NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2004-KA-1156**
VERSUS	*	**COURT OF APPEAL**
WESLEY WILSON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 397-459, SECTION "B"
Honorable Lynda Van Davis, Judge
* * * * * *
Judge Edwin A. Lombard
* * * * * *

(Court composed of Judge Terri F. Love, Judge Edwin A. Lombard, Judge Roland L. Belsome)

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AFFIRMED

This appeal concerns a resentencing only. Finding no error, we affirm.

RELEVANT FACTS AND PROCEDURAL HISTORY

Wesley Wilson was convicted of distribution of cocaine and possession of cocaine with intent to distribute after a jury trial on May 19, 1999. On August 4, 1999, he was sentenced as a third offender to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence on each count with the sentences to be served concurrently. He appealed, and this Court affirmed his convictions and vacated his sentences. *State v. Wilson*, 2000-1736 (La. App. 4 Cir. 11/14/01), 803 So. 2d 102, *writ denied*, 2001-3279 (La. 9/30/02), 825 So. 2d 1191. The defendant was resentenced on November 20, 2002, to serve forty years on each count. He sought review of the trial court's denial of his motion to reconsider, arguing that the trial court erred in sentencing him as a multiple offender on both counts. This Court granted his writ and again vacated his sentences, remanding the case for resentencing. *State v. Wilson*,

2003-1330 (La. App. 4 Cir. 9/19/03). He was resentenced on January 27, 2004, to serve forty years as a third felony offender on count one and to serve thirty years on count two; the sentences are to run concurrently.

He now appeals his sentences, arguing that (1) the trial court erred in resentencing him without another hearing as to his status as a multiple offender and (2) his sentences are excessive.

The facts of the case as presented in the first appeal are as follows:

> On March 26, 1998, at approximately 3:00 p.m., Officer Tommy Mercadel was working in an undercover capacity when he passed the corner of Saint Anthony and Derbigny Streets. The co-defendant flagged him down. Mercadel asked for a twenty. The co-defendant walked over to the defendant, returned to Mercadel, took a marked twenty dollar bill from him, exchanged something with the defendant, returned to Mercadel, and gave him a rock of cocaine. Mercadel's car was equipped with a radio transmitter, and Mercadel broadcast a description of the defendant and co-defendant. Mercadel said although the car had video equipment, he did not videotape the transaction. He identified pictures of the defendant and co-defendant taken immediately after the transaction and arrest.
>
> Officer Clarence Gillard followed Mercadel and observed the transaction from a distance. He saw the co-defendant give the money to defendant after Mercadel drove away. He also gave a description of the defendant and the co-defendant to the take down unit. He identified the men in the photographs.
>
> Take down officers moved in. The co-defendant was at the time leaning into a car occupied by Ashante Wright and a baby. After the

> defendant and the co-defendant were detained, the defendant was found to be in possession of the marked bill. After he was arrested and advised of his rights, officers took him to an alley and had him lower his pants. They could see a clear plastic bag hidden under his testicles. Officer Dwight Rousseve reached in and took the bag that contained seven pieces of crack cocaine.
>
> Nothing was seized from the co-defendant.
>
> Ashante Wright said she was the defendant's girlfriend. She did not know the co-defendant. On the day in question, she and the defendant went to St. Anthony's Store to buy diapers for the child. Outside the store, the co-defendant passed them and asked for change for a twenty-dollar bill. He gave her the twenty-dollar bill, but before she could give him change, the police rushed in, took the bill out of her pocket, and arrested the men. She said that officers threatened her the day of the trial.
>
> Tameki Harrell said she heard the officers threaten Wright.

State v. Wilson, 2000-1736, pp. 1-3 (La. App. 4 Cir. 11/14/04), 803 So. 2d 102, pp. 104-105.

ERRORS PATENT

The commitment form of January 27, 2004, lists the defendant's sentences as forty years on count one and twenty years on count two. The transcript of the hearing indicates that Mr. Wilson was sentenced on count two to serve thirty years. When there are discrepancies between a transcript and a minute entry or commitment form, the transcript prevails. *State v. Fenner*, 94-1498 (La. App. 4 Cir. 11/16/95), 664 So.2d 1315; *State v.*

Boudreaux, 95-153 (La. App. 5th Cir. 9/20/95), 662 So.2d 22. It is ordered that Wesley Wilson's commitment form be corrected to show that his sentence on count two is thirty years.

Additionally, the record also reveals a potential error patent in the sentence. In 1998 the statute governing sentencing on distribution of cocaine convictions, La. R.S. 40:967(B)(4)(b), required that such sentences be imposed without benefit of parole, probation, or suspension of sentence for the first five years. The thirty-year term the defendant received on count two should have been so imposed. The Habitual Offender Statute, La. R.S. 15:529.1(G), prohibits the benefits of probation or suspension of sentence. Thus, the defendant's sentence on count one should also have been imposed without benefit of parole for the first five years and without benefit of probation or suspension of sentence for the entire term. No such prohibitions were imposed in this case. However, he has already served the first five years of his sentences without parole. Furthermore, under La. R.S. 15:301.1 when statutory restrictions are not recited at sentencing, they are contained in the sentence, whether or not imposed by the sentencing court. Hence, this Court need take no action to correct the trial court's failure to specify that the defendant's sentences be served without benefits.

LAW AND DISCUSSION

In his first assignment of error, the defendant maintains that the trial court erred in sentencing him as a multiple offender. He makes several arguments. First, he claims that on November 7, 2003, this Court found that the multiple bill was defective, and thus, Mr. Wilson should have had another multiple bill hearing before being sentenced. The defendant refers to the supervisory writ granted on November 7, 2003. There the defendant argued (1) that his sentence was excessive, (2) that the judge erred in sentencing him under the multiple offender statute on both counts, and (3) that his counsel was ineffective for failing to object to the sentence. This Court, finding merit in the second assignment, held:

> The district court's judgment denying relator's motion to reconsider sentence is reversed. On November 20, 2002, relator was resentenced under the multiple bill statute to serve forty years on each count to run concurrently. In the instant case, the offenses arose out of a single transaction. The district attorney multiple billed relator on both counts, and the trial court erroneously enhanced both sentences. Accordingly, relator's *sentence is vacated*, and the district court is ordered to resentence relator within sixty days of this order. As proof of compliance the district court is ordered to furnish this court with a copy of the minute entry evidencing resentencing and a copy of the new commitment order. [Emphasis added].

State v. Wilson, 2003-1330 (La. App. 4 Cir. 11/7/04). (Record, Vol. I, p. 102).

Although defendant contends that his multiple bill was found to be defective, the writ indicates that this Court simply vacated his sentence(s) and remanded the case for resentencing. There is no evidence that this Court found the multiple bill defective and vacated it.

In his statement of the case, the defendant maintains that on January 27, 2004, the State acknowledged that the multiple bill was defective by amending it. However, at that time the State simply deleted the second count, possession of cocaine with intent to distribute, from the multiple bill so that the defendant would be charged as a multiple offender only on the first count of his most current offenses. At the hearing, the defense attorney objected to the bill as defective, and the judge correctly pointed out that this Court had ordered only a resentencing of the defendant, and she intended to do only that.

At the multiple offender hearing in *State v. Mitchell*, 278 So. 2d 48 (La. 1973), the record of the defendant's prior conviction indicated the defendant pleaded guilty to "theft" but the bill of information charging the defendant as a multiple offender provided showed that he pleaded guilty to "simple burglary." When the trial judge allowed the State to amend the bill of information to change the "simple burglary" to "theft," the defendant objected. The Supreme Court found that no error occurred in allowing the

amendment and noted that the defendant was not prejudiced by this action.

In the case at bar, the amendment simply reduced the counts in the multiple bill, and the defendant's sentence on the second count was lessened by the action. Thus, there was no prejudice to the defendant. This Court had not vacated the defendant's status as a multiple offender.

He also argues that at his sentencing on January 27, 2004, he denied allegations in the bill and asked to have a multiple bill hearing where he could contest the charges. The allegations in the multiple bill of information were proved on August 4, 1999. In a pro se assignment of error in his first appeal, the defendant argued he should not have been found to be a third offender. This Court considered the argument then and found it meritless. *State v. Wilson*, 803 So. 2d at 111. Thus, at the January 27, 2004 hearing the defendant did not have a right to contest his multiple bill. His sentences were the only issues to be decided at that point. This assignment has no merit.

The defendant next argues that the judge did not follow the guidelines under La. C.Cr.P. art. 894.1 in imposing his sentences and, thus, both the forty-year multiple bill sentence and the thirty-year term are excessive.

In 1998 under La. R.S. 40:967(A), Mr. Wilson faced a sentence of life imprisonment as a third felony offender on count one and a term of five to

thirty years on count two. At his first sentencing in 1999, he received two life terms. When he was resentenced in 2002, the trial court took into consideration the fact that the penalty for third offenders such as the defendant had been changed; under the new law, a similarly charged defendant would face a multiple offender sentence of twenty to sixty years. The defendant was then sentenced to a term of forty years because, as the judge declared in his reasons, Mr. Wilson was not the worst kind of offender.

At the sentencing hearing of November 20, 2002, the defendant was given a chance to enumerate the mitigating factors in his case. Mr. Wilson told the court of his accomplishments at Angola and his contrition for his past offenses. He claimed that he had learned to be a productive person and wanted a lesser sentence in order to prove that he could live a crime-free life in society. Under cross-examination he was asked if he had not had a chance to take advantage of jail time after his first two convictions, and he answered that he had finally learned his lesson. The judge stated that under the law at the time of Mr. Wilson's crimes, the penalty was life in prison, but because of the facts of this case, he would sentence the defendant to a lesser term of forty years as a triple offender.

Article I, § 20 of the Louisiana Constitution of 1974 provides that "[n]

o law shall subject any person . . . to cruel, excessive or unusual punishment." A sentence, although within the statutory limits, is constitutionally excessive if it is "grossly out of proportion to the severity of the crime" or is "nothing more than the purposeless and needless imposition of pain and suffering." *State v. Caston*, 477 So. 2d 868, 871 (La. App. 4 Cir. 1985). However, the penalties provided by the legislature reflect the degree to which the criminal conduct is an affront to society. *State v. Brady*, 97-1095 (La. App. 4 Cir. 2/3/99), 727 So. 2d 1264.

Generally, a reviewing court must determine whether the trial judge adequately complied with the sentencing guidelines set forth in La. C.Cr.P. art. 894.1 and whether the sentence is warranted in light of the particular circumstances of the case. *State v. Black*, 98-0457, p. 8 (La. App. 4 Cir. 3/22/00), 757 So. 2d 887, 892. If adequate compliance with Article 894.1 is found, the reviewing court must determine whether the sentence imposed is too severe in light of the particular defendant and the circumstances of his case. *State v. Caston*, 477 So. 2d at 871. The reviewing court must also keep in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged. *State v. Quebedeaux*, 424 So. 2d 1009, 1014 (La. 1982).

The trial court has great discretion in sentencing within the statutory

limits. *State v. Trahan*, 425 So. 2d 1222 (La. 1983). The reviewing court shall not set aside a sentence for excessiveness if the record supports the sentence imposed. La. C.Cr.P. art. 881.4 (D).

At his most recent sentencing in 2004, the judge did not refer to the sentencing guidelines under La. C.Cr.P. art. 894.1. However, the defendant had benefited by receiving a sentence which was less than the statutory minimum when he was sentenced in 2002. He now maintains he should be given another windfall. He offers no reasons for another reduction in his sentences. The defendant was convicted of selling cocaine to an undercover officer and possession of seven additional rocks of cocaine in 1998; his prior offenses were possession of cocaine in 1994, and possession of stolen property worth more than $500 in 1990. His four offenses in an eight-year period indicate an inability to conform to society's norms. As the trial judge stated, he is not the worst kind of offender, yet the reasons he offered in 2002 for lessening his term are better considered by the parole board than by this Court. The defendant failed to show that he is exceptional and/or that unusual circumstances indicate that he should benefit from another downward departure in his sentences. There is no merit to this assignment of error.

Accordingly, the defendant's sentences are affirmed.

AFFIRMED