUISIANA

VERSUS

SIMON FONTENOT, JR.

Judgment Rendered: OCT 2 8 2016

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On Appeal from the
32nd Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Trial Court No. 689,872

The Honorable Juan W. Pickett, Judge Presiding

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BEFORE: PETTIGREW, McDONALD, AND DRAKE, JJ.

DRAKE, J.

The defendant, Simon Fontenot, Jr., was charged by bill of information with aggravated second degree battery, in violation of La. R.S. 14:34.7, and pled not guilty. The trial court denied the defendant's pretrial motion to suppress confession and, after a trial by jury, the defendant was found guilty as charged.[1] The State filed a habitual offender bill of information, and the defendant subsequently denied the allegations set forth therein.[2] The trial court denied the defendant's motion for postverdict judgment of acquittal and motion for new trial. The trial court sentenced the defendant on the original bill of information to fifteen years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. After a hearing on the habitual offender bill of information, the trial court adjudicated the defendant a second-felony habitual offender, vacated the original sentence, and resentenced the defendant to thirty years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The defendant now appeals.

Contending that there are no non-frivolous issues to support the instant appeal, the defense counsel filed a brief on behalf of the defendant raising no assignments of error and requesting a routine patent error review pursuant to La. Code Crim. P. art. 920(2). The defense counsel also filed a motion to withdraw as

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[1] The trial court further denied the defendant's motion for preliminary hearing and motion to appoint a sanity commission. At the pretrial hearing on the defendant's motion to appoint a sanity commission, the trial court questioned the defendant extensively and found no reasonable grounds to doubt his mental capacity to proceed. The motion to appoint a sanity commission was re-urged by the defense on the first day of the trial. The trial court re-questioned the defendant at length and considered the evidence and argument of the attorneys and again found no reasonable grounds to appoint a sanity commission. The trial court also ruled on the motion for preliminary examination on the first day of the trial, noting that when the arrest warrant was issued, probable cause was found to support the charge. The trial court further noted that the defendant's original lawyer initially filed a motion for preliminary examination but abandoned the motion in exchange for open file discovery. The trial court noted that the re-urged motion for preliminary hearing was filed less than two weeks before the trial and reiterated the availability of the State's open file discovery.

[2] The predicate offense was set forth as the defendant's April 10, 2006 guilty plea conviction of possession of methamphetamine, a Schedule II controlled dangerous substance, in violation of La. R.S. 40:967(C). See also La. R.S. 40:964 Schedule II(C)(2).

counsel of record. For the following reasons, we affirm the conviction and habitual offender adjudication, amend the sentence, affirm the sentence as amended, remand with instructions, and grant the defense counsel's motion to withdraw.

STATEMENT OF FACTS

On November 8, 2014, officers of the Terrebonne Parish Sheriff's Office (TPSO) responded to Terrebonne General Medical Center to investigate a report of a battery occurring at the residence of Millard Molitor (the elderly victim and the defendant's stepfather) and his wife, Gladys Molitor (the defendant's mother). The incident was reported by the victim's biological son, John Molitor, who was summoned to the residence by Gladys Molitor (his stepmother), who frantically told him that the defendant was beating up his father. John lived in a trailer next door to his father's house and immediately responded to his stepmother's call. When he entered the residence he noted that his father was in the bathroom bleeding heavily and surrounded by blood, and Gladys was shaking and seemingly in shock. The victim told John that he had an argument with the defendant that escalated into a physical altercation in which the defendant kept punching him and hitting him with a chair.

John drove his father to the hospital and called the Sheriff's Office. Dr. Lee Lenahan and Angela Guillory, the emergency room physician and registered nurse who were present when the victim arrived, testified at the trial and described the victim's severe trauma to the head, face, and chest, including many bruises, a bottom lip abrasion, facial trauma under his right eye that was still bleeding upon arrival, nasal swelling, and ecchymosis to the neck. The victim indicated that the injuries were caused by the defendant repeatedly kicking him in the face. Dr. Lenahan (an expert in emergency and trauma medicine) ordered a CAT scan which showed that the victim suffered a fracture of the zygomatic arch (cheekbone) and a

fracture of the orbital wall (the portion of the skull that holds the eyeball). The injuries were consistent with the victim's account of the incident.

Alexander Allen, a TPSO patrol deputy at the time of the offense, arrived at the emergency room at approximately 9:50 p.m. and met the victim in an examination room. Deputy Allen testified that the victim was severely injured, noting that he had suffered bruises and lacerations on his face and additional bruising, discoloration, and cuts on his forearms, consistent with defensive wounds. Photographs of the victim taken by Deputy Allen in the examination room were consistent with Deputy Allen's trial description of the victim's injuries. Upon determining that the victim's stepson, the defendant, was the suspect in the case, Deputy Allen went to the Molitor residence and took additional photographs. After entering the residence, Deputy Allen noted that it was in disarray and observed a table with an overturned wooden chair nearby with apparent blood spots on the floor. He further noted a blood trail from a couch located towards the back of the residence to the back bathroom, a cloth in the sink saturated with apparent blood, and apparent blood spots on the bathroom floor. While the defendant was not at the residence at that time, Deputy Allen obtained a warrant for his arrest and located him the following evening.

After being advised of his **Miranda**[3] rights, the defendant admitted to having a physical altercation with the victim, and was placed under arrest. The defendant, who was fifty-one years old at the time of the offense, did not have any visible injuries at the time of his arrest. The victim was eighty-two years old at the time of the offense, and his health began to deteriorate after the offense. Dr. Russell Henry (the former Terrebonne General Medical Center Chief of Staff and Medical Director at the time of the trial) also testified at the trial and agreed with

[3] **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

the emergency room diagnosis of blunt head trauma. Dr. Henry (an expert in internal medicine, including causation and diagnosis of stroke and brain injury) confirmed that the victim was brought back to the emergency room on December 22, 2014, and a repeat CAT scan at that time revealed that he had developed a large subdural hematoma. Dr. Henry further explained that the lining of the victim's skull that encircles the brain had accumulated blood since the previous scan. Dr. Henry related the results back to the November 8, 2014 incident. The victim had to undergo a procedure to drain the blood from his skull. The victim came to Dr. Henry's office twice in late January 2015, due to left-sided weakness of the brain and a stroke (permanent injury to his right frontal lobe described as a stroke occurring belatedly as a result of the subdural hematoma). The victim and his wife, Gladys, were deceased at the time of the trial.

ANDERS BRIEF

The defense counsel has filed a brief containing no assignments of error, as well as a motion to withdraw. In the brief and motion to withdraw, referring to the procedures outlined in **State v. Jyles**, 96-2669 (La. 12/12/97), 704 So.2d 241 (per curiam), counsel indicated that after a conscientious and thorough review of the record, he could find no non-frivolous issues to raise on appeal.

The procedure in **Anders v. California**, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), used in Louisiana, was discussed in **State v. Benjamin**, 573 So.2d 528, 529-31 (La. App. 4th Cir. 1990), sanctioned by the Louisiana Supreme Court in **State v. Mouton**, 95-0981 (La. 4/28/95), 653 So.2d 1176, 1177 (per curiam), and expanded by the Louisiana Supreme Court in **Jyles**, 704 So.2d at 242. According to **Anders**, 386 U.S. at 744, 87 S.Ct. at 1400, "if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw." To comply with **Jyles**, appellate counsel must review not only the procedural history of the case and the evidence

presented at trial, but must also provide "a detailed and reviewable assessment for both the defendant and the appellate court of whether the appeal is worth pursuing in the first place." **Jyles**, 704 So.2d at 242 (quoting **Mouton**, 653 So.2d at 1177). When conducting a review for compliance with **Anders**, an appellate court must conduct an independent review of the record to determine whether the appeal is wholly frivolous. **Jyles**, 704 So.2d at 241-42.

Herein, the defense counsel has complied with all the requirements necessary to file an **Anders** brief. The defense counsel has reviewed the procedural history and facts of the case. The defense counsel concludes in his brief that there are no non-frivolous issues for appeal. Further, the defense counsel certifies that the defendant was served with a copy of the **Anders** brief and the motion to withdraw as counsel of record. The defense counsel's motion to withdraw notes that the defendant has been notified of the motion to withdraw and his right to file a pro se brief on his own behalf. The defendant has not filed a pro se brief.

This court has conducted an independent review of the entire record in this matter, including a review for error under La. Code Crim. P. art. 920(2). The defendant was resentenced as a second-felony offender to thirty years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. However, in accordance with subsection C of the underlying statute in this case, La. R.S. 14:34.7, the restriction of parole is only appropriate (at a minimum of one year) if the offender knew or should have known that the victim is an active member of the United States Armed Forces or is a disabled veteran and the aggravated second degree battery was committed because of that status. There is no indication that the victim in this case had a status that would cause the parole restriction to be applicable in this case, and no allegation to that effect was made in the bill of information. Moreover, the habitual offender statute does not preclude

eligibility for parole. See La. R.S. 15:529.1(G). Therefore, the restriction of parole portion of the defendant's sentence is illegal.

An appellate court is authorized to correct an illegal sentence pursuant to La. Code Crim. P. art. 882(A). Ordinarily, when correction of such an error involves sentencing discretion, an appellate court should remand to the trial court for correction of the error. See **State v. Haynes**, 2004-1893 (La. 12/10/04), 889 So.2d 224 (per curiam). However, in the instant case it is clear that the trial court attempted to impose the maximum sentence possible for the defendant's conviction. In doing so, the trial court inadvertently restricted the benefit of parole. Because the trial court's intentions are clear from the record, correction of this error does not involve sentencing discretion. Therefore, we exercise our authority under La. Code Crim. P. art. 882(A) to vacate the trial court's restriction of parole on the defendant's habitual offender sentence. See **State v. Miller**, 96-2040 (La. App. 1st Cir. 11/7/97), 703 So.2d 698, 701, writ denied, 98-0039 (La. 5/15/98), 719 So.2d 459. We have found no other errors under La. Code Crim. P. art. 920(2). Furthermore, our independent review reveals no non-frivolous issues or trial court rulings that arguably support this appeal. Accordingly, we affirm the defendant's conviction and habitual offender adjudication, amend the sentence to vacate the parole restriction, and affirm the sentence as amended. We remand for correction of the minute entry and commitment order, if any, in accordance with this opinion. Defense counsel's motion to withdraw, which has been held in abeyance pending the disposition in this matter, is hereby granted.

CONVICTION AND HABITUAL OFFENDER ADJUDICATION AFFIRMED; SENTENCE AMENDED AND AFFIRMED AS AMENDED; REMANDED WITH INSTRUCTIONS; DEFENSE COUNSEL'S MOTION TO WITHDRAW GRANTED.