NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2007-KA-1474**
VERSUS	*	**COURT OF APPEAL**
KEVIN WASHINGTON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 371-478, SECTION "D"
Honorable Frank A. Marullo, Judge
* * * * * *
Judge David S. Gorbaty
* * * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Terri F. Love, Judge David S. Gorbaty)

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MOTION TO WITHDRAW GRANTED; SENTENCE VACATED;

REMANDED

By bill of information filed August 17, 1994, the defendant was charged with eleven counts of armed robbery. On November 12, 1996, the State elected to try the defendant on counts one, two, six, seven, and eight. After a jury trial, he was acquitted on count six and found guilty as charged on the remaining counts. On December 5, 1996 the defendant was sentenced on each count to serve ninety-nine years at hard labor without benefit of parole. A multiple-bill hearing was held on July 29, 1997, and he was adjudicated a third felony offender. The district court vacated the previous sentence imposed on count two and resentenced the defendant to serve ninety-nine years at hard labor without benefit of parole. This court affirmed the convictions. The sentences were vacated, and the matter was remanded for resentencing. State v. Washington, 98-0583 (La. App. 4 Cir. 11/17/99), 747 So.2d 1191, writ denied, 2000-0365 (La. 9/15/00), 768 So.2d 1277. On January 27, 2000 the district court resentenced the defendant on each count to serve ninety-nine years at hard labor without benefit of parole.

According to the judgment attached to counsel's brief, on January 26, 2004 the U.S. District Court (CA 02-3529 H) ordered that the defendant's adjudication as a third felony offender be set aside and that the State conduct a new multiple

offender proceeding or have the defendant resentenced as a second offender by April 22, 2004. According to the April 19, 2004 transcript, on that date, the trial court vacated the sentence as a third felony offender on count two and resentenced the defendant as a second felony offender to ninety-nine years at hard labor. The defendant *pro se* asked for a motion for an appeal, but the State indicated that the multiple bills and excessive sentence claims had been litigated all the way to the Supreme Court and that there was nothing left to appeal. The record contains motions for out-of-time appeal and designation of record (one is dated July 19, 2007). According to a July 19, 2007 transcript contained in the record, on that date defense counsel put on the record that he was filing a motion for appeal as to the defendant's resentencing. The notice of appeal is dated July 19, 2007. The record was lodged here on November 13, 2007.

FACTS

The facts are not relevant here. This is an appeal of the defendant's April 19, 2004 resentencing. A summary of the facts may be found in the defendant's previous appeal opinion, State v. Washington, 98-0583, pp. 2-8, 747 So.2d at 1193-96.

DISCUSSION

***PRO SE* SUPPLEMENTAL ASSIGNMENT OF ERROR NUMBER 1**

The defendant argues that the trial court erred by failing to hold a new hearing relating to his multiple offender adjudication. He contends that the State was required to file a new multiple bill after the federal district court vacated his sentence as a third felony offender. The defendant also claims that he was without counsel at the resentencing.

According to the judgment of the U.S. District Court dated January 26, 2004, the court ordered that "the adjudication of the petitioner as a third felony offender is hereby set aside." The federal court went on to state that "no later than April 22, 2004, the state must either conduct a new multiple offender proceeding with respect to the 1987 attempted simple burglary conviction or resentence petitioner as a second felony offender." The federal court clearly indicated that it had a problem with only one predicate offense; therefore, the defendant, who had been proven to be a second offender (but not a third), could legally be resentenced as a second felony offender. There was no need for a new multiple bill or a new hearing because the State was not attempting to prove the second predicate offense, the 1987 attempted simple burglary conviction from Jefferson Parish, in order to have the defendant adjudicated a third felony offender. The defendant was to be resentenced as a second felony offender. This argument lacks merit.

The defendant claims that he was completely without counsel during the April 19, 2004 resentencing. He concludes his argument by stating that he was not provided his Sixth Amendment right to counsel at the resentencing. The April 19, 2004 docket master entry indicates that the defendant appeared with counsel, Derek Honore; the record does not contain a minute entry for that date. Regardless, according to the April 19, 2004 transcript, the defendant and the assistant district attorney appeared. After the trial court imposed sentence, the defendant himself asked for a motion for a new appeal. No defense counsel was present. Where there is a conflict between the transcript and the minute entry, the transcript controls. State v. Rideau, 2005-0462, p. 34 (La. App. 4 Cir. 12/6/06), 947 So.2d 127, 147; State v. Kirkling, 2004-1906, pp. 9-10 (La. App. 4 Cir.

5/18/05), 904 So.2d 786, 792, writ denied, 2005-2045 (La. 6/23/06), 930 So.2d 972.

In State v. Hall, 1999-2887, p. 16 (La. App. 4 Cir. 10/4/00), 775 So.2d 52, 62-63, this Court stated the settled law as to a sentence imposed in the absence of counsel:

> La. Const. art. I, § 13 recognizes the right to the assistance of counsel at every stage of the proceedings against a person accused of a crime. *State v. White,* 325 So.2d 584, 585 (La.1976). Likewise, the constitutional right to the assistance of counsel provided by the Sixth Amendment of the United States Constitution mandates the right, unless waived, to the assistance of counsel at every critical stage of the proceedings, including an initial or deferred sentencing. *McConnell v. Rhay,* 393 U.S. 2, 89 S.Ct. 32, 21 L.Ed.2d 2 (1968). Unless a defendant has made a knowing and intelligent waiver of his right to counsel, any sentence imposed in the absence of counsel is invalid and must be set aside. *State v. Williams,* 374 So.2d 1215, 1217 (La.1979).

There is no indication in the April 19, 2004 transcript that the defendant waived his right to counsel. Therefore, the sentence imposed is invalid and must be vacated.

ASSIGNMENT OF ERROR NUMBER 1;
PRO SE ASSIGNMENT OF ERROR NUMBER 2

The defendant requests a review of the record for errors patent. Counsel for the defendant purportedly complied with the procedures outlined by Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), as interpreted by this Court in State v. Benjamin, 573 So.2d 528 (La. App. 4 Cir. 1990). Counsel has filed a brief complying with State v. Jyles, 96-2669 (La. 12/12/97), 704 So.2d 241. Counsel provides a detailed review of the procedural history of the case and a notation that a recitation of the facts could be found in the defendant's appeals affirming his convictions. Counsel moves to withdraw because she believes, after a conscientious review of the record, that there is no non-frivolous issue for appeal

of the resentencing. A copy of the brief was forwarded to the defendant, and he requested the record and filed a pro se brief in his own behalf.

In brief, counsel considered the potential issue relating to the severe sentence, but quoted from this Court's decision in State v. Washington, 747 So.2d at 1191, where this Court set out the defendant's prior criminal record and the robbery spree which led to these charges. This Court concluded that the sentences were not excessive: "The defendant is within the class of the most egregious violators and should receive the maximum. The sentences imposed by the trial court are not unconstitutionally excessive." Id. at pp. 16-17, 747 So.2d at 1199-1200.

As per State v. Benjamin, an independent, thorough review of the docket master, minute entries, and resentencing transcript in the appeal record has been made. The ninety-nine year sentence as a second felony offender was legal. The defendant was present at the April 19, 2004 resentencing; however, counsel was not present. According to the transcript, the defendant himself moved for a new appeal after being resentenced. We note that appellate counsel does not mention the fact that the defendant had no counsel at the resentencing. We vacate the April 19, 2004 sentence and remand for resentencing. Further, we grant the motion to withdraw.

CONCLUSION

Accordingly, for the foregoing reasons, we vacate the sentence imposed, and remand this matter for resentencing. Further, we grant counsel's motion to withdraw.

MOTION TO WITHDRAW GRANTED; SENTENCE VACATED; REMANDED