STATE OF LOUISIANA

VERSUS

KERRY J. REYNARD

NO. 17-KA-375

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 15-1144, DIVISION "M"
HONORABLE HENRY G. SULLIVAN, JR., JUDGE PRESIDING

December 13, 2017

MARC E. JOHNSON
JUDGE

Panel composed of Judges Marc E. Johnson,
Robert M. Murphy, and Stephen J. Windhorst

AFFIRMED; MOTION GRANTED

MEJ
RMM
SJW

COUNSEL FOR PLAINTIFF/APPELLEE,
STATE OF LOUISIANA

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KERRY J. REYNARD

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JOHNSON, J.

Defendant/Appellant, Kerry J. Reynaud, appeals his convictions and sentences from the 24th Judicial District Court, Division "M". For the following reasons, we affirm Defendant's convictions and sentences and grant the motion to withdraw.

FACTS AND PROCEDURAL HISTORY

On February 26, 2015, Defendant and 20 other co-defendants were charged in a 30-count indictment for various acts of racketeering committed in furtherance of a narcotics distribution network on the Westbank of Jefferson Parish, operated by a street gang known by its members as the "Harvey Hustlers." Specifically, Defendant was charged with racketeering, in violation of La. R.S. 15:1352 (count one), conspiracy to distribute cocaine, in violation of La. R.S. 40:979 and La. R.S. 40:967(A) (count two), and conspiracy to distribute heroin and marijuana, in violation of La. R.S. 40:979 and La. R.S. 40:966(A) (count three). Defendant pleaded not guilty to the charged offenses at his arraignment on March 23, 2015. On August 21, 2015, Defendant filed a motion to suppress evidence and the following day, Defendant filed a motion to quash the indictment.[1]

On February 16, 2016, Defendant withdrew his prior pleas of not guilty and pleaded guilty as charged. Because Defendant pleaded guilty, the facts were not fully developed at a trial. However, during the guilty plea colloquy, the State provided the following factual basis for the guilty pleas:

> Kerry Reynard engaged in conduct to further the aims of an Enterprise by engaging in a pattern of racketeering activity and conspiring with members of that Enterprise to distribute controlled dangerous substances, including cocaine, heroin and marijuana. This conduct, which occurred between 2006 and 2015, included participating in the operation of a narcotics distribution network on the Westbank of Jefferson Parish wherein a violent street gang named by its members the "Harvey Hustlers" obtained controlled dangerous substances from

[1] Prior to these filings, on March 25, 2015, Defendant filed omnibus motions, including motions to suppress statement, evidence, and identification.

> associates and Enterprise members who transported the drugs into the Metropolitan New Orleans area.
>
> The ranking members of the Harvey Hustlers then directed the conversion of these drugs into a saleable form, such as converting powder cocaine to crack cocaine, and provided the drugs to rank and file Harvey Hustlers who sold the drug product on the street for the profit of Enterprise members. This activity included all of them working on the streets of Scottsdale, on the side of each other, selling cocaine, heroin or marijuana.
>
> Members of the Harvey Hustlers frequently identified themselves openly through items of jewelry and clothing containing a "HH" logo, tattoos containing phrases identified with the gang, social media posts, and YouTube videos.
>
> Enterprise members and their associates sold, exchanged and otherwise transferred quantities of controlled dangerous substances to street level end users in Jefferson Parish.

In accordance with the plea agreement, the court sentenced Defendant on count one (racketeering) to 20 years imprisonment at hard labor; count two (conspiracy to distribute cocaine) to 15 years imprisonment at hard labor; and count three (conspiracy to distribute heroin)[2] to 20 years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The court ordered that all of Defendant's sentences be served concurrently.

Also on February 16, 2016, the State filed a habitual offender bill of information on count two, alleging Defendant to be a second felony offender, to which Defendant stipulated. The trial court vacated Defendant's previous sentence on count two and resentenced Defendant as a second felony offender, pursuant to La. R.S. 15:529.1, to 20 years imprisonment at hard labor without the benefit of probation or suspension of sentence. On April 3, 2017, Defendant filed an application for post-conviction relief, seeking an out-of-time appeal, which was granted by the trial court on April 4, 2017. The instant appeal follows.

[2] While Defendant was charged with and pleaded guilty to one count of conspiracy to distribute heroin and marijuana, he was sentenced on conspiracy to distribute heroin only.

ASSIGNMENTS OF ERROR

On appeal, Defendant seeks review of his convictions and sentences in conformity with the procedures outlined in *State v. Jyles*, 96-2669 (La. 12/12/97); 704 So.2d 241 (*per curiam*).

LAW AND ANALYSIS

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,[3] appointed appellate counsel has filed a brief asserting that he has made a conscientious and thorough review of the entire appellate record, including the procedural history and facts, and has not found any non-frivolous issues to raise on appeal.[4] Accordingly, appointed counsel requests permission to withdraw as counsel of record.

After receiving appellate counsel's brief and motion to withdraw, this Court performed a full examination of all the appellate 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 examination of the record in the instant 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 states of the proceedings and that the convictions and sentences are legal; and (3) a review of all the transcripts to determine if any ruling provided an arguable basis for appeal. After review, we find no non-frivolous issues with any of Defendant's convictions.

With regard to Defendant's sentences, La. C.Cr.P. art. 881.2(A)(2) precludes

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[3]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*).

[4] On August 8, 2017, this Court notified Defendant of his right to file a *pro se* supplemental brief in this appeal. Defendant did not file a supplemental brief.

a defendant from seeking review of a sentence imposed in conformity with a plea agreement which was set forth in the record at the time of the plea. *State v. Washington*, 05-211 (La. App. 5 Cir. 10/6/05); 916 So.2d 1171, 1173. Additionally, this Court has consistently recognized that La. C.Cr.P. art. 881.2 precludes a defendant from seeking review of an enhanced sentence to which the defendant agreed. *State v. Williams*, 12-299 (La. App. 5 Cir 12/11/12); 106 So.3d 1068, 1075, *writ denied*, 13-0109 (La. 6/21/13); 118 So.3d 406. Here, Defendant's original sentences[5] and enhanced sentence were imposed in accordance with the terms of the plea agreement set forth in the record at the time of the plea. Nevertheless, Defendant's sentences fall within the sentencing ranges set forth in the statutes. *See* La. R.S. 15:1354(A);[6] La. R.S. 40:979;[7] La. R.S. 40:967(B)(4)(b);[8] and La. R.S. 15:529.1.[9] Moreover, Defendant's plea agreement was beneficial to him in that he received approximate midrange sentences on counts one and three. Also, on his enhanced sentence, Defendant received a 20-year sentence, which was less than the 30-year maximum exposure.

Furthermore, the transcript reflects that the trial judge informed Defendant

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[5] Defendant's original sentence on count two was vacated before he was sentenced as a habitual offender.

[6] La. R.S. 15:1354(A) provides in pertinent part: "any person who violates any provision of R.S. 15:1353 shall be fined not more than one million dollars, or imprisoned at hard labor for not more than fifty years, or both."

[7] La. R.S. 40:979 provides:

> A. Except as otherwise provided herein, any person who attempts or conspires to commit any offense denounced and/or made unlawful by the provisions of this Part shall, upon conviction, be fined or imprisoned in the same manner as for the offense planned or attempted, but such fine or imprisonment shall not exceed one-half of the longest term of imprisonment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.
> B. Any person who attempts or conspires to distribute or possess with intent to distribute any substance classified in Schedule I, as provided for in R.S. 40:963 and R.S. 40:964, which is a narcotic drug (all substances in Schedule I preceded by an asterisk "*") shall, upon conviction, be imprisoned at hard labor for not less than eight nor more than fifty years without benefit of parole, probation or suspension of sentence and may, in addition, be required to pay a fine of not more than ten thousand dollars.

Defendant's sentence for conspiracy to distribute heroin falls under the penalty provision of La. R.S. 40:979(B), as heroin is classified as a *Schedule I narcotic drug.

[8] At the time of the offense, La. R.S. 40:967(B)(4)(b) provided in pertinent part:

> Distribution…[of] cocaine… shall be sentenced to a term of imprisonment at hard labor for not less than two years nor more than thirty years, with the first two years of said sentence being without benefit of parole, probation, or suspension of sentence; and may, in addition, be sentenced to pay a fine of not more than fifty thousand dollars.

[9] La. R.S. 15:529.1 provides in pertinent part that upon a second felony conviction, "the sentence to imprisonment shall be for a determinate term not less than one-half the longest term and not more than twice the longest term prescribed for a first conviction."

that if he stipulated to the habitual offender bill, his 20-year enhanced sentence on count two would be served without the benefit of probation or suspension of sentence. Afterward, the trial judge imposed the enhanced sentence without the benefit of probation or suspension of sentence.

La. R.S. 15:529.1(G) provides that an enhanced sentence shall be at hard labor without benefit of probation or suspension of sentence. However, La. R.S. 40:967(B)(4)(b) required that the first two years of the sentence shall be without benefit of parole, probation, or suspension of sentence.

The restrictions on parole eligibility imposed on habitual offender sentences under La. R.S. 15:529.1 are "those called for in the reference statute." *State v. Esteen*, 01-879 (La. App. 5 Cir. 5/15/02); 821 So.2d 60, 79 n.24, *writ denied*, 02-1540 (La. 12/13/02); 831 So.2d 983. Because the underlying offense carries a parole restriction, the habitual offender sentence is to likewise be imposed without parole. *See State v. Smith*, 09-100 (La. App. 5 Cir. 8/25/09); 20 So.3d 501, 509, *writ denied*, 09-2102 (La. 4/5/10); 31 So.3d 357. Therefore, the trial court erred by not restricting parole eligibility on Defendant's enhanced sentence for the first two years.

La. R.S. 15:301.1(A) provides that in instances where the statutory restrictions are not recited at sentencing, they are deemed contained in the sentence whether or not specified by the sentencing court, and are therefore statutorily effective. *Williams*, 00-1725, (La. 11/28/01); 800 So.2d 790, 798-99. Thus, we find that no corrective action is required to specify that the first two years of Defendant's sentence is to be served without benefit of parole. *See State v. Young*, 13-745 (La. App. 5 Cir. 4/9/14); 140 So.3d 136, 140 n.2, *writ denied*, 14-1002 (La. 12/8/14); 153 So.3d 439. We also find that the trial judge's failure to specify that the first two years of his original sentence were to be served without the benefit of probation, parole, or suspension of sentence and the first two years of his enhanced

sentence were to be served without benefit of parole did not affect the voluntariness of Defendant's guilty plea or habitual offender stipulation.

In *State v. Duncan*, 16-493 (La. App. 5 Cir. 2/8/17); 213 So.3d 1247, 1253, this Court found that the trial judge's failure to specify that the first two years of the habitual offender sentence were to be served without benefit of parole did not affect the voluntariness of the stipulation. In so finding, this Court cited *State v. Harrell*, 09-364 (La. App. 5 Cir. 5/11/10); 40 So.3d 311, *writ denied*, 10-1377 (La. 2/10/12); 80 So.3d 473, where the defendant contended that his plea on one of the counts was not knowing and voluntary because the trial court failed to advise him that the first five years of the sentence had to be served without the benefit of parole, probation, or suspension of sentence. In *Harrell*, this Court found that the trial court's failure in this regard did not render the defendant's guilty plea unknowing or involuntary. It noted that the trial court advised the defendant of his *Boykin* rights, that the defendant indicated his willingness to plead guilty throughout the plea colloquy, that the defendant acknowledged that he had discussed the guilty plea with his attorney and that he still desired to plead guilty, and that the defendant received a substantial benefit for pleading guilty.

In *Duncan*, this Court noted that the record reflected that the trial judge advised the defendant of his habitual offender rights, the defendant indicated his willingness to stipulate to the habitual offender bill, and the defendant acknowledged that he had discussed his stipulation with his attorney and that he still desired to stipulate to the habitual offender bill. Further, the defendant received a substantial benefit for stipulating to the habitual offender bill. Also, the record did not reflect that receiving the benefit of parole was crucial to his stipulation. This Court found that the trial judge's failure to advise the defendant that the first two years of the sentence was to be served without benefit of parole

did not render his stipulation to the habitual offender bill unknowing or involuntary. *See Duncan*, *supra*.

Likewise, in the instant matter, the record reflects that the trial court advised Defendant of his *Boykin*[10] rights; Defendant indicated his willingness to plead guilty throughout the plea colloquy; Defendant acknowledged that he had discussed the guilty plea with his attorney; and he still desired to plead guilty and that he received a substantial benefit for pleading guilty. Accordingly, we find that the trial judge's failure to advise Defendant that the first two years of his sentence on count two were to be served without the benefit of probation, parole, or suspension of sentence did not render Defendant's guilty plea unknowing or involuntary.

The record further reflects that the trial judge advised Defendant of his habitual offender rights and Defendant indicated his willingness to stipulate to the habitual offender bill. Defendant acknowledged that he had discussed his stipulation with his attorney and that he still desired to stipulate to the habitual offender bill. Additionally, Defendant received a substantial benefit for stipulating to the habitual offender bill. Also, the record does not reflect that receiving the benefit of parole was crucial to his stipulation. Moreover, his enhanced sentence was ordered to run concurrent with a 20-year sentence with the restriction of benefits imposed. Accordingly, we find that the trial judge's failure to advise Defendant that the first two years of his enhanced sentence were to be served without benefit of parole did not render his stipulation to the habitual offender bill unknowing or involuntary. *See State v. Davis*, 17-81 (La. App. 5 Cir. 6/29/17); 224 So.3d 1211 (where this Court's review of the record reflected that defendant may have received inadequate information regarding the restriction of benefits for his enhanced sentence, but the omission did not require correction or warrant an

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

assignment of error).

Because appellate counsel's brief adequately demonstrates by full discussion and analysis that he 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, we grant appellate counsel's motion to withdraw as attorney of record.

DECREE

For the foregoing reasons, we affirm Defendant's convictions and sentences and grant the motion to withdraw.

AFFIRMED; MOTION 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 **DECEMBER 13, 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-375

E-NOTIFIED
24TH JUDICIAL DISTRICT COURT (CLERK)
HONORABLE HENRY G. SULLIVAN, JR. (DISTRICT JUDGE)
TERRY M. BOUDREAUX (APPELLEE)

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