

STATE OF LOUISIANA

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NO. 2002-KA-0421

VERSUS

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COURT OF APPEAL

KIRK JOHNSON, JR.

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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. 404-016, SECTION "E"
HONORABLE CALVIN JOHNSON, JUDGE

JAMES F. MCKAY III
JUDGE

(Court composed of Chief Judge William H. Byrnes III, Judge Charles R. Jones, Judge James F. McKay III)

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**SENTENCE VACATED; REMANDED FOR
RESENTENCING**

On January 7, 1999, Kirk Johnson, Jr., was charged by bill of information with distribution of cocaine in violation of La. R.S. 40:967(A). At his arraignment on January 22nd, he pleaded not guilty. However, on March 2, 2000, the defendant withdrew his earlier plea and entered a plea of guilty as charged under La. C.Cr.P. art. 893. Johnson was sentenced on March 15th under La. R.S. 13:5301-5304 to serve five years at hard labor; the sentence was suspended, and he was placed on three years active probation with special conditions. One of the conditions was that he participate in the drug court program. The state objected and announced its intent to seek writs, but it followed the wrong procedure and now appeals the sentence.

The facts of the case are available only in the police report. According to that report, a confidential informant contacted Detective Paul Toye in August of 1996 and reported that a man named Elton Wicker was selling cocaine from several locations in the city. The tip resulted in undercover Officer Yvonne Farve making several drug purchases. On October 22, 1996, she arranged to meet a drug dealer at Wagner's Meat Market on North

Claiborne Avenue. The defendant drove Elton Wicker to the site, and then Johnson actually sold 6.44 grams of crack cocaine to the officer for \$250; the transaction was videotaped. The officer recorded his automobile license plate number. On May 19, 1998, Kirk Johnson was arrested.

The state argues that the trial court erred in suspending the defendant's sentence in that La. R.S. 13:5301-5304, which sets up a drug division probation program, requires that the district attorney recommend a defendant for the drug court probation program, and in this case, there was no such recommendation. The state also notes that Johnson was sentenced under La. R.S. 40:967(A) and La. C.Cr.P. art. 893 which prohibits suspension of sentence for a violation of La. R.S. 40:967(A).

In State v. Taylor, 99-2935 (La. 10/17/00), 769 So. 2d 535, the Louisiana Supreme Court considered the same argument at issue here. In that case, the Supreme Court held that a trial court is not authorized by La. R.S. 13:5301-5304 to place a defendant in the drug court program without the recommendation of the district attorney. Therefore, we vacate the defendant's sentence and remand the case for resentencing. However, the trial court should consider whether the defendant's guilty plea was made in consideration of a suspended sentence, and in such a case, the court should allow the defendant the opportunity to withdraw his plea. Additionally, the

court may consider whether the minimally mandated sentence is constitutionally excessive in this particular defendant's circumstances under State v. Dorthey, 623 So. 2d 1276 (La. 1993), and State v. Fobbs, 99-1024 (La. 9/24/99), 744 So. 2d 1274.

**SENTENCE VACATED; REMANDED FOR
RESENTENCING**