

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

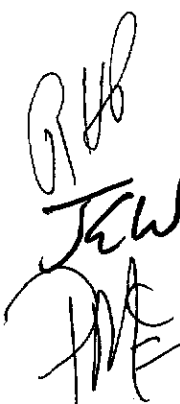
**FIRST CIRCUIT**

**2008 KA 0301**

**STATE OF LOUISIANA**

**VERSUS**

**WARREN J. RANGE**

  
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**On Appeal from the 19th Judicial District Court  
Parish of East Baton Rouge, Louisiana  
Docket Nos. 12-80-1044 and 11-81-0975, Section 3  
Honorable Michael R. Erwin, Judge Presiding**  
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Warren J. Range**

**Warren J. Range  
Cottonport, LA**

**Defendant-Appellant  
In Proper Person**

**BEFORE: PARRO, McCLENDON, AND WELCH, JJ.**

**Judgment rendered** SEP 19 2008

**PARRO, J.**

In 1980, defendant, Warren Range, was charged with one count of armed robbery (Count 1), a violation of LSA-R.S. 14:64, and one count of attempted first degree murder (Count 2), a violation of LSA-R.S. 14:27 and 14:30. Defendant was tried before a jury and found guilty as charged. The state instituted habitual offender proceedings, and defendant was subsequently adjudicated a second felony habitual offender. Defendant was originally sentenced to two consecutive fifty-year terms, with his sentence for armed robbery ordered to be served without benefit of parole, probation, or suspension of sentence.

Defendant's original convictions and sentences were affirmed by the Louisiana Supreme Court on June 29, 1983. **State v. Range**, 434 So.2d 1108 (La. 1983) (per curiam). In the twenty-five years following defendant's convictions, he has filed numerous writs, appeals, and post-conviction applications challenging both his convictions and sentences.

Relevant to this appeal is a sentencing issue. On August 6, 2003, in response to defendant's challenge to the legality of his sentences, the trial court vacated defendant's original sentences on the basis that it was unclear whether one or both of defendant's original sentences had been enhanced. The state reinstated habitual offender proceedings and defendant was again adjudicated a second felony habitual offender as to his conviction for armed robbery. The trial court ordered a presentence investigation and defendant's resentencing was held on October 29, 2003.

At the October 29, 2003 resentencing, the trial court imposed a sentence of twenty-five years at hard labor for defendant's attempted first degree murder conviction, and thirty-three years at hard labor for his armed robbery conviction (second felony habitual offender) to be served without benefit of probation, parole, or suspension of sentence. The trial court ordered these sentences to be served consecutive to each other.

Defendant continued filing motions with regard to his sentences and post-conviction relief. On October 5, 2004, a commissioner signed an order of recusal filed

by the District Attorney. The recusal motion was based on the fact that Doug Moreau, who presided over defendant's trial as the judge, was presently the District Attorney for East Baton Rouge Parish. Following the signing of the recusal order, the Attorney General's office began responding to defendant's pleadings.

On December 7, 2005, defendant filed a motion to correct illegal sentence, contending that neither of his sentences should have been imposed without parole eligibility. On April 18, 2006, the trial court conducted a hearing on the motion. Following the hearing, the trial court deleted the prohibition against probation, parole, or suspension of sentence for defendant's attempted first degree murder conviction.

Defendant then filed a motion to appeal. Defendant also filed a motion to reconsider sentence, which was denied on May 3, 2006. Defendant also appealed the trial court's denial of his motion to reconsider sentence.

### **FACTS OF THE OFFENSES**

On August 5, 1980, defendant entered Louisiana Oil, located on Scenic Highway in Baton Rouge, and robbed Edward McCrary of approximately \$1,500 at gunpoint. As defendant was attempting to leave the business, Henrietta McCrary entered the office. Defendant shot Henrietta in the neck and fled.

### **RECUSAL OF DISTRICT ATTORNEY**

In his first assignment of error, defendant argues the District Attorney's Office erred in failing to remove itself from the prosecution of this case after being recused on its own motion. Defendant contends that the continued participation by the District Attorney's Office in the proceedings constituted an ethical breach that should result in nullity.

In order to preserve an issue for appellate review, a party must state an objection contemporaneously with the occurrence of the alleged error, as well as the grounds for the objection. LSA-C.Cr.P. art. 841. The purpose behind the contemporaneous objection rule is to put the trial judge on notice of an alleged irregularity so that he may cure the problem, and to prevent the defendant from gambling on a favorable verdict, then resorting to an appeal on errors that might easily

have been corrected by an objection. While we recognize that the state was represented by the District Attorney at the April 18, 2006 sentencing hearing, we note that defense counsel mailed notice of his request for such a hearing (motion to correct illegal sentence) to the District Attorney, not the Attorney General. The transcript of this hearing reflects that neither defendant nor his lawyer made any objection to the participation in the hearing by the District Attorney's Office, and the issue was not preserved for appellate review. However, even if the alleged error had been properly preserved, this assignment of error has no merit.

Defendant argues the District Attorney's Office continued to act in this case following the signing of the recusal order. In support of this contention, defense counsel cites record references which supposedly reflect such action by the District Attorney. However, as the Attorney General's brief and the record reflect, these record references do not support defendant's representations. First, Volume 2, pages 308-10, is a motion for extension of time filed by the Attorney General's Office. Next, Volume 2, pages 496-99, are a response and memo filed by the Attorney General's Office to defendant's application for post-conviction relief. Finally, defendant's reference to Volume 5, page 107, reflects only the recusal order signed by Nineteenth Judicial District Court Commissioner Rachel Morgan.

Defendant argues that "[w]ithout the recused-prosecutor's continued insistence during the hearing that [defendant] not receive any additional good time credit and that his sentence on the armed robbery charge be maintained, the result of the proceeding would probably have been different."

We disagree. Defendant's assertion clearly presumes that had the state been represented by the Attorney General's Office at the April 18, 2006 hearing, there would have been no objection to any type of reduction of defendant's sentence. There is no basis in the record to reach such a conclusion.

We are not persuaded by defendant's reliance on the jurisprudence finding that a recused judge's continued acting on matters from which he was recused creates a nullity. We note that the grounds for recusal of a trial judge are directly related to

whether that judge can act in a fair and impartial manner as he presides over the proceedings. The prosecutor, although bound by the Rules of Professional Conduct and obligations under the federal and state constitutions, maintains a different role from the trial judge. Given the distinction between the roles of the trial judge and prosecutor, and considering the circumstances of this matter, we find defendant has failed to show how the prosecutor's continued participation in this matter has caused him prejudice.

### **EXCESSIVE SENTENCE**

In defendant's second assignment of error, he argues the imposition of lengthy, consecutive sentences violates the constitutional prohibition against excessive punishment.

At the outset, we note that the Second Circuit recently held that a non-discretionary and ministerial correction of a sentence under LSA-C.Cr.P. art. 882, to delete an illegal provision is not a resentencing, and is not accompanied by the right to be present in court, the right to counsel, the right to appeal, or the reinstatement of the two-year delay from finality of conviction after the correction. See State v. Littleton 43,609 (La. App. 2nd Cir. 5/7/08), 982 So.2d 978. Using this rationale, the trial court's reinstatement of defendant's parole eligibility for his attempted first degree murder conviction would not be considered a resentencing that is accompanied by the right to appeal. Accordingly, defendant has no right to his present appeal.

Further, the consecutive sentences defendant presently complains of in this appeal were imposed by judgment rendered August 26, 2003. No appeal was taken from this judgment; therefore it became a final judgment. On April 7, 2004, defendant filed an untimely motion to reconsider sentence, which was denied. On December 5, 2005, defendant filed a motion to correct illegal sentence, contending that neither of his sentences imposed for his convictions should have been imposed without parole eligibility.

Louisiana Code of Criminal Procedure article 881.5 provides that on motion of the state or the defendant, or its own motion, at any time, the court may correct a sentence imposed by that court which exceeds the maximum sentence authorized by

law. At the April 18, 2006 hearing, the trial court found that based on the law existing at the time of the original convictions, the sentence for attempted first degree murder should not have been ordered served without benefit of probation, parole, or suspension of sentence. The trial court deleted those prohibitions only with respect to defendant's attempted first degree murder conviction. During that hearing, the trial court did not change the previous order that the sentences be imposed consecutive to each other.

Because the issue of consecutive sentences became final in 2003, defendant is procedurally barred from raising that issue within the context of this appeal. The defendant can only appeal what was properly addressed by the trial court's action on his motion to correct illegal sentence, i.e., the April 18, 2006 reinstatement of parole eligibility on his attempted first degree murder conviction.

This assignment of error is moot.

**SENTENCES AFFIRMED.**