

STATE OF LOUISIANA

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NO. 2001-KA-1617

VERSUS

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COURT OF APPEAL

ANTHONY RUFFIN

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 416-877, SECTION "J"
Honorable Leon Cannizzaro, Judge

JUDGE

JOAN BERNARD ARMSTRONG

(Court composed of Judge Joan Bernard Armstrong, Judge Miriam G. Waltzer and Judge Dennis R. Bagneris, Sr.)

HARRY F. CONNICK, DISTRICT ATTORNEY
ANNE M. DICKERSON, ASSISTANT DISTRICT ATTORNEY
619 SOUTH WHITE STREET
NEW ORLEANS, LA 70119

COUNSEL FOR PLAINTIFF/APPELLEE

MARY CONSTANCE HANES
LOUISIANA APPELLATE PROJECT
P. O. BOX 4015
NEW ORLEANS, LA 701784015

COUNSEL FOR DEFENDANT/APPELLANT

REMANDED.

STATEMENT OF THE CASE:

On September 22, 2000, the defendant, Anthony Ruffin, was charged by bill of information with possession of cocaine. La. R.S. 40:967. On January 16, 2001, he was arraigned and pled not guilty. After his motion to suppress was denied on February 13, 2001, he changed his plea to guilty pursuant to State v. Crosby, 338 So.2d 584 (La. 1976). On May 21, 2001, the defendant was sentenced to five years at hard labor and ordered to participate in The About Face Program. He filed a motion to reconsider sentence, which the trial court held open. Defendant now appeals.

ERRORS PATENT:

The trial court deferred ruling on the motion to reconsider sentence.

The First, the Fourth, and the Fifth Circuits have considered cases in which there had been no ruling on a motion to reconsider sentence. The approach of the First and Fifth was set forth in State v. Wilson, 99-214, pp. 4-5 (La. App. 5 Cir. 6/30/99), 743 So.2d 728, 730:

This Court addressed the same problem in State v. Winfrey, 97-427 (La. App. 5th Cir. 10/38/97) (sic), 703 So.2d 63; writ

denied, 98-0264 (La. 6/19/98), 719 So.2d 481. In that case, the defendant filed a motion to reconsider his one-hundred year enhanced sentence, which, on appeal, defendant claimed was excessive. This Court found that it would be premature to rule on the excessiveness issue while a motion to reconsider sentence was pending, and remanded the case with these instructions:

Rather than rule on the excessiveness issue while a motion for reconsideration is pending which may vacate the present sentence, we remand the case for a ruling on the motion and supplementation of the record with the results. If the motion to reconsider is granted and defendant is re-sentenced, he may appeal the new sentence. If the motion is denied or if it has already been ruled on, defendant must move to re-lodge this appeal within sixty days of the date of the ruling on the motion to reconsider sentence or the date of this opinion, whichever is later. State v. Winfrey, *supra* at 81; See also LSA-C.Cr.P. art. 881.4 C; State v. Smith, 96-285 (La. App. 5 Cir. 10/1/96), 683 So.2d 826; State v. Sanders, 92-1508, 618 So.2d 904 (La. App. 1 Cir. 1993).

In State v. Allen, 99-2579 (La. App. 4 Cir. 1/24/01), 781 So.2d 88, writ denied by, 2001-1187 (La. 3/15/02), 811 So.2d 897, this Court followed the above reasoning, and considered the merits of the argument pertaining to the conviction, but refused to address the sentencing issues: “[C]onsidering that the record in the instant case reflects that the trial court has not held a hearing on the motion to reconsider sentence, and that a trial court has discretion to reduce the defendant’s sentence if it believes such reduction is

appropriate, we will not address the issue of the excessiveness of the sentence until the trial court has ruled upon the motion to reconsider.”

Allen, p. 12, 781 So.2d at 95.

However, despite these cases, in State v. Roberts, 01-0283, pp. 2-3 (La. App. 4 Cir. 1/23/02), 807 So.2d 1072, this Court stated:

A motion to reconsider sentence under C.Cr.P. art. 881.1 must be made by the defendant or the state. It cannot be made by the court on the defendant’s behalf. The statute specifically lets the court extend the time for filing a motion to reconsider. Thus, if, as in the case at bar, the trial judge was trying to let the convicted defendant complete the now illegal About Face Program in order to reduce his sentence, he should have extended the period of time for the defendant to file his motion to reconsider to a date certain or within a specific period of time. No provision of law authorizes a trial court to defer ruling on a defendant’s motion to reconsider sentence. In State v. Temple, 2000-2183, p. 9 (La. App. 4 Cir. 5/16/01), 789 So.2d 639, 646, we stated:

If the trial court granted an indefinite period within which to file a motion to reconsider the sentence, until the motion is filed *and acted upon*, a defendant would be precluded from appealing his conviction and sentence because a conviction without a final sentence is a non-appealable judgment. (Italics added.)

Moreover, in cases where the defendant has argued that his sentence was excessive, this Court has held that it is not procedurally correct to review a sentence prior to the trial court’s ruling on the motion. State v. Allen, 99-2579 (La. App. 4 Cir. 1/24/01), 781 So.2d 88; State v. Boyd, 2000-0274 (La. App. 4 Cir. 7/19/00), 775 So.2d 463.

In this case, the defendant did not object to the deferred ruling by the trial court and does not seek review of his

sentence on appeal. However, by deferring the ruling, the trial court is able to amend or change a hard labor sentence after the execution of the sentence in violation of La. C.Cr.P. art. 881 (but as apparently authorized by C.Cr.P. art. 881.1(B)). Thus, as noted in Temple, *supra*, without a final sentence the conviction is not appealable. Accordingly, the case must be remanded for a ruling on the motion to reconsider the sentence.

For the foregoing reasons, the case is remanded to the trial court for a ruling on the motion to reconsider the sentence, reserving the defendant's right to appeal his conviction and sentence once the court has ruled on the motion.

Roberts is controlling precedent in this circuit.

Accordingly, this case is remanded to the trial court for a ruling on the motion to reconsider the sentence. The defendant will have the right to appeal his conviction once the court has ruled on the motion.

REMANDED.