NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 0950

STATE OF LOUISIANA

VERSUS

EDWARD NELSON McCRAY

Judgment Rendered: March 23, 2012

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of Washington, State of Louisiana
Trial Court Number 03 CR8 88943

Honorable Raymond Childress, Judge Presiding

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Walter P. Reed **Lewis V. Murray, III** **Franklinton, LA**	**Counsel for Appellee,** **State of Louisiana**
Kathryn Landry **Baton Rouge, LA**	
Frank Sloan **Mandeville, LA**	**Counsel for Defendant/Appellant,** **Edward Nelson McCray**

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BEFORE: WHIPPLE, KUHN AND GUIDRY, JJ.

WHIPPLE, J.

The defendant, Edward Nelson McCray, was charged by bill of information with simple escape, a violation of LSA-R.S. 14:110 (count 1); simple burglary, a violation of LSA-R.S. 14:62 (count 2); and unauthorized use of a movable, a violation of LSA-R.S. 14:68 (count 3). He pled not guilty and not guilty by reason of insanity. Following a jury trial, the defendant was found guilty as charged on count 1 (simple escape) and not guilty on counts 2 and 3. The defendant was sentenced to five years imprisonment at hard labor. The State subsequently filed a habitual offender bill of information and, following a hearing on the matter, the defendant was adjudicated a third-felony habitual offender. The trial court vacated the previously imposed five-year sentence and resentenced the defendant to ten years imprisonment at hard labor. The sentence was ordered to run concurrently with the sentence the defendant was currently serving. The defendant filed a motion to reconsider sentence, which was denied. The defendant now appeals, designating one assignment of error. We affirm the conviction, habitual offender adjudication, and sentence.

FACTS

On May 28, 2003, the defendant was incarcerated in the Washington Parish Jail. During yard call, the defendant and another inmate, Howard Dunaway, escaped from the yard by passing through a hole in the fence caused by the fence having been pulled away from the support poles. The alarm was sounded and officers with the Washington Parish Sheriff's Office began searching for the inmates. Some officers searched for them from a boat on the Bogue Chitto River because the river was near the jail, and the officers assumed the inmates had likely crossed the river.

Detective Roy Stevens, who had a camp on the river, discovered that his son's boat (a 16-foot "Special"), which he had borrowed, was gone. Detective

Stevens joined the officers in a search boat and, a few miles down river, the detective found his son's boat tied up. The lower unit on the boat motor had been damaged. The officers continued a few more miles down river when they came upon a canoe docked in front of a camp. Inside the canoe were a flashlight and a bottle of whiskey. The deck nearby had wet footprints on it, so the officers got out of the search boat to investigate. They approached the camp and observed wet footprints on the stairs and a kicked-in door to a utility room at the bottom of the camp. The front door to the camp had also been kicked in. The officers searched inside the camp and found men's wet boxers with the name "McCray" on the waistband. The officers did not find anyone inside the camp, so they began searching outside.

Detective Raymond Lentz, who was part of the search party outside of the camp, observed the defendant about a hundred yards away walking toward the camp. Detective Lentz ran toward the defendant and identified himself. The defendant attempted to run into the wooded area nearby, but was apprehended by Detective Lentz. The other inmate, Dunaway, was apprehended about one-half mile from the camp near La. Highway 16.

The defendant testified at trial that he escaped from the jail, but he did not know Dunaway. The defendant explained that he saw Dunaway go through the hole in the fence and the defendant followed behind him. At that point, they went their separate ways. The defendant also testified that he did not know anything about a boat and that the wet footprints at the camp were not his.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues that the sentence imposed is excessive. Specifically, the defendant contends that the trial court did not consider his psychiatric illness as a mitigating factor, and that the ten-year

sentence he agreed to was "worthless" because a ten-year sentence was the maximum time he could have received as a third-felony habitual offender.

At the habitual offender hearing, defense counsel informed the trial court that the defendant would admit to being a third-felony habitual offender with the understanding that the maximum sentence he would receive was ten years. The prosecutor responded, "And that is correct, Your Honor. We would accept that plea or offer."

As a third-felony habitual offender, the defendant faced a maximum sentence of ten years. See LSA-R.S. 15:529.1(A)(1)(b)(i) (prior to the 2010 amendments) & LSA-R.S. 14:110(B)(3). In his brief, the defendant asserts that since the maximum sentencing exposure was already ten years under LSA-R.S. 15:529.1(A)(1)(b)(i), the sentence should be set aside because the agreed-upon cap of a ten-year sentence "was worthless." This assertion is baseless. In its habitual offender bill of information, the State listed three prior felony convictions of the defendant and sought to have him adjudicated a fourth-felony habitual offender. Thus, the record supports the conclusion that in exchange for the defendant's admission to being a third-felony habitual offender, the State elected to forego establishing at the habitual offender hearing that he was a fourth-felony habitual offender. Importantly, the defendant's sentencing exposure as a fourth-felony habitual offender would have been twenty years to life. See LSA-R.S. 15:529.1(A)(1)(c)(i) (prior to the 2010 amendments).

Moreover, the defendant agreed to being adjudicated a third-felony habitual offender with a specific sentencing agreement. The trial court then sentenced him to the agreed-upon sentencing cap of ten years. Under LSA-C.Cr.P. art. 881.2(A)(2), a defendant "cannot appeal or seek review of a sentence imposed in conformity with a plea agreement which was set forth in the record at the time of the plea." See State v. Young, 96-0195 (La. 10/15/96), 680 So. 2d 1171, 1174.

See also State v. Williams, 98-0952 (La. App. 1st Cir. 2/19/99), 729 So. 2d 1080, 1082; State v. Carter, 460 So. 2d 72 (La. App. 1st Cir. 1984). The term "plea agreement" encompasses a situation whereby a defendant agrees to be sentenced under an agreed-upon sentencing cap. See Young, 680 So. 2d at 1173-74. Thus, having admitted to his status as a third-felony habitual offender pursuant to a specific sentencing agreement, the defendant is not entitled to a review of his sentence. See State v. Johnson, 99-2371 (La. App. 1st Cir. 9/22/00), 768 So. 2d 234, 236.

The assignment of error is without merit.

SENTENCING ERROR

This court routinely reviews the record for error under LSA-C.Cr.P. art. 920(2). Pursuant to LSA-C.Cr.P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we have found a sentencing error.

The trial court ordered that the defendant's ten-year enhanced sentence was to run concurrently "with his life sentence that he was doing." Pursuant to LSA-R.S. 14:110(B)(3):

> A person imprisoned, committed, or detained who commits the crime of simple escape . . . shall be imprisoned . . . for not less than two years nor more than five years; provided that such sentence shall not run concurrently with any other sentence.

The trial court erred in not ordering the defendant's ten-year sentence to run consecutively rather than concurrently. Accordingly, the defendant's sentence is illegally lenient. However, since the sentence is not inherently prejudicial to the defendant, and neither the State nor the defendant has raised this sentencing issue on appeal, we decline to correct this error. See State v. Price, 2005-2514 (La. App.

1st Cir. 12/28/06), 952 So. 2d 112, 123-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So. 2d 1277.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.