NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2003-KA-2143**
VERSUS	*	**COURT OF APPEAL**
DARWIN YARLS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 319-505, SECTION "I"
Honorable Raymond C. Bigelow, Judge
* * * * * *
Judge Patricia Rivet Murray
* * * * * *

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge David S. Gorbaty)

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AFFIRMED

This is defendant-Darwin J. Yarls' second appeal. On his original appeal, we affirmed his armed robbery conviction and fifty year sentence. *State v. Yarls*, 527 So. 2d 385 (La. App. 4 Cir. 1988). Granting Mr. Yarls' subsequent writ application, we remanded for correction of an illegally lenient sentence. *State v. Yarls*, 94-2668 (La. App. 4th Cir. 3/2/95)(unpub.). This second appeal is from the trial court's judgment resentencing Mr. Yarls. The issues raised on this appeal relate solely to resentencing. Finding no error, we affirm Mr. Yarls' sentence.

FACTUAL AND PROCEDURAL BACKGROUND

On August 20, 1987, the jury convicted Mr. Yarls of armed robbery. On September 4, 1987, the trial court sentenced him to fifty years at hard labor. Assigning as his sole error the excessiveness of that sentence, Mr. Yarls appealed. Affirming his conviction and sentence, we reasoned:

> [T]he defendant pointed a gun at the victim and threatened her with her child nearby. The trial court expressly found no mitigating circumstances, but found as aggravating the defendant's long criminal history and the seriousness of this offense. The fifty year sentence is six months more than half of the ninety-nine year

> maximum. There was compliance with Art. 894.1 and we do not find the sentence excessive.

Yarls, 527 So. 2d at 387. We also found no errors patent. *Id.*

The trial court, this court, and the Louisiana Supreme Court all denied Mr. Yarls' applications for post-conviction relief. *State v. Yarls*, 615 So. 2d 450 (La. App. 4th Cir. 1993), *writ denied*, 653 So. 2d 559 (La. 1995). On July 21, 1994, the trial court denied Mr. Yarls' *pro se* Motion to Correct Illegal Sentence. In its judgment denying that motion, the trial court reasoned that the minute entry of September 4, 1987 reflected that Mr. Yarls' sentence was imposed without benefit of parole, probation, or suspension of sentence.

On March 2, 1995, we granted Mr. Yarls' writ application, stating:

> Relator's sentence is illegally lenient. The minute entry of September 4, 1987 reflects that the trial court imposed this sentence without benefit of probation, parole, or suspension of sentence. The sentencing transcript, however, does not contain the prohibition against parole eligibility. Where there is a discrepancy between the minutes and the transcript, the transcript must prevail. *State v. Lynch*, 441 So. 2d 732, 734 (La. 1983). The judgment of July 21, 1994 is vacated. The trial court is ordered to resentence the relator in accordance with *State v. Desdunes*, 579 So. 2d 452 (La. 1991), and *State v. Husband*, 593 So. 2d 1257 (La. 1992).

State v. Yarls, 94-2668 (La. App. 4 Cir. 3/2/95)(unpub.).

On July 7, 1995, the trial court resentenced Mr. Yarls to fifty years at

hard labor without benefit of parole, probation, or suspension of sentence. The minute entry stated that "[t]he court is convinced that the sentencing judge, Judge S. Wimberly, intended to impose the above sentence, but inadvertently omitted 'without the benefit of probation, parole or suspension of sentence.'" Mr. Yarls' counsel objected to the sentence and noted on the record her client's absence from the hearing.

On April 3, 1998, the trial court denied Mr. Yarls' motion to correct an illegal sentence, providing the following reasons in its judgment:

> The sentence in this matter was *amended* to reflect it be served without benefit of parole, probation or suspension of sentence. That *amendment* did not serve to impose a harsher sentence, but rather it accomplished the obvious intentions of the original sentencing judge. Additionally, it brought the sentence in compliance with the statute under which defendant was convicted. (Emphasis supplied.)

Mr. Yarls then requested an out-of-time appeal from the July 7, 1995 judgment. On April 24, 2003, the trial court granted that motion. This appeal followed.

DISCUSSION

Complying with the procedures outlined in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), as interpreted by this Court

in *State v. Benjamin*, 573 So. 2d 528 (La. App. 4th Cir. 1990), Mr. Yarls' appellate counsel filed a brief requesting a review for errors patent. Counsel's brief also complied with the requirements enunciated in *State v. Jyles*, 96-2669 (La. 12/12/97), 704 So. 2d 241, which requires counsel's brief contain "`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*, 96-2669, p. 3, 704 So. 2d at 242. Counsel's detailed review of the procedural history and facts of the case reflect her thorough review of the record. Because she believed, after a conscientious review of the record, including available transcripts, that there is no non-frivolous issue for appeal, counsel filed a motion to withdraw. A copy of counsel's brief was forwarded to Mr. Yarls, and he was informed of his right to file a brief in his own behalf.

In response, Mr. Yarls filed a *pro se* brief assigning two errors regarding his resentencing; to wit:

> (1) The imposition of sentence in this case without the appellant being present is a violation of both his State and Federal constitutional and statutory rights.
>
> (2) The district court's failure to properly make a determination of the intent of the original sentencing judge, and to follow the

> criteria of *State v. Desdunes,* 579 So. 2d 452 (La. 1991), and *State v. Husband*, 593 So. 2d 1257 (La. 1992), represents an abuse of the court's discretion and sufficiently implies a presumption of vindictiveness upon resentencing.

In his first assignment of error, Mr. Yarls contends that the trial court erred in resentencing him on July 7, 1995, in his absence. He argues that in resentencing him in his absence the trial judge violated La. C.Cr. P. art. 835, which provides:

> 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.

La. C. Cr. P. art. 835 (emphasis supplied). Despite the mandatory language requiring a defendant's presence, Article 835 has been construed as inapplicable when a trial court merely corrects a previously imposed illegal sentence. *State v. McIntyre,* 567 So. 2d 800, 801 (La. App. 3rd Cir. 1990)(citing *State v. Champagne,* 506 So. 2d 1377, 1378 (La. App. 3rd Cir. 1987)). Such is the case here.

Moreover, as counsel points out in her *Anders* brief, appellate courts no longer remand for correction of illegally lenient sentences when the sentencing court has failed to order that such sentences be served without benefit of probation, parole, or suspension of sentence. Rather, La. R.S. 15:301.1(A), which became effective August 15,

1999, deems such illegally lenient sentences to include statutorily mandated prohibitions against parole, probation, or suspension of sentence, regardless of whether the trial court pronounced them. *State v. Williams*, 2000-1725 (La. 11/28/01), 800 So. 2d 790. In *Williams, supra,* the Louisiana Supreme Court also construed this statute as applying retroactively to sentences imposed before its effective date. The court also construed the 180-day time limitation contained in this statute, La. R.S. 15:301.1(D), as inapplicable to the self-activitating corrections provided for under La. R.S. 15:301.1(A). *Id.*

Although Mr. Yarls attempts to distinguish his situation by arguing that he was both sentenced and resentenced before the Legislature enacted La. R.S. 15:301.1(A), we find that a distinction without a difference. The ministerial nature of the resentencing at issue here involved a *pro forma* correction of an illegal sentence. *See Williams*, 2000-1725 at pp. 9-10, 800 So. 2d at 798. We thus find no error in the trial court's resentencing Mr. Yarls without him being physically present.

Mr. Yarls' second assignment of error is that the trial court failed to properly determine the original sentencing judge's intent and failed to follow the criteria in *Desdunes* and *Husband.* Stated otherwise, Mr. Yarls' argument, based on *Husband, supra,* is that at his resentencing hearing the

trial court should have—but did not—make an independent determination regarding his sentence and should have considered mitigating events that occurred since the sentence was imposed. Continuing, he contends that these failures resulted in a presumption of vindictiveness upon resentencing.

In *State v. Harris*, 93-1098, 94-2243 (La. 1/5/96), 665 So. 2d 1164, the Louisiana State Supreme Court overruled in part both *Desdunes, supra*, and *Husband, supra*, stating:

> In the absence of an articulable basis for concluding that the district court imposed sentence under a misapprehension of what the law required or of its full range of sentencing discretion, we will presume that the failure of the court expressly to impose the special restriction required by law (e.g. parole disability) presents the need only for *ministerial correction* of the record.

Harris, 93-1098, 94-2243 at p. 1, 665 So. 2d at 1164 (Emphasis supplied). Under *Harris*, "[t]he presumption is that the judge knew what the law was and understood his range of discretion, but made a simple ministerial error, which can be corrected by a minute entry. Ginger Roberts Berrigan, *Louisiana Criminal Trial Practice*, §26-9 (3rd ed. 1998)(citing *Harris, supra*). "If the judge is different than the predecessor judge, the latter judge may make the same ministerial correction unless there is a reasonable doubt as to the intent of the original judge." *Id.* "If the judge does harbor such a doubt, he is to try to glean the intent of the original judge and resentence

accordingly." *Berrigan, supra* (citing *Desdunes, supra,* and *Husband, supra,* and noting that both of those cases were overruled in part by *Harris, supra*). But, the judge "may not substitute his own view as to the appropriate penalty or correct what he perceives to be an excessive sentence." *Berrigan, supra* (citing *State v. Johnson,* 98-0275 (La. 2/4/98), 704 So. 2d 1172).

Illustrative, in *State v. Wilson,* 96-0710 (La. App. 4 Cir. 11/20/96), 684 So. 2d 495, we affirmed a trial court's decision resentencing a defendant's sentence in response to a motion to correct an illegal sentence by adding a statutory prohbition denying eligibility for parole, probation, or suspension of sentence. In so doing, we noted our agreement with the state's argument that the defendant was limited to arguing the issue of the intent of the original sentencing judge as to eligibility of benefits and was precluded from arguing the excessiveness of the sentence originally imposed. We further noted that the resentencing judge simply made a ministerial correction to defendant's sentence and did not impose an entirely new sentence. We still further noted that the resentencing judge was not required to state reasons for the sentence he imposed; rather, he was only required to state if had a reasonable doubt as to the predecessor judge's intent to impose the sentence without benefits. Given the resentencing transcript was silent

on this issue, we requested a per curiam from the resentencing judge; the judge's per curiam stated that he had no doubt regarding his predecessor's intent and that his predecessor's failure to impose that limitation was simply an oversight or a good faith error. We therefore affirmed.

By analogy, the resentencing judge in this case expressly stated that he was "convinced" that the predecessor judge intended Mr. Yarls' sentence to be served without benefits, but inadvertently omitted the language "without the benefit of probation, parole or suspension of sentence." As we noted in *Wilson, supra,* this was the only issue before us. We thus find Mr. Yarls' argument unpersuasive.

Finally, Mr. Yarls suggests that the trial court's resentencing of him without benefits resulted in a more severe and a vindictive sentence. This argument is belied by the Louisiana Supreme Court's reasoning in *Williams, supra*; to wit:

> It is readily apparent that a significant distinction may be drawn between vindictiveness which, after appeal, increases a defendant's sentencing exposure or increases a legal sentence, and the *pro forma* correction of an illegal sentence. When an illegal sentence is corrected, even though the corrected sentence is more onerous, there is no violation of the defendant's constitutional rights.

2000-1725, p. 9-10, 800 So. 2d at 798. Again, as noted above, this case involved solely a *pro forma* correction of an illegal sentence. We thus find

this argument unpersuasive.

As required by *Benjamin*, *supra*, we performed an independent review of the appeal record and of the *Anders* brief filed by appellate counsel and the *pro se* brief filed by Mr. Yarls. Based on our review, we find Mr. Yarls' sentence legal in all respects. We further find no non-frivolous issue and no trial court ruling that arguably supports the appeal.

DECREE

For the forgoing reasons, we find appellate counsel has complied with *Anders* and grant her motion to withdraw. We affirm Mr. Yarls' sentence.

AFFIRMED