NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 KA 0019

STATE OF LOUISIANA

VERSUS

JIM E. THOMAN

Judgment rendered September 14, 2007.

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Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. 391784
Honorable Donald M. Fendlason, Judge

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DEFENDANT-APPELLANT
JIM E. THOMAN

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BEFORE: CARTER, C.J., PETTIGREW, AND WELCH, JJ.

BSC
by JSP

CARTER, J. Concurs with Reasons.

Welch J. concurs without reasons

PETTIGREW, J.

The defendant, Jim E. Thoman, was charged by bill of information with driving while intoxicated, his second fourth offense, a violation of La. R.S. 14:98. The defendant pled not guilty. Following a jury trial, the defendant was found guilty as charged. The defendant was sentenced to fifteen (15) years imprisonment at hard labor with "at least three years" of the sentence to be served without benefit of suspension of sentence, probation, or parole. The trial court further ordered the sentence to run consecutive to the sentence the defendant was presently serving. The defendant now appeals, designating one assignment of error. We affirm the conviction, vacate the sentence, and remand for resentencing.

FACTS

On November 15, 2004, at about 1:20 a.m., Louisiana State Trooper Talmadge Dixon effected a traffic stop of the defendant for speeding on the I-10 near Old Spanish Trail in Slidell. The defendant exited his vehicle and spoke with Trooper Dixon. As Trooper Dixon was informing the defendant that he was traveling 85 mph in a 70-mph zone, Trooper Dixon smelled a strong odor of alcohol on the defendant's breath. He also observed that the defendant's balance was poor; he swayed as he spoke, and his eyes were bloodshot and glassy. Based on these observations, Trooper Dixon conducted a field sobriety test on the defendant. Because of the defendant's poor performance, Trooper Dixon determined that the defendant was impaired and arrested him. After being **Mirandized** and handcuffed, the defendant told Trooper Dixon that earlier he had drank two beers.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues the trial court erred in denying defense counsel's challenge for cause during voir dire. Specifically, the defendant contends that prospective juror Lisa Stakelum should have been excused for cause because she was unable to accept the presumption of innocence of the accused.

When defense counsel asked if anyone believed the defendant was more likely to be guilty of the present DWI charge because he had several prior DWI convictions,

several prospective jurors raised their hands, including Stakelum. When asked by defense counsel if it would "be fair to say you don't have a lot of tolerance for DUIs [sic] in general," Stakelum responded, "Yes."

Later during voir dire, the trial court asked the same group of prospective jurors:

> Thank you. ... For those who maybe indicated they have an intolerance towards driving while intoxicated ... if you were chosen to sit on this jury, could you base your verdict solely on the evidence and the law that is presented? If you feel you couldn't, raise your hand. Okay. Thank you. I see none. All right.
>
> . . . .
>
> I guess the intolerance is what I'm getting at. We can all be intolerant. But can you freely, willingly, and understandingly, judge a person based on the law and evidence? That's where I'm coming from. If you feel you couldn't, raise your hand. Thank you. I see none.

In challenging Stakelum for cause, defense counsel stated:

> Yes. I think the other one I'm having a problem [sic] is Lisa Stakelum. Her husband is an attorney. Her kids are attorneys. I'm having a problem, chewing on that. I asked about intolerances of DUI, and about this being a second fourth, if she could put that out of her mind and give him a fair trial.

The trial court responded:

> I put a question mark by her. I believe she was rehabilitated when I asked about those intolerances. She indicated, when I asked about the intolerances, they indicated they could put that out of their mind and rely solely on the facts and evidence. I'm going to deny that strike.

To the trial court's denial of the challenge for cause, defense counsel replied, "That was the only one for cause, Your Honor."

Louisiana Code of Criminal Procedure article 800(A) provides as follows:

> A defendant may not assign as error a ruling refusing to sustain a challenge for cause made by him, unless an objection thereto is made at the time of the ruling. The nature of the objection and grounds therefore shall be stated at the time of objection.

Because the defendant neither objected to the trial court's ruling denying his challenge of Lisa Stakelum for cause nor stated the nature of the objection and grounds therefor, he is prohibited from assigning the ruling as error, by the express terms of Article 800(A). We therefore find that the defendant has waived the alleged error. See

State v. Deboue, 496 So.2d 394, 400-401 (La. App. 4 Cir. 1986), writ denied, 501 So.2d 229 (La. 1987).

Moreover, even had the defendant lodged a proper objection to the trial court's ruling, we would not find reversible error. Prejudice is presumed when a challenge for cause is erroneously denied by a trial court and the defendant has exhausted his peremptory challenges. To prove there has been reversible error warranting reversal of the conviction, defendant need only show (1) the erroneous denial of a challenge for cause; and (2) the use of all his peremptory challenges. **State v. Robertson**, 92-2660 (La. 1/14/94), 630 So.2d 1278, 1280-1281. It is undisputed that defense counsel exhausted all of his peremptory challenges before the selection of the tenth juror. Therefore, the only issue to be determined would be whether the trial judge erred in denying the defendant's challenge for cause regarding prospective juror Stakelum.

Pursuant to La. Code Crim. P. art. 797(2), a prospective juror may be challenged for cause on the ground that:

> The juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence[.]

A refusal by the trial court to excuse a prospective juror on the ground that he is not impartial is not an abuse of discretion where, after further inquiry or instruction, he has demonstrated a willingness and ability to decide the case impartially according to the law and the evidence. **State v. Copeland**, 530 So.2d 526, 534 (La. 1988), cert. denied, 489 U.S. 1091, 109 S.Ct. 1558, 103 L.Ed.2d 860 (1989). A trial court is accorded great discretion in determining whether to seat or reject a juror for cause, and such rulings will not be disturbed unless a review of the voir dire as a whole indicates an abuse of that discretion. **State v. Martin**, 558 So.2d 654, 658 (La. App. 1 Cir.), writ denied, 564 So.2d 318 (La. 1990).

Following defense counsel's questioning of Stakelum, the trial court questioned the prospective jurors as a group, including Stakelum. The prospective jurors indicated that if chosen, they could base their verdict solely on the evidence and the law

presented. The trial court was in the best position to determine if Stakelum could discharge her duties as a juror. Upon reviewing the voir dire in its entirety, we cannot say that the trial court abused its discretion in denying defense counsel's challenge for cause. Accordingly, the assignment of error is without merit.

SENTENCING ERROR

The trial court sentenced the defendant to fifteen years at hard labor "of which at least three years shall be imposed without benefit of suspension of sentence, probation or parole." Prior to sentencing the defendant, the trial court read aloud the provisions, mostly in their entirety, of La. R.S. 14:98(E)(1)(a), (E)(4)(a) and (E)(4)(b).[1] It is clear, thus, that the defendant was sentenced under (E)(4)(a). The transcript of the defendant's predicate guilty plea to DWI, fourth offense, which was submitted into evidence, indicates that the trial court sentenced the defendant to ten years at hard labor, with all but sixty days of the sentence suspended. The trial court placed the defendant on supervised probation for a period of five years. The (E)(4)(a) provision addresses a predicate third offense, whereas the (E)(4)(b) provision addresses a

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[1] (E)(1)(a) provides:

> Except as otherwise provided in Subparagraph (4)(b) of this Subsection, on a conviction of a fourth or subsequent offense, notwithstanding any other provision of law to the contrary and regardless of whether the fourth offense occurred before or after an earlier conviction, the offender shall be imprisoned with or without hard labor for not less than ten years nor more than thirty years and shall be fined five thousand dollars. Sixty days of the sentence of imprisonment shall be imposed without benefit of probation, parole, or suspension of sentence. The court, in its discretion, may suspend all or any part of the remainder of the sentence of imprisonment. If any portion of the sentence is suspended, the offender shall be placed on supervised probation with the Department of Public Safety and Corrections, division of probation and parole, for a period of time not to exceed five years, which probation shall commence on the day after the offender's release from custody.

(E)(4)(a) provides:

> If the offender has previously been required to participate in substance abuse treatment and home incarceration pursuant to Subsection D of this Section, the offender shall not be sentenced to substance abuse treatment and home incarceration for a fourth or subsequent offense, but shall be imprisoned at hard labor for not less than ten nor more than thirty years, and at least three years of the sentence shall be imposed without benefit of suspension of sentence, probation, or parole.

(E)(4)(b) provides:

> If the offender has previously received the benefit of suspension of sentence, probation, or parole as a fourth offender, no part of the sentence may be imposed with benefit of suspension of sentence, probation, or parole, and no portion of the sentence shall be imposed concurrently with the remaining balance of any sentence to be served for a prior conviction for any offense.

predicate fourth offense. Accordingly, the (E)(4)(a) provision under which the trial court sentenced the defendant is inapplicable. The applicable provision under which the defendant should have been sentenced for his present conviction (DWI, second fourth offense) is (E)(4)(b), which provides that no part of his sentence may be imposed with benefit of suspension of sentence, probation, or parole if he has previously received the benefit of probation as a fourth offender. As such, a sentence of fifteen years of which at least three years shall be imposed without benefit of suspension of sentence, probation, or parole is an illegally lenient sentence, since *all* fifteen years of the defendant's sentence, under (E)(4)(b), would have to be served without benefit of suspension of sentence, probation, or parole.[2]

Under **State v. Price**, 2005-2514, p. 22 (La. App. 1 Cir. 12/28/06), 952 So.2d 112, 124-125 (en banc) (petition for cert. filed at La. Supreme Court on 1/24/07, 2007-K-130), while an illegally lenient sentence is presumably not "inherently prejudicial" to the defendant, this court nevertheless has the option to vacate the sentence and remand for resentencing. Since the resentencing involves discretion,[3] we find that correcting the error by this court is not a viable option under **Price**. Furthermore, the defendant's sentence is indeterminate since the trial court stated that "at least" three years of the fifteen-year sentence is to be served without benefit of suspension of sentence, probation, or parole. See La. Code Crim. P. art. 879. Because the sentence is indeterminate, and because resentencing would involve discretion, we vacate the sentence and remand for resentencing.

CONVICTION AFFIRMED; SENTENCE VACATED, REMANDED FOR RESENTENCING.

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[2] In **State v. Mayeux**, 2001-3195, p. 6 (La. 6/21/02), 820 So.2d 526, 530, the supreme court held that the law in effect at the time of the date of conviction for the offense is determinative of the penalty imposed. In the instant matter, any potential **Mayeux** issues would be irrelevant because (E)(4)(b), which is the controlling provision (rather than (E)(1)(a)), remained unchanged by the 2005 amendment to La. R.S. 14:98.

[3] For example, since no portion of the defendant's sentence, under (E)(4)(b), can be imposed with benefit of suspension of sentence, probation, or parole, the trial court might be inclined to sentence the defendant to a period of less than fifteen years, but at least ten years.

STATE OF LOUISIANA

VERSUS

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CARTER, C.J., concurring.

The sentence imposed by the trial court, which requires that the defendant serve "*at least* three years . . . without benefit of suspension of sentence, probation, or parole," is indeterminate and therefore illegal.[1] See LSA-C.Cr.P. art. 879; **State ex rel. Thomas**, 95-1319 (La. 1/31/97), 687 So.2d 397. Therefore, the sentence must be vacated and remanded for imposition of a determinate sentence. See **State ex rel. Dawson v. Ballard**, 460 So.2d 595 (La. 1984).

For these reasons I respectfully concur.

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[1] Emphasis in quotation is ours.

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WELCH, J. CONCURRING.

I agree with result reached by the majority and note that **State v. Price**, 2005-2514 (La. App. 1st Cir. 12/28/06), does allow this court to vacate an illegally lenient sentence and remand for re-sentencing when the re-sentencing involves discretion. However, I write separately to point out that I believe **Price** was incorrectly decided.

With regard to illegally lenient sentences, **Price** allows this court to: (1) do nothing, (2) vacate the illegally lenient sentence and remand to the trial court for resentencing, (3) correct the sentence, or (4) note the illegally lenient sentence, but decline to exercise discretion and correct the error. These different options will lead to inconsistent judgments by different panels of this court. See **State v. Thompson**, 2006-1687 (La. App. 1st Cir. 3/23/07); **State v. Jackson**, 2006-1904 (La. App. 1st Cir. 3/23/07), 960 So.2d 170; **State v. Riles**, 2006-1039 (La. App. 1st Cir. 2/14/07), 959 So.2d 950; **State v. Anderson**, 2006-1542 (La. App. 1st Cir. 2/14/07), and **State v. Johnson**, 2006-1235 (La. App.1st Cir. 12/28/06), 951 So.2d 294.

Since **Price** overruled **State v. Paoli**, 2001-1733 (La. App. 1st Cir. 4/11/02), 818 So.2d 795, writ denied, 2002-2137 (La. 2/21/03), 837 So.2d 628, to the extent that it had been interpreted to mandate a remand for re-sentencing when the sentencing court imposed an illegally lenient sentence, in this case, I would simply correct the defendant's illegally lenient sentence.

Thus, I respectfully concur.