STATE OF LOUISIANA

VERSUS

JOHNNY BEASON

NO. 17-KA-254

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 15-1984, DIVISION "I"
HONORABLE NANCY A. MILLER, JUDGE PRESIDING

November 15, 2017

JUDE G. GRAVOIS
JUDGE

Panel composed of Judges Jude G. Gravois,
Robert A. Chaisson, and Stephen J. Windhorst

RESENTENCINGS AFFIRMED; MOTION TO WITHDRAW GRANTED; REMANDED FOR CORRECTION OF COMMITMENTS AND UNIFORM COMMITMENT ORDERS

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GRAVOIS, J.

Defendant/appellant, Johnny Beason, filed this appeal regarding his resentencings on remand from this Court. His appointed appellate counsel has filed a brief in accordance with the procedures adopted by this Court in *State v. Bradford*, 95-929 (La. App. 5 Cir. 6/25/96), 676 So.2d 1108, 1110-11,[1] and a motion to withdraw as attorney of record for defendant. After thorough review, we affirm defendant's resentencings and grant appointed appellate counsel's motion to withdraw as attorney of record for defendant. We further remand the matter to the district court for correction of the commitments and Uniform Commitment Orders as described below.

PROCEDURAL HISTORY

This is defendant's second appeal.

Defendant was charged with and convicted of two counts of distribution of cocaine within 2,000 feet of a drug free zone, namely, Jesse Owens Playground, violations of La. R.S. 40:981.3. The trial court sentenced defendant to forty-five years imprisonment at hard labor on each count, with the first two years of the sentences to be served without the benefit of probation, parole, or suspension of sentence, with the sentences to run concurrently with each other. On March 17, 2016, defendant was adjudicated as a second felony offender, whereupon the trial court vacated his sentence on count one and imposed an enhanced sentence of sixty years imprisonment at hard labor without the benefit of probation or suspension of sentence, to be served concurrently with his sentence on count two.[2]

In defendant's first appeal, this Court found that the evidence was insufficient to support his convictions under La. R.S. 40:981.3; however, it found

[1] In *Bradford*, *supra*, this Court adopted the procedures outlined in *State v. Benjamin*, 573 So.2d 528, 530 (La. App. 4th Cir. 1990), which were sanctioned by the Louisiana Supreme Court in *State v. Mouton*, 95-0981 (La. 4/28/95), 653 So.2d 1176, 1177 (per curiam).

[2] *See State v. Beason*, 16-195 (La. App. 5 Cir. 12/7/16), 204 So.3d 1206, 1208.

that the evidence was nonetheless sufficient to convince a rational trier of fact beyond a reasonable doubt that defendant was guilty of the lesser included responsive offense of distribution of cocaine under La. R.S. 40:967(A)(1). Accordingly, this Court vacated defendant's convictions of distribution of cocaine within two thousand feet of a drug free zone under La. R.S. 40:981.3 and rendered a judgment of conviction on two counts of the lesser included responsive offense of distribution of cocaine under La. R.S. 40:967(A)(1). This Court affirmed defendant's adjudication as a second felony offender, vacated defendant's habitual offender sentence on count one and his original sentence on count two, and remanded this case to the district court for resentencing.[3]

On January 19, 2017, pursuant to this Court's opinion, the trial court resentenced defendant to thirty years imprisonment at hard labor on each count, with the first two years of the sentences to be served without the benefit of probation, parole, or suspension of sentence, and ordered that these sentences run concurrently with each other. Subsequently, on January 23, 2017, the trial court resentenced defendant under La. R.S. 15:529.1. The trial court vacated defendant's sentence on count one and imposed an enhanced sentence of forty-five years imprisonment at hard labor, to run concurrently with his sentence on count two.

On January 24, 2017, defendant filed a motion for reconsideration of sentence and a motion for appeal, and the motion for appeal was granted. On April 6, 2017, the trial court found that it was without jurisdiction to rule on the motion to reconsider as it had already granted an appeal in this case. On May 18, 2017, this Court ordered that the trial court rule on defendant's motion to reconsider sentence. Thereafter, on May 22, 2017, the trial court denied defendant's motion to reconsider sentence. This appeal followed.

[3] *Id.*, at 1212.

FACTS

The underlying facts of the case are not relevant to defendant's second appeal. Nevertheless, a full narrative can be found in this Court's previous opinion regarding defendant's first appeal. *See State v. Beason*, *supra*.

***ANDERS* BRIEF**

Under the procedure adopted by this Court in *State v. Bradford*, *supra*, 676 So.2d at 1110-11, appointed appellate counsel has filed a brief asserting that she has thoroughly reviewed the trial court record and cannot find any non-frivolous issues to raise on appeal. Accordingly, pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) and *State v. Jyles*, 96-2669 (La. 12/12/97), 704 So.2d 241 (per curiam), appointed counsel requests permission to withdraw as attorney of record for defendant.

In *Anders*, *supra*, the United States Supreme Court stated that appointed appellate counsel may request permission to withdraw if she finds her case to be wholly frivolous after a conscientious examination of it.[4] The request must be accompanied by "'a brief referring to anything in the record that might arguably support the appeal'" so as to provide the reviewing court "with a basis for determining whether appointed counsel have fully performed their duty to support their clients' appeals to the best of their ability" and to assist the reviewing court "in making the critical determination whether the appeal is indeed so frivolous that counsel should be permitted to withdraw." *McCoy v. Court of Appeals of Wisconsin, Dist. 1*, 486 U.S. 429, 439, 108 S.Ct. 1895, 1902, 100 L.Ed.2d 440 (1988).

In *Jyles*, 704 So.2d at 241, the Louisiana Supreme Court stated that an *Anders* brief need not tediously catalog every meritless pretrial motion or objection

[4] The United States Supreme Court reiterated *Anders* in *Smith v. Robbins*, 528 U.S. 259, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000).

made at trial with a detailed explanation of why the motions or objections lack merit. The Supreme Court explained that an *Anders* brief must demonstrate by full discussion and analysis that appellate counsel "has cast an advocate's eye over the trial record and considered whether any ruling made by the trial court, subject to the contemporaneous objection rule, had a significant, adverse impact on shaping the evidence presented to the jury for its consideration." *Id.*

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. *Bradford*, *supra*, 676 So.2d at 1110. If, after an independent review, the reviewing court determines there are no non-frivolous issues for appeal, it may grant counsel's motion to withdraw and affirm the defendant's conviction and sentence. However, if the court finds any legal point arguable on the merits, it may either deny the motion and order the court-appointed attorney to file a brief arguing the legal point(s) identified by the court, or grant the motion and appoint substitute appellate counsel. *Id.*

ANALYSIS

Defendant's appellate counsel asserts that after a detailed review of the record, she could find no non-frivolous issues to raise on appeal. Appellate counsel avers that there is no ruling of the trial court to be challenged. Appellate counsel admits that she considered raising an issue of excessiveness of sentence, but felt such a claim would be frivolous. Defendant was sentenced to a lesser sentence based on the lessor included conviction upheld by this Court and within the new sentencing range as a second felony offender. Therefore, the sentence of forty-five years would not be considered unconstitutionally excessive, although she contends that it may shock the conscience as a virtual life sentence for two drug sales.

Appellate counsel has filed a motion to withdraw as attorney of record for defendant which states she has filed an *Anders* brief and that defendant has a right to file his own brief in this appeal. Additionally, this Court sent defendant a letter by certified mail informing him that an *Anders* brief had been filed on his behalf and that he had until July 9, 2017 to file a *pro se* supplemental brief. Defendant has not filed a brief as of the date of this opinion.

The State responds that the brief filed by appellate counsel shows a conscientious and thorough review of the procedural history of the case with references to the record. It further asserted that appellate counsel had "cast an advocate's eye" over the record and determined that there were no non-frivolous issues to raise on appeal. The State agrees with appellate counsel in that there is no ruling of the trial court that can be challenged. The State avers that the trial court already sentenced defendant to a lesser sentence based on the evidence and upheld the ruling on the habitual offender bill. The State contends that the forty-five-year sentence is not unconstitutionally excessive because the sentences were within the statutory limits.

An independent review of the record supports appellate counsel's assertion that there are no non-frivolous issues to be raised on appeal.

It is first noted that in this second appeal, defendant may only seek review of issues related to his resentencing. *See State v. Torres*, 05-260 (La. App. 5 Cir. 11/29/05), 919 So.2d 730, 733, *writ denied*, 06-0697 (La. 10/6/06), 938 So.2d 65. It is also noted that defendant was resentenced in compliance with this Court's order in defendant's first appeal. *See State v. Beason*, *supra.*

The record shows that defendant was present at his resentencing on January 19, 2017, and his enhanced sentencing on January 23, 2017, and was represented by counsel. Defendant was properly sentenced in accordance with La. R.S. 40:967(A)(1), and his sentences fall within the sentencing range as set forth in La.

R.S. 40:967(A)(1).[5] Defendant's enhanced sentence also falls within the sentencing range as set forth in La. R.S. 15:529.1[6] and La. R.S. 40:967. Although appellate counsel notes that defendant's sentence would not be considered unconstitutionally excessive,[7] she does state that his forty-five-year sentence may shock the conscience as a virtual life sentence for two drug sales. However, upon review, we find that the trial court did not abuse its broad sentencing discretion and that defendant's sentences are supported by the record.

Because appellate counsel's brief adequately demonstrates by full discussion and analysis that she has reviewed the trial court proceedings and cannot identify any basis for a non-frivolous appeal and an independent review of the record supports counsel's assertion, appellate counsel's motion to withdraw as attorney of record for defendant is hereby granted.

ERRORS PATENT REVIEW[8]

Defendant requests an errors patent review. However, this Court routinely reviews the record for errors patent in accordance with La. C.Cr.P. art. 920, *State v. Oliveaux*, 312 So.2d 337 (La. 1975), and *State v. Weiland*, 556 So.2d 175 (La. App. 5 Cir. 1990), regardless of whether defendant makes such a request. The following matters require corrective action.

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[5] La. R.S. 40:967(B)(3)(b) provided for a term of imprisonment at hard labor for not less than two years nor more than thirty years, with the first two years of the sentence being imposed without the benefit of parole, probation, or suspension of sentence. In addition, the defendant may be sentenced to pay a fine of not more than fifty thousand dollars.

[6] La. R.S. 15:529.1(A)(1) provides for a determinate term of imprisonment not less than one-half the longest term and not more than twice the longest term prescribed for a first conviction. As such, defendant faced a sentencing range of not less than fifteen years with a maximum of sixty years imprisonment.

[7] The Eighth Amendment to the United States Constitution and Article I, § 20 of the Louisiana Constitution prohibit the imposition of excessive punishment. Although a sentence is within statutory limits, it can be reviewed for unconstitutional excessiveness. *State v. Smith*, 01-2574 (La. 1/14/03), 839 So.2d 1. A sentence is considered excessive if it is grossly disproportionate to the offense or imposes needless and purposeless pain and suffering. A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. *State v. Lawson*, 04-334 (La. App. 5 Cir. 9/28/04), 885 So.2d 618. A trial judge has broad discretion when imposing a sentence and a reviewing court may not set a sentence aside absent a manifest abuse of discretion. *State v. Dorsey*, 07-67 (La. App. 5 Cir. 5/29/07), 960 So.2d 1127.

[8] As this is defendant's second appeal, he is not entitled to a second errors patent review. *See State v. Taylor*, 01-452 (La. App. 5 Cir. 11/14/01), 802 So.2d 779, 783-84, *writ denied*, 01-3326 (La. 1/10/03), 834 So.2d 426. As a result, this errors patent review is limited to defendant's resentencing.

First, the commitments and Uniform Commitment Orders (UCOs) are inaccurate. The commitment from defendant's resentencing on January 19, 2017 reflects that defendant was found guilty of two counts of violating La. R.S. 40:981.3, distribution of cocaine within 2,000 feet of a drug-free zone, but does not reflect that this Court vacated those convictions, and entered a judgment of conviction on two counts of the lesser included responsive offense of distribution of cocaine under La. R.S. 40:967(A)(1). Similarly, the UCO dated February 2, 2017 inaccurately reflects that defendant was convicted of two counts of La. R.S. 40:981.3, distribution of cocaine within 2,000 feet of a drug-free zone. It also reflects the adjudication date as September 9, 2015, which was when the jury entered verdicts of conviction under La. R.S. 40:981.3; however, these verdicts were later vacated by this Court on December 7, 2016.[9]

Further, the commitment and UCO from defendant's enhanced resentencing on January 23, 2017 also do not reflect this Court's judgment vacating defendant's convictions under La. R.S. 40:981.3 and entering a judgment of conviction on two counts of the lesser included responsive offense of distribution of cocaine under La. R.S. 40:967(A)(1). This UCO also lists the adjudication date as September 9, 2015; however, the record reflects defendant was adjudicated as a second felony offender on March 17, 2016.[10] This Court has previously remanded for correction of the Uniform Commitment Order in its errors patent review. *See State v. Lyons*, 13-564 (La. App. 5 Cir. 1/31/14), 134 So.3d 36, *writ denied*, 14-0481 (La. 11/7/14), 152 So.3d 170 (citing *State v. Long*, 12-184 (La. App. 5 Cir. 12/11/12), 106 So.3d 1136, 1142).

Accordingly, we remand this matter and order that the commitments and UCOs be corrected to conform to the transcripts and this Court's opinion. We

[9] *See also State v. Beason, supra.*
[10] *Id.*

further order the Clerk of Court for the 24th Judicial District Court to transmit the original of the corrected Uniform Commitment Orders to the officer in charge of the institution to which defendant has been sentenced and the Department of Corrections' legal department. *See Long*, 106 So.3d at 1142.

CONCLUSION

For the foregoing reasons, defendant's resentencings are affirmed, and appellate counsel's motion to withdraw as attorney of record for defendant is hereby granted. This matter is remanded to the district court for correction of the commitments and Uniform Commitment Orders as described above.

RESENTENCINGS AFFIRMED; MOTION TO WITHDRAW GRANTED; REMANDED FOR CORRECTION OF COMMITMENTS AND UNIFORM COMMITMENT ORDERS

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **NOVEMBER 15, 2017** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU
CLERK OF COURT

17-KA-254

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24TH JUDICIAL DISTRICT COURT (CLERK)
HONORABLE NANCY A. MILLER (DISTRICT JUDGE)
TERRY M. BOUDREAUX (APPELLEE)

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