STATE OF LOUISIANA

VERSUS

KYREN THORNTON

NO. 17-KA-608

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 14-4708, DIVISION "H"
HONORABLE GLENN B. ANSARDI, JUDGE PRESIDING

April 11, 2018

JUDE G. GRAVOIS
JUDGE

Panel composed of Judges Susan M. Chehardy,
Fredericka Homberg Wicker, and Jude G. Gravois

AFFIRMED; MOTION TO WITHDRAW GRANTED

JGG
SMC
FHW

COUNSEL FOR PLAINTIFF/APPELLEE,
STATE OF LOUISIANA
Paul D. Connick, Jr.
Terry M. Boudreaux

COUNSEL FOR DEFENDANT/APPELLANT,
KYREN THORNTON
Gwendolyn K. Brown

GRAVOIS, J.

Defendant, Kyren Thornton, appeals his conviction and sentence resulting from a guilty plea to armed robbery. His appointed appellate attorney has filed a brief in conformity with the procedure outlined in *State v. Bradford*, 95-929 (La. App. 5 Cir. 6/25/96), 676 So.2d 1108, 1110-11, 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 appellate attorney requests permission to withdraw as counsel of record for defendant. After thorough review of the record, we agree with counsel's assessment of the case and accordingly grant the motion to withdraw. We also affirm defendant's conviction and sentence.

PROCEDURAL HISTORY

On September 2, 2014, the Jefferson Parish District Attorney filed a bill of information charging defendant, Kyren Thornton, with one count of armed robbery while armed with a firearm, in violation of La. R.S. 14:64.[1] Defendant pled not guilty at his arraignment on September 4, 2014.

On August 4, 2015, defendant withdrew his plea of not guilty, and after being advised of his *Boykin*[2] rights, pled guilty as charged. In accordance with the plea agreement, defendant was sentenced to serve ten years imprisonment in the Department of Corrections,[3] without the benefit of parole, probation, or suspension of sentence.[4] The trial court further recommended defendant for participation in

[1] The record reflects that the State did not seek use of the firearm enhancement statute per La. R.S. 14:64.3. The record further reflects that defendant was charged along with co-defendants Nyran Batiste and Bernel Rhodes.

[2] *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

[3] Although the trial court did not state that defendant's sentence was to be served at "hard labor," he did order that defendant serve his sentence with the "Department of Corrections." This Court has previously held that when the trial judge states that the defendant is sentenced to the Department of Corrections, the sentence is necessarily at hard labor. *See State v. Martin*, 10-710 (La. App. 5 Cir. 5/24/11), 70 So.3d 41, *writ denied*, 11-1367 (La. 2/3/12), 79 So.3d 1023, *cert. denied*, --- U.S. ---, 133 S.Ct. 142, 184 L.Ed.2d 69 (2012).

[4] At the time of his guilty plea to the charge of armed robbery, defendant also pled guilty to battery on a correctional facility employee and two counts of battery on a police officer under case numbers 14-1058 and 14-

any drug rehabilitation, self-help, and work-release programs available through the Department of Corrections.

Defendant filed an application for post-conviction relief ("APCR") on August 8, 2017, seeking an out-of-time appeal, which was granted by the trial court on August 14, 2017.[5] The instant appeal followed.

FACTS

Because defendant pled guilty, the facts of this case were not fully developed at trial. Thus, the facts were gleaned from the bill of information which provides that on August 2, 2014, defendant violated La. R.S. 14:64, in that he and co-defendants Nyran Batiste and Bernel Rhodes did rob German Castro while armed with a dangerous weapon, to-wit: a firearm.

ANDERS BRIEF

Under the procedure adopted by this Court in *State v. Bradford*, *supra*, 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*, *supra*, and *State v. Jyles*, *supra*, appointed counsel requests permission to withdraw as counsel of record for defendant.

In *Anders*, 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. The request must be accompanied by "a brief referring to anything in the record that might arguably

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3170. Defendant was sentenced on each of these counts to one year in the Department of Corrections without the benefit of probation, parole, or suspension of sentence. These sentences were ordered to run consecutively to the sentence imposed in this case. These additional convictions are not before this Court on appeal.

[5] Notably, the trial court granted defendant's request for an out-of-time appeal finding that his filing was within the time limit for seeking such a request. For the purpose of determining timeliness, the actual date of filing for pleadings filed by inmates is the date the pleading is delivered to the prison authorities. *See Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988); *State ex rel. Johnson v. Whitley*, 92-2689 (La. 1/6/95), 648 So.2d 909; *Shelton v. Louisiana Department of Corrections*, 96-0348 (La. App. 1 Cir. 2/14/97), 691 So.2d 159. Here, the record indicates that although filed on August 8, 2017, two years and four days after defendant's conviction and sentence became final, defendant's APCR was properly granted as timely by the trial court per the mailbox rule, having been dated and signed by defendant and three witnesses on August 2, 2017.

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 made at trial with a detailed explanation of why the motions or objections lack merit. The 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*, 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. Counsel provides

that defendant pled guilty pursuant to a plea agreement, which was properly accepted by the trial court after defendant was fully informed of the legal consequences surrounding his plea. Counsel avers that defendant was informed of the sentence that was to be imposed and that the trial court imposed the agreed-upon sentence without objection by defendant, precluding defendant from challenging his sentence on appeal.

Appellate counsel has filed a motion to withdraw as counsel of record for defendant which states that she has made a conscientious and thorough review of the trial court record and can find no non-frivolous issues to raise on appeal and no rulings of the trial court which would arguably support the appeal. Counsel indicates that she has prepared an appellate brief in compliance with *Anders*, *supra*, and *Jyles*, *supra*, and has notified defendant of the filing of her motion and his right to file a *pro se* brief in this appeal. Additionally, this Court notified defendant by certified mail that an *Anders* brief had been filed on his behalf and that he had until December 27, 2017 to file a *pro se* supplemental brief. As of the date of the case's submission for decision, defendant had not filed a brief with this Court.

The State agrees with appellate counsel that after a careful review of the record, there are no non-frivolous issues present. It maintains that defendant was fully informed by the trial court of his constitutional rights, which he voluntarily and intelligently waived. The State asserts that defendant was advised of the sentence to be imposed and was sentenced accordingly within 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. The bill of information properly charged defendant and plainly and concisely stated the essential facts constituting the charged offense. It also sufficiently identified defendant and the crime charged. *See* La. C.Cr.P. arts. 464-466. As reflected by

the minute entries and commitment, defendant appeared at each stage of the proceedings against him. As such, defendant's presence does not present any issues supporting an appeal.

Further, defendant pled guilty as charged to armed robbery, a violation of La. R.S. 14:64. If a defendant pleads guilty, he normally waives all non-jurisdictional defects in the proceedings leading up to the guilty plea and precludes review of such defects either by appeal or post-conviction relief. *State v. Wingerter*, 05-697 (La. App. 5 Cir. 3/14/06), 926 So.2d 662, 664.

Defendant filed several pre-trial motions, including motions to suppress, which do not appear to have been ruled upon prior to the time defendant entered his guilty plea. When a defendant does not object to the trial court's failure to hear or rule on a pre-trial motion prior to pleading guilty, the motion is considered waived. *See State v. Corzo*, 04-791 (La. App. 5 Cir. 2/15/05), 896 So.2d 1101, 1102. Thus, no rulings were preserved for appeal under *State v. Crosby*, 338 So.2d 584 (La. 1976).

Additionally, a review of the record reveals no irregularities in defendant's guilty plea. Once a defendant is sentenced, only those guilty pleas that are constitutionally infirm may be withdrawn by appeal or post-conviction relief. A guilty plea is constitutionally infirm if it is not entered freely and voluntarily, if the *Boykin* colloquy is inadequate, or when a defendant is induced to enter the plea by a plea bargain or what he justifiably believes was a plea bargain and that bargain is not kept. *State v. McCoil*, 05-658 (La. App. 5 Cir. 2/27/06), 924 So.2d 1120, 1124.

The record shows that defendant was aware that he was pleading guilty to one count of armed robbery. Defendant was properly advised of his *Boykin* rights by the trial court and via the waiver of rights form. During the colloquy with the trial judge, defendant was advised of his right to a judge or jury trial, his right to confrontation, and his privilege against self-incrimination. Defendant verbally

indicated to the trial court that he understood that by pleading guilty he was waiving these rights and further placed his initials next to the rights he was waiving and his signature at the end of the waiver of rights form indicating that he understood that he was waiving these rights by pleading guilty.

Defendant was also informed that his guilty plea could be used to enhance a penalty for any future conviction. Defendant indicated that he understood the possible legal consequences of pleading guilty and confirmed that he had not been forced, coerced, or threatened into entering his guilty plea. He also stated that he was satisfied with the handling of his case by his attorney. Further, defendant was informed during the colloquy, and by means of the waiver of rights form, of the sentencing range for the offense, as well as the actual penalty that would be imposed upon acceptance of his guilty plea. After his colloquy with defendant, the trial judge accepted defendant's guilty plea as knowingly, intelligently, freely, and voluntarily made.

Lastly, defendant's sentence does not present an issue for appeal. His sentence falls within the sentencing range prescribed by the statute. *See* La. R.S. 14:64(B).[6] Further, defendant's sentence was imposed pursuant to, and in conformity with, the plea agreement. La. C.Cr.P. art. 881.2(A)(2) precludes a defendant from seeking review of his sentence imposed in conformity with a plea agreement which was set forth in the record at the time of the plea. *State v. Moore*, 06-875 (La. App. 5 Cir. 4/11/07), 958 So.2d 36, 46; *State v. Washington*, 05-211 (La. App. 5 Cir. 10/6/05), 916 So.2d 1171, 1173.

Because appellate counsel's brief adequately demonstrates by full discussion and analysis that she has reviewed the trial court proceedings and cannot identify

[6] At the time the offense was committed, a conviction under La. R.S. 14:64 carried a term of imprisonment at hard labor for "not less than ten years and for not more than ninety-nine years, without benefit of parole, probation, or suspension of sentence," for which defendant received a ten-year sentence with the Department of Corrections without the benefit of parole, probation, or suspension of sentence.

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 counsel of record for defendant is hereby granted.

ERRORS PATENT REVIEW

The record was reviewed for errors patent, according to 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. 5th Cir. 1990). No errors patent were discovered.

CONCLUSION

For the foregoing reasons, defendant's conviction and sentence are affirmed. Appellate counsel's motion to withdraw as counsel of record for defendant is granted.

AFFIRMED; MOTION TO WITHDRAW GRANTED

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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 **APRIL 11, 2018** 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-608

E-NOTIFIED
24TH JUDICIAL DISTRICT COURT (CLERK)
HONORABLE GLENN B. ANSARDI (DISTRICT JUDGE)
TERRY M. BOUDREAUX (APPELLEE)
GWENDOLYN K. BROWN (APPELLANT)

MAILED
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