STATE OF LOUISIANA

VERSUS

NATHANIEL RAINEY

NO. 14-KA-664

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 10-3303, DIVISION "G"
HONORABLE ROBERT A. PITRE, JR., JUDGE PRESIDING

DECEMBER 16, 2014

STEPHEN J. WINDHORST
JUDGE

Panel composed of Judges Susan M. Chehardy,
Robert M. Murphy and Stephen J. Windhorst

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AFFIRMED; MOTION TO WITHDRAW GRANTED; REMANDED FOR CORRECTION OF COMMITMENT

Defendant, Nathaniel Rainey, pled guilty to two counts of sexual battery of a juvenile in violation of La. R.S. 14:43.1, pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).[1] In accordance with the plea agreement, defendant was sentenced to four years imprisonment in the custody of the Department of Corrections on each count to run concurrently.[2] Defendant thereafter filed an application for post-conviction relief, which was denied as premature by the trial court. Defendant subsequently filed a motion for out-of-time appeal, which was granted by the trial court. In this appeal, defendant seeks an error patent review of his convictions.[3]

[1] Under Alford, an accused may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even though he is unwilling to admit participation in the crime, or even if his guilty plea contains a protestation of innocence, when he intelligently concludes that his interests require a guilty plea and the record strongly evidences guilt. See State v. Mayon, 11-643 (La. App. 5 Cir. 2/28/12), 88 So.3d 1115, 1117 n.1.

[2] Defendant's sentence was further ordered to run concurrently with the sentence imposed in district court case number 10-4939.

[3] The Court routinely reviews the record for errors patent according to the mandates of La. C.Cr.P. art. 920, State v. Oliveaux, 312 So.2d 337 (La. 1075), and State v. Weiland, 556 So.2d 175 (La. App. 5 Cir. 1990), regardless of whether a defendant makes such a request.

DISCUSSION

Under the procedure adopted by this Court in State v. Bradford, 95-929 (La. App. 5 Cir. 6/25/96), 676 So.2d 1108, 1110-11,[4] 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, appointed counsel requests permission to withdraw as counsel of record.

After receiving appellant counsel's brief and motion to withdraw, this Court performed a full examination of the entire appellate court record to determine whether the appeal is frivolous in accordance with 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*). Our independent review of the record in this case consisted of (1) a review of the bill of information to ensure that defendant was properly charged; (2) a review of all minute entries to ensure that defendant was present at all crucial stages of the proceedings and that the conviction and sentence are legal; and (3) a review of the guilty plea and sentencing transcript to determine if there was an arguable basis for appeal. In our review, we found no non-frivolous issues regarding defendant's convictions and sentences.

We find however that although the commitment reflects that defendant was given a proper notice of the time period for seeking post-conviction relief as required by La. C.Cr.P. art. 930.8, the transcript does not show a proper notice. The transcript prevails when there is a discrepancy between the commitment and the transcript. State v. Lynch, 441 So.2d 732, 734 (La. 1983).

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[4] In Bradford, supra, this Court adopted the procedures outlined in State v. Benjamin, 573 So.2d 528, 530 (La. App. 4 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*).

Accordingly, we advise defendant by way of this opinion that no application for post-conviction relief, including applications which seek an out-of-time appeal, shall be considered if it is filed more than two years after the judgment of conviction and sentence has become final under the provisions of La. C.Cr.P. arts. 914 or 922. See State v. Brooks, 12-226 (La. App. 5 Cir. 10/30/12), 103 So.3d 608, writ denied, 12-2478 (La. 4/19/13), 111 So.3d 1030.

We further find that a review of the transcript reveals that the trial court did not state that defendant's sentences for violations of La. R.S. 14:43.1, sexual battery, are to be served without benefits. The law mandates that defendant's sentences for sexual battery be served without benefit of parole, probation, or suspension of sentence. La. R.S. 15:301.1(A) provides that in instances where the statutory restrictions are not recited at sentencing, they are included in the sentence given, regardless of whether or not they are imposed by the sentencing court. Given the self-activating nature of the benefits provision in this case, we find no reason to correct the trial court's omission to specify that defendant's sentences on two counts of sexual battery are to be served without benefit of parole, probation, or suspension of sentence. See State v. Williams, 00-1725 (La. 11/28/01), 800 So.2d 790.

Finally, the record reveals a discrepancy between the transcript and the State of Louisiana Uniform Commitment Order. The uniform commitment order reflects the date of the offenses as June 11, 2010; however, the record reflects that the offenses were committed on or about June 9, 2010. See State v. Lyons, 13-564 (La. App. 5 Cir. 1/31/14), 134 So.3d 36, (citing State v. Long, 12-184 (La. App. 5 Cir. 12/11/12), 106 So.3d 1136, 1142). Accordingly, to ensure accuracy in the record, we remand this matter and order that the uniform commitment order be corrected to reflect the correct date of the offenses. We further direct the Clerk of

Court for the 24th Judicial District Court to transmit the original of the corrected uniform commitment order 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 , citing La. C.Cr.P. art. 892B(2).

DECREE

For the foregoing reasons, we affirm defendant's two convictions for sexual battery of a juvenile and his concurrent sentences of four years imprisonment in the Department of Corrections. We grant appellate counsel's motion to withdraw. This memorandum opinion is issued in compliance with U.R.C.A. 2-16.1B and U.R.C.A. 2-16.3B and posted to this Court's website pursuant to La. C.C.P. art. 2168.

AFFIRMED; MOTION TO WITHDRAW GRANTED;
REMANDED FOR CORRECTION OF COMMITMENT.

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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 2-20** THIS DAY **DECEMBER 16, 2014** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU
CLERK OF COURT

14-KA-664

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