NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 KA 0154

STATE OF LOUISIANA

VERSUS

FRANCIS DANCY WINCHESTER, IV

Judgment rendered September 20, 2006.

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Appealed from the
16th Judicial District Court
in and for the Parish of St. Mary, Louisiana
Trial Court No. 157,877
Honorable Keith Comeaux, Judge

* * * * * *

HON. J. PHIL HANEY
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FRANCIS D. WINCHESTER
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DEFENDANT-APPELLANT
IN PROPER PERSON

* * * * * *

BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

Hughes, J., concurs with reasons.

PETTIGREW, J.

The defendant, Francis Dancy Winchester, IV, was charged by bill of information with two counts of attempted armed robbery, violations of La. R.S. 14:27 and I4:64 (counts 1-2); one count of aggravated burglary, a violation of La. R.S. 14:60 (count 3); one count of possession of a firearm by a convicted felon, a violation of La. R.S. 14:95.1 (count 4); and one count of attempted aggravated burglary, a violation of La. R.S. 14:27 and 14:60 (count 5). He pled not guilty. Thereafter, pursuant to a plea agreement, the defendant withdrew his prior plea and pled guilty as charged on counts 1-4. In exchange, the State dismissed the attempted aggravated burglary charge (count 5) and agreed not to multiple bill the defendant. The State further agreed that the sentences to be imposed on counts 1-4 would be made concurrent with the eight-year sentence the defendant would have to serve as a result of a probation violation in Docket Number 98-150,349. The defendant subsequently was sentenced to thirty years at hard labor, without the benefit of parole, probation, or suspension of sentence on count one; thirty years at hard labor, without the benefit of parole, probation, or suspension of sentence on count two; thirty years at hard labor on count three; and fifteen years at hard labor, without the benefit of parole, probation, or suspension of sentence on count four. The sentences were ordered to be served concurrently with each other but consecutively to the sentence the defendant was serving for the probation violation.[1] The defendant objected to the severity of the sentences and moved for reconsideration. The trial court denied the motion.

The defendant appealed and asserted that the trial court erred in ordering his sentences for the instant offenses to run consecutively to the sentence he was serving

[1] The defendant was on probation for a previous simple burglary conviction, Docket Number 98-150,349, when he committed the instant offenses. We note that following sentencing on December 5, 2002, the defendant had his probation revoked for the simple burglary conviction at a felony revocation hearing on April 11, 2003. The trial court at this hearing also ordered the remaining portion of his simple burglary sentence (eight years) to run concurrently with the thirty-year total sentence he was presently serving by virtue of the plea agreement. Thus, arguably, the defendant's application for postconviction relief, filed November 14, 2003, which failed to mention that he was sentenced properly and in accordance with his plea agreement at the revocation hearing, should have been rendered moot. See La. Code Crim. P. art. 901(C)(2).

when the plea agreement provided that the sentences would be served concurrently. This court agreed with the defendant, finding that the trial court failed to comply with the plea agreement. In **State v. Winchester**, 2004-0910, p. 5 (La. App. 1 Cir. 12/30/04), 890 So.2d 37 (unpublished opinion), we affirmed the convictions, but vacated the sentences and remanded with the instructions that the defendant be given the option of demanding specific performance of the plea agreement or the opportunity to request withdrawal of his guilty plea.

At the hearing on his motion to withdraw the guilty plea on February 9, 2005, the defendant requested to withdraw his guilty plea. The trial court initially granted the request. Gary LeGros, defense counsel, informed the trial court that the defendant's request to withdraw his guilty plea was being done against his (LeGros') advice, and that the defendant had not listened to what he had to say. The trial court questioned the defendant and, upon discovering the defendant had a sixth grade education, the trial court informed the defendant that it was not going to allow him to withdraw his plea at that time. The trial court ordered the matter be set for hearing to determine if, under the circumstances, due process required the defendant be given the option to withdraw his guilty plea.

At the motion to withdraw the guilty plea on April 25, 2005, the defendant again requested to withdraw his guilty plea. The trial court ordered the hearing to commence and instructed Mr. LeGros to call his first witness. The defendant informed the trial court that he needed to call his own witnesses; namely, Mr. McClelland, the prosecutor, Judge Keith Comeaux,[2] and Gregory Aucoin, defense counsel who had represented the defendant prior to Mr. LeGros. The trial court ordered the hearing to be continued and rescheduled it for June 3, 2005, so that the defendant would have the opportunity to subpoena his witnesses to testify at the next hearing.

At the hearing on June 3, 2005, the trial court informed the defendant that he had the choice to demand specific performance of the plea agreement or to request to

[2] Judge Comeaux was the trial judge presiding at the present hearing.

withdraw his guilty plea. The defendant demanded specific performance, and the trial court sentenced the defendant to thirty years at hard labor, without the benefit of parole, probation, or suspension of sentence on count one (attempted armed robbery); thirty years at hard labor, without the benefit of parole, probation, or suspension of sentence on count two (attempted armed robbery); thirty years at hard labor on count three (aggravated burglary); and fifteen years at hard labor, without the benefit of parole, probation, or suspension of sentence on count four (possession of a firearm by a convicted felon). The sentences were ordered to be served concurrently with each other and concurrently with the sentence the defendant was serving for the probation violation. The defendant made an oral motion for reconsideration of sentence, which was denied. The defendant now appeals, urging one assignment of error by counseled brief and one assignment of error by pro se brief.

FACTS

Because the defendant pled guilty, the facts were not fully developed at trial. The factual basis for the guilty plea, provided by the prosecutor during the **Boykin** hearing, is as follows:

> [O]n [June 14, 2001], Mr. Adam Guillot, a college student, returned to his parent's residence in Berwick. While getting out of his vehicle he was approached by the defendant ... armed with a rifle. The defendant demanded money from Mr. Guillot. However, being a college student, he had no money. He then forced Mr. Guillot into his parent's residence, at which time his mother, Ms. Tessie Guillot, appeared. Mr. Winchester threatened her with the rifle and demanded money, and she and her son both said that they had money in another location in the house. He then forced them to that location in the house where Mr. Garrett Guillot, the father and husband of the victims, tackled him from behind. The rifle went off a couple of times. He was held at that location until Berwick police arrived. He was questioned by Berwick police and he confessed fully and brought them through a re-enactment of that crime and also of an attempted aggravated burglary just down the street where he had removed a screen on another residence but was unable to actually enter the residence. He had come to the scene on a bicycle and he showed them where he had hidden the bicycle.

COUNSELED ASSIGNMENT OF ERROR

In this assignment of error, the defendant argues that defense counsel refused to represent him in his request to withdraw his guilty plea.[3] The defendant also argues that the trial court failed to follow this court's instructions to afford him a contradictory hearing on his request to withdraw his guilty plea.

Nothing in the record indicates that defense counsel, Gary LeGros, refused to represent the defendant. On the contrary, the record clearly establishes that Mr. LeGros sufficiently informed the defendant of the consequences of withdrawing his guilty plea. At the April 25, 2005 hearing on the motion to withdraw the guilty plea, Mr. LeGros explained at length to the trial court, and in the presence of the defendant, the choices the defendant had and the significance of whatever choice he made:

> This hearing has been provoked by virtue of the Court of Appeal decision, basically sending it back to the court with instructions to have a hearing to decide what Mr. Winchester wants. Does he want to: a) demand specific performance of the plea agreement; or b) does he wish to vacate the guilty plea?
>
> . . . .
>
> I have spoken with Mr. Winchester, who's here present beside me, and have explained to him the possible outcomes of today's proceedings: the specific performance will be granted with regard to the original sentence, i.e. thirty years concurrent with the eight years he's serving; or, Mr. Winchester can elect to have a hearing to vacate the guilty plea, ... at which time the court would move to have this matter re-allotted and set for trial ... [or] the court would determine not to vacate the guilty plea, at which time the court would, of course, be bound to sentence Mr. Winchester to the original sentence and run it concurrent with the eight years he's serving.
>
> For the record, I've explained all of this to Mr. Winchester and have pointed out several things, specifically Title 15:529.1, the habitual offender law. I have explained to Mr. Winchester that should he be successful in having the guilty plea vacated he would subject himself to further proceedings which would either conclude by way of a plea bargain or by way of trial. I told him that Mr. McClelland [prosecutor] has informed me that there would be no plea bargain other than the one originally tendered in this case, and that if Mr. Winchester elected to proceed to trial, if there was a conviction, Mr. McClelland indicated to me that he would file habitual offender proceedings seeking to classify Mr.

[3] In his counseled brief, the defendant never addresses the issue of ineffective assistance of counsel per se, although he alludes to it when he contends that his attorney "refused to represent him." Since the issue of ineffective assistance of counsel is specifically raised by the defendant in his pro se brief, we address the issue there.

Winchester as a third offender. I've explained all that to Mr. Winchester, and we went over in great detail Title 15, Section 529.1.

I want Mr. Winchester clear on the fact that I have apprized him that, in my opinion, if he goes to trial on these charges and loses, he will be a third time felony offender, at which time he will be facing a mandatory minimum of thirty-three years without good time up to a possible maximum of ninety-nine years without good time .... In addition to that, he would be facing the eight years on his burglary conviction. ...

Did I explain that to you, Mr. Winchester?

A. [The defendant]: Yes, you did.

. . . .

BY MR. LEGROS: Again, Judge, what I told you is what I explained to Mr. Winchester. ...

. . . .

BY MR. LEGROS: Let the record reflect, Judge, I spent two hours Friday in jail and I spent all morning with him this morning.

The defendant was clearly represented by defense counsel. Moreover, it is clear that the object of this representation, as indicated by the record, was in the best interest of the defendant. When the defendant asserts in his brief that defense counsel refused to represent him in his request to withdraw his guilty plea, he is, erroneously, equating a refusal by defense counsel to acquiesce to the defendant's misguided decision to withdraw his plea with a lack of representation. Had the defendant withdrawn his guilty plea, he would, upon being found guilty at trial, have been exposed to a much longer sentence than thirty years. Regardless, the decision to withdraw the guilty plea was entirely left to the defendant, and the fact that defense counsel disagreed with the plea being withdrawn in no way meant that the defendant was not being represented at the hearing. Thus, we find baseless the defendant's assertion that he was not represented in his request to withdraw his plea.[4]

[4] The defendant's claim that he thought his plea agreement was for an eight-year sentence has no merit. This issue has already been addressed and disposed of by this court in **State v. Winchester**, 2004-0910 (La. App. 1 Cir. 12/30/04), 890 So.2d 37 (unpublished opinion). In **Winchester**, we found the defendant's claim unsupported by the record, which indicated the trial court had explained to the defendant his maximum sentence exposure, and that the defendant indicated he understood the penalty exposure. **Winchester**, 2004-0910 at 10-11, 890 So.2d 37. Moreover, as indicated in the above excerpt from the hearing following remand of this matter by this court, defense counsel explained to the defendant that his plea agreement was for a thirty-year sentence to run concurrently with the eight years he was already

We find baseless, as well, the defendant's assertion that he was not afforded a contradictory hearing on his request to withdraw his guilty plea. At the hearing on June 3, 2005, the defendant was given the choice to demand specific performance or to request a withdrawal of his guilty plea. The defendant demanded specific performance of his original plea agreement, and the trial court sentenced him accordingly. This assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR

In his pro se assignment of error, the defendant avers that he was not afforded the assistance of counsel to which he was constitutionally entitled. Specifically, the defendant contends that defense counsel was ineffective in his representation of him in his pursuit to withdraw his guilty plea.

Although a claim of ineffective assistance of counsel is normally raised in an application for postconviction relief, this court may address the merits of the claim when

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(Continued)
serving for a prior conviction. Furthermore, at this hearing, the trial court specifically informed the defendant that there was never any agreement to a sentence of only eight years, and that the defendant, if he demanded specific performance, was not going to get a sentence of only eight years:

> Q. I'm going to sentence you and I'm going to make it concurrent with what you owe on your other sentence. That's what the specific performance --
> A. You're going to honor the eight year deal?
> Q. Not eight years, no. I never did promise you eight years.
> A. That's what it says in the plea agreement.
> Q. No, it doesn't. You show me where it says it in the plea agreement.
> . . . .
> Q. It's not a conflict of interest, Mr. Winchester. I think once you got your sentence you realized I'm going to get a whole lot more than I had bargained for, and I really don't like this anymore and now I want to try and undo it. ... I said whatever sentence I would give you would run concurrent with the eight year sentence.
> A. Right, with the eight years.
> Q. That's right. No, it wouldn't just be eight years. I said any sentence I would give you would run concurrent with the eight years.
> A. Well, the way I understood it --
> Q. And that's what I'm going to do.
> A. So you mean any sentence you give me is going to run to the eight years, and the maximum sentence I would receive will be eight years.
> Q. No, sir, that's not what it says.
> A. But that's the specific performance that I'm asking for.
> Q. You can ask for what you want, but that doesn't necessarily mean that's what you're going to get. That's not what this says Mr. Winchester. That may be what you want to hear and what you understand, but that's not what it says.
> . . . .
> Q. You're entitled to whatever Mr. McClelland is going to offer you if I allow you to withdraw the guilty plea. If you don't want to withdraw the guilty plea, I'm going to enforce specific performance. We'll have a sentencing hearing and I'll sentence you.
> A. Obviously we have two different understandings on specific performance.
> Q. I'm not giving you eight years, if that's what you're asking me.

the record on appeal is sufficient. **State v. Seiss**, 428 So.2d 444, 448-449 (La. 1983). In this instance, the record is sufficient, and we will therefore address the defendant's claim.

In **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the United States Supreme Court enunciated the test for evaluating the competence of trial counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

"In evaluating the performance of counsel, the 'inquiry must be whether counsel's assistance was reasonable considering all the circumstances.'" **State v. Morgan**, 472 So.2d 934, 937 (La. App. 1 Cir. 1985) (citing **Strickland v. Washington**, 466 U.S. at 688, 104 S.Ct. at 2065). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. **State v. Robinson**, 471 So.2d 1035, 1038-1039 (La. App. 1 Cir.), writ denied, 476 So.2d 350 (La. 1985).

As discussed above in the counseled assignment of error, defense counsel provided adequate, effective representation for the defendant. Based on the very likely probability that the defendant would have received a longer sentence had he withdrawn his guilty plea, we cannot see how the advice of defense counsel to the defendant to not withdraw his guilty plea amounts to ineffective assistance of counsel. The defendant has shown neither deficient performance nor sufficient prejudice. This assignment of error is without merit.

PATENT ERROR

Whoever is found guilty of violating the provisions of La. R.S. 14:95.1 shall be imprisoned at hard labor for not less than ten nor more than fifteen years without the benefit of probation, parole, or suspension of sentence and be fined not less than one

thousand dollars nor more than five thousand dollars. La. R.S. 14:95.1(B). In the instant matter, the trial court sentenced the defendant to fifteen years at hard labor, without the benefit of parole, probation, or suspension of sentence, but failed to impose the mandatory fine upon the defendant pursuant to La. R.S. 14:95.1(B).

Sentencing errors by a trial court that pertain to mandatory sentencing requirements require the appellate court to vacate the sentence and remand for resentencing in accordance with law. **State v. Paoli**, 2001-1733, pp. 6-8 (La. App. 1 Cir. 4/11/02), 818 So.2d 795, 799-800 (en banc), writ denied, 2002-2137 (La. 2/21/03), 837 So.2d 628. Because the amount of the fine lies in the trial court's discretion, the correction of the sentencing error must be made by the trial court. See **State v. Haynes**, 2004-1893 (La. 12/10/04), 889 So.2d 224.

CONVICTIONS AFFIRMED; SENTENCES FOR COUNTS 1-2 (ATTEMPTED ARMED ROBBERY) AND COUNT 3 (AGGRAVATED BURGLARY) AFFIRMED; SENTENCE FOR COUNT 4 (POSSESSION OF A FIREARM BY A CONVICTED FELON) VACATED AND MATTER REMANDED FOR RESENTENCING.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 KA 0154

STATE OF LOUISIANA

VERSUS

FRANCIS DANCY WINCHESTER, IV

HUGHES, J., concurring.

I respectfully concur. **State v Paoli** does not "require" remand, but only requires that patent error be considered.