NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 0021

STATE OF LOUISIANA

VS.

BRANDON ALFORD

****

JUDGMENT RENDERED: SEP 15 2006

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ON APPEAL FROM THE
NINETEENTH JUDICIAL DISTRICT COURT
DOCKET NUMBER 10-3-0647, SECTION VII
PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA

HONORABLE TODD W. HERNANDEZ, JUDGE

****

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APPELLANT BRANDON ALFORD

BEFORE: CARTER, C.J., WHIPPLE AND MCDONALD, JJ.

MCDONALD, J.

The defendant, Brandon Alford, was charged by bill of information with operating a vehicle while intoxicated (DWI), fourth offense, in violation of La. R.S. 14:98E. The defendant originally entered a plea of not guilty as charged. On January 5, 2005, the defendant withdrew his plea of not guilty and entered a plea of guilty as charged. Subsequently, the defendant was sentenced to eighteen years imprisonment at hard labor. The court further ordered that "at least five years" of said sentence are to be served without the benefit of suspension of sentence, probation, or parole. The defendant now appeals, raising error as to the legality of the sentence imposed. For the following reasons, we affirm the conviction, vacate the sentence, and remand for resentencing.

STATEMENT OF FACTS

As the defendant entered a guilty plea, the facts for the instant offense were not fully developed. The bill of information states that on or about September 27, 2003, the defendant committed the offense of driving while intoxicated by operating a motor vehicle while under the influence of alcoholic beverages. The bill further states the defendant was previously convicted of operating a vehicle while intoxicated as follows: on September 3, 2003, (for an offense committed on March 22, 2003) in the 19th Judicial District Court under docket number 06-03-0804; on November 19, 2002, (for an offense committed on October 6, 2002) in the 20th Judicial District Court under docket number 02-CR-1279; and, on September 5, 2002, (for an offense committed on December 14, 2001) in the City Court of Baker, Louisiana, under docket number 53465.

ASSIGNMENT OF ERROR

In the sole assignment of error, the defendant avers that he never received the benefit of substance abuse treatment as specifically provided by the legislature in La. R.S. 14:98 for a conviction of a third offense DWI. Thus, the defendant

contends that the trial court erred in sentencing him pursuant to La. R.S. 14:98E(4)(a). The defendant cites ***State v. Corbitt***, 2004-2663 (La. App. 1st Cir. 6/10/05), 917 So.2d 29, writ denied, 2005-1656 (La. 2/3/06), 922 So.2d 1174, in his brief to this Court. The defendant attempts to distinguish the instant case from ***Corbitt*** and, alternatively, argues that the holding in ***Corbitt*** is incorrect. The defendant notes that, in the instant case, the Division of Probation and Parole failed to immediately place him in an inpatient setting following his release for third offense DWI. The defendant further avers that the holding in ***Corbitt*** does not focus on the actual purpose of the applicable version of La. R.S. 14:98 after legislative amendments in 2001 La. Acts No. 1163, i.e., to treat alcoholism.

As previously stated, on September 3, 2003, the defendant pled guilty to DWI, third offense, for an offense that was committed on March 22, 2003. Regarding the third offense, the defendant was sentenced to three years imprisonment at hard labor; all but thirty days of said sentence was suspended. The defendant was placed on active supervised probation for a period of three years with general and special conditions, including requirements that the defendant undergo a substance abuse evaluation, attend a court approved inpatient substance abuse treatment facility for a period of not less than four weeks nor more than six weeks, and undergo subsequent home incarceration. The court ordered the defendant to report to the Division of Probation and Parole for his initial interview in connection with his probation within forty-eight hours of release.

According to the testimony presented by the defendant during the hearing on his motion to reconsider sentence, the defendant was released from imprisonment on September 16, 2003. The defendant further testified that he reported to the Division of Probation and Parole within forty-eight hours of his release. However, the department's computers were inoperable at the time of the defendant's arrival. The defendant was told to come back the next day and he complied. On that

particular day, the defendant's probation officer was not present. A substitute officer assisted the defendant, but he was not scheduled for evaluation or treatment. On September 27, 2003, the defendant committed the instant offense. The defendant pled guilty to the instant offense on January 5, 2005.

Prior to amendment by 2005 La. Acts No. 497, § 1, La. R.S. 14:98D stated, in pertinent part, as follows:

> (1)(a) On a conviction of a third offense, notwithstanding any other provision of law to the contrary and regardless of whether the offense occurred before or after an earlier conviction, the offender shall be imprisoned with or without hard labor for not less than one year nor more than five years and shall be fined two thousand dollars. Thirty days of the sentence of imprisonment shall be imposed without benefit of probation, parole, or suspension of sentence. The remainder of the sentence of imprisonment shall be suspended, and 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 equal to the remainder of the sentence of imprisonment, which probation shall commence on the day after the offender's release from custody.
>
> (b) The offender shall be required as a condition of probation to submit to and complete either of the following requirements:
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> (i) To immediately undergo an evaluation by the Department of Health and Hospitals, office for addictive disorders to determine the nature and extent of the offender's substance abuse disorder and to participate in any treatment plan recommended by the office for addictive disorders, including treatment in an inpatient facility approved by the office for a period of not less than four weeks followed by outpatient treatment services for a period not to exceed twelve months.
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> (ii) To participate in substance abuse treatment in an alcohol and drug abuse program provided by a drug division subject to the applicable provisions of R.S. 13:5301 et seq. if the offender is otherwise eligible to participate in such program.
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> (c) In addition to the requirements set forth in Subparagraph (b) of this Paragraph, the offender shall be placed in a home incarceration program approved by the division of probation and parole for a period of time not less than six months and not more than the remainder of the sentence of imprisonment.

La. R.S. 14:98E stated, in pertinent part, as follows:

> (1)(a) 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 remainder of the sentence of imprisonment shall be suspended, and 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.
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> * * *
>
> (4)(a) *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. (emphasis added).

Statutory interpretation begins, "as [it] must, with the language of the statute." ***State v. Mayeux***, 2001-3195, p. 4 (La. 6/21/02), 820 So.2d 526, 529 (quoting ***Bailey v. United States***, 516 U.S. 137, 144, 116 S.Ct. 501, 506, 133 L.Ed.2d 472 (1995)). This Court's holding in ***Corbitt*** is based on the plain and unambiguous language of La. R.S. 14:98E(4)(a). In ***Corbitt***, the defendant pled guilty to third offense DWI on June 17, 2004. The trial court imposed a partly suspended sentence, home incarceration, a $2,000.00 fine, thirty days in parish jail, and four to six weeks of rehabilitation. On June 23, 2004, the defendant was tried and convicted of fourth offense DWI. The trial court imposed sentence pursuant to La. R.S. 14:98E(4)(a). On appeal, the defendant argued he should have been sentenced under La. R.S. 14:98E(1)(a), rather than La. R.S. 14:98E(4)(a), because he had not previously received substance abuse evaluation, treatment for substance abuse at an inpatient facility, or the benefits of home incarceration. We found no trial error in this regard. This Court, in part, stated as follows:

> By its express terms, La. R.S. 14:98 E(4)(a) is triggered when "the offender has previously been required to participate in substance abuse treatment and home incarceration pursuant to [La. R.S. 14:98 D.]" The defense argument relies upon a reading of the language "been required to participate in" as "completed." Such a construction is not a genuine construction, according to the fair import of the words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision. See La. R.S. 14:3. ***Corbitt***, 2004-2663 at p. 5, 917 So.2d at 32.

We further noted the purpose of La. R.S. 14:98D(1) and E(1) as follows:

> A defendant sentenced under either La. R.S. 14:98 D(1) or E(1) is given the benefit of having a substantial portion of his sentence suspended if he satisfies certain conditions involving substance abuse evaluation and treatment and home incarceration. See La. R.S. 14:98 D(1)(a)- D(1)(d) & E(1)(a)- E(1)(d). If he fails to complete his substance abuse treatment or violates any condition of his home incarceration, he is imprisoned for the original term of his suspended sentence with no credit for time served under home incarceration. See La. R.S. 14:98 D(1)(e) & E(1)(e). ***Corbitt***, 2004-2663 at pp. 5-6, 917 So.2d at 32-33.

Here, the defendant was previously required to participate in substance abuse treatment and home incarceration pursuant to Subsection D of La. R.S. 14:98, as a third offender. In spite of the arguments raised by the defendant on appeal, we find our holding in ***Corbitt*** to be sound and controlling herein. Thus, we find that the trial court did not err in sentencing the defendant, as a fourth offender, pursuant to La. R.S. 14:98E(4)(a). The defendant's sole assignment of error is without merit. Nonetheless, we must vacate the sentence and remand for the imposition of a determinate sentence.

PATENT ERROR

In accordance with La. Code Crim. P. art. 920(2), we review the appeal for errors patent on the face of the record. After reviewing the record, we note as follows. The trial court imposed an indeterminate sentence when it ordered that "at least" five years of the defendant's sentence for fourth offense DWI be served without benefit of probation, parole, or suspension of sentence. The pertinent

sentencing provision, La. R.S. 14:98E(4)(a), requires that at least three years of the sentence be imposed without benefit of suspension of sentence, probation, or parole. Thus, the trial court may order all or a portion, but at least three years, of the sentence to be served without benefits, but it must specify the term. La. Code Crim. P. art. 879; ***State v. Cedars***, 2002-861, p. 2 (La. App. 3d Cir. 12/11/02), 832 So.2d 1191, 1193; ***State v. Cabanas***, 552 So.2d 1040, 1046 (La. App. 1st Cir. 1989), writ denied, 556 So.2d 41 (La. 1990). Accordingly, we must vacate the sentence and remand the case for resentencing.

CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED FOR RESENTENCING.