

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 0447

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STATE OF LOUISIANA

VERSUS

KIMBERLIN EDWARDS

Judgment Rendered: **SEP 14 2011**

On Appeal from the 22nd Judicial District Court
In and For the Parish of St. Tammany
Trial Court No. 458,662

Honorable Allison H. Penzato, Judge Presiding

Walter P. Reed
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State of Louisiana

and

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Mandeville, Louisiana

Counsel for Defendant/Appellant
Kimberlin Edwards

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

Hughes, J., dissents.

GAIDRY, J.

Defendant, Kimberlin T. Edwards, was charged by grand jury indictment with vehicular homicide (count 1) and possession of cocaine (count 2), violations of LSA-R.S. 14:32.1 and LSA-R.S. 40:967(C), respectively. She initially pled not guilty to both charges but, after the commencement of trial, withdrew her former pleas and pled guilty as charged to both charges. The trial court sentenced her to seventeen years at hard labor, with five years to be served without benefit of parole, a fine of \$2,000.00 for vehicular homicide, and a concurrent term of five years at hard labor for possession of cocaine.

Thereafter, the state filed a habitual offender bill of information seeking to enhance the defendant's sentences as a multiple offender.¹ Defendant admitted the allegations of the habitual offender bill, and the trial court adjudicated her to be a fourth-felony habitual offender. The court sentenced her, under LSA-R.S. 15:529.1(A)(1)(c)(i),² on each conviction to thirty-five years at hard labor without benefit of parole, probation, or suspension of sentence, to be served concurrently. Subsequently, the trial court issued an order amending the sentencing minutes with respect to the sentence imposed for possession of cocaine in order to "conform to applicable statutory provisions by deleting the parole prohibition" from that sentence. The trial court also indicated in sentencing reasons, issued that same date, that no parole restriction was imposed on defendant's sentence for possession of cocaine.³

¹ The habitual offender bill of information enumerated predicate convictions consisting of three convictions for possession of cocaine, two convictions for armed robbery, and one conviction for attempted armed robbery.

² All references made herein to LSA-R.S. 15:529.1 are made to that provision as it existed prior to its amendment by 2010 La. Acts, Nos. 69, 911, and 973.

³ The imposition of the parole restriction upon the defendant's sentence for possession of cocaine was illegal, because neither the reference statute for the underlying offense, LSA-R.S. 40:967(C)(2), nor the Habitual Offender Statute, LSA-R.S. 15:529.1, authorize such a restriction upon the sentence. An illegal sentence may be corrected at any time by the court that imposed it. LSA-C.Cr.P. art. 882(A). Moreover, a defendant's presence is not required under LSA-C.Cr.P. art. 835 when an illegal sentence is corrected. See State v. Champagne, 506 So.2d 1377, 1378-79 (La. App. 3 Cir. 1987).

Defendant now appeals, alleging in her sole assignment of error that the sentence imposed upon her for vehicular homicide was illegal because the trial court was not authorized to impose any period of parole ineligibility beyond thirty years. For the following reasons, we affirm the convictions, habitual offender adjudications, and sentences.

DISCUSSION

In her sole assignment of error, the defendant argues that her thirty-five year sentence for vehicular homicide, without benefit of parole, probation, or suspension of sentence, was illegally excessive.⁴ Specifically, she complains that, because LSA-R.S. 14:32.1, the reference statute for vehicular homicide, provides that the maximum sentence for the offense is thirty years at hard labor without benefit of probation, parole, or suspension of sentence, only thirty years of her sentence on that conviction as a habitual offender may be imposed without benefit of parole.

Although LSA-R.S. 15:529.1(G) provides that habitual offender sentences should be imposed at hard labor without benefit of probation or suspension of sentence, the habitual offender statute does not authorize the restriction of parole eligibility. Rather, with respect to restrictions on parole eligibility, the conditions imposed on the sentence are those called for in the reference statute of the underlying offense. **State v. Bruins**, 407 So.2d 685, 687 (La. 1981); **State v. Bonit**, 2005-0795 (La. App. 1 Cir. 2/10/06), 928 So.2d 633, 642, writ denied, 2006-1211 (La. 3/16/07), 952 So.2d 688.

In the instant case, prior to her adjudication as a habitual offender, the defendant's conviction for vehicular homicide exposed her, under LSA-R.S.

⁴ Since defendant is actually challenging the legality of the sentence imposed, rather than its excessiveness, we will consider the issue despite her failure to file a motion to reconsider sentence pursuant to LSA-C.Cr.P. art. 881.1(A). Cf. **State v. Caston**, 40,093 (La. App. 2 Cir. 10/26/05), 914 So.2d 122, 135 (issue considered because it attacked legality of the sentence even though it was not included in the motion to reconsider sentence).

14:32.1(B), to imprisonment, with or without hard labor, for not less than five years nor more than thirty years, at least three years of the sentence to be imposed without benefit of parole, probation, or suspension of sentence. Thus, while this provision mandates that the trial court restrict parole eligibility for only three years, it grants the court the authority to restrict parole eligibility for the entire sentence. Accordingly, because imposition of the entire sentence without parole eligibility is a sentencing condition authorized by the reference statute, the trial court's imposition of the entire thirty-five year habitual offender sentence without benefit of parole was not illegally excessive.

This assignment of error is without merit.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATIONS, AND SENTENCES AFFIRMED.