NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 0152

STATE OF LOUISIANA

VERSUS

MARVIN MITCHELL WILLIAMSON, JR.

Judgment rendered October 29, 2010.

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Appealed from the
16th Judicial District Court
in and for the Parish of St. Mary, Louisiana
Trial Court No. 2008-175670
Honorable Paul J. deMahy, Judge

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HON. J. PHIL HANEY
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DEFENDANT-APPELLANT
MARVIN MITCHELL WILLIAMSON, JR.

* * * * * *

BEFORE: KUHN, PETTIGREW, JJ., and KLINE, J. *pro tempore.*[1]

J. Kline concurs

[1] Judge William F. Kline, Jr., retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

PETTIGREW, J.

The defendant, Marvin Mitchell Williamson, Jr., was charged by bill of information with aggravated criminal damage to property, a violation of La. R.S. 14:55. The defendant pled not guilty and, after trial by jury, was found guilty as charged. The trial court imposed a sentence of two years at hard labor. The defendant appealed, and this court affirmed the conviction and sentence. **State v. Williamson**, 2009-1299 (La. App. 1 Cir. 12/23/09) (unpublished case). Subsequently, the defendant was adjudicated a second felony habitual offender. The trial court vacated the original sentence and sentenced the defendant to seven-and-one-half years at hard labor without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, claiming the parole restriction resulted in an illegal sentence. We affirm the habitual offender adjudication, vacate the sentence, and remand for resentencing.

FACTS

On December 12, 2007, Brenda Aucoin was working at Friend's Tavern in Morgan City. When her shift was over, she went into the parking lot where she found the defendant waiting for her. Aucoin and the defendant had been in a romantic relationship for years, living together for part of that time but separating for periods of time as well. On December 12, the defendant wanted Aucoin to come home with him, but she refused. At this point, Aucoin and the defendant were in their respective pickup trucks, the defendant's having special "heavy duty" bumpers. The defendant pulled away from Aucoin's truck, angled his truck so that his rear-bumper faced Aucoin's driver's side, accelerated, and rammed her truck while she was sitting in it. Aucoin had dropped her keys on the floorboard and was reaching down to get them when she felt the impact, which occurred with enough force to cause Aucoin's truck to "fish-tail." The defendant left, and Aucoin called the police. She was taken to Teche Action Hospital, where she was treated for dizziness, headache, and neck, shoulder, and spinal pain.

EXCESSIVE SENTENCE

In his only assignment of error, the defendant contends that the sentence imposed is illegally excessive because the court ordered it served without the benefit of parole,

although neither the aggravated criminal damage to property statute nor the habitual offender statute restricts parole eligibility.

The trial court sentenced the defendant under La. R.S. 15:529.1A(1)(a) to seven-and-one-half years at hard labor without the benefit of probation, parole, or suspension of sentence. However, parole eligibility is not prohibited by either the habitual offender statute or the aggravated criminal damage to property statute. See La. R.S. 14:55 & La. R.S. 15:529.1G. Thus, the denial of parole eligibility on the defendant's habitual offender sentence is unlawful. This sentencing error does not involve discretion. It is dependent upon the sentencing provisions of the particular penalty provisions of the criminal statute the defendant is charged with. What is discretionary is the range of the time the defendant may be in prison. Specifically, pursuant to La. R.S. 15:529.1A(1)(a), the sentencing range is seven-and-one-half years to thirty years without the benefit of probation or suspension of sentence. See La. R.S. 14:55 & La. R.S. 15:529.1G. What is not clear from the record is whether the trial court's mistaken belief that he could sentence the defendant without the benefit of parole affected the term of the sentence he imposed upon the defendant. In other words, if the trial court had known the sentence would be with the benefit of parole, would he have imposed a longer sentence for defendant than the seven-and-one-half years? This is discretionary with the trial court. The Louisiana Supreme Court has previously admonished, "[t]o the extent that the amendment of defendant's sentence entails more than a ministerial correction of a sentencing error, the decision in **State v. Williams**, [2000-1725] (La. 11/28/01), 800 So.2d 790, does not sanction the *sua sponte* correction made by the court of appeal on defendant's appeal of his conviction and sentence." **State v. Haynes**, 2004-1893 (La. 12/10/04), 889 So.2d 224 (per curiam). Thus, we must vacate the sentence and remand for resentencing.

HABITUAL OFFENDER ADJUDICATION AFFIRMED; SENTENCE VACATED AND REMANDED WITH INSTRUCTIONS.