STATE OF LOUISIANA	*	**NO. 2002-KA-0694**
VERSUS	*	**COURT OF APPEAL**
ELGIN MCCLAY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 392-507, SECTION "C"
Honorable Sharon K. Hunter, Judge
* * * * * *
Judge Steven R. Plotkin
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Steven R. Plotkin, Judge Max N. Tobias, Jr.)

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AFFIRMED. The issue in this appeal is whether the sentence is excessive.

PROCEDURAL HISTORY

The defendant, Elgin McClay, was charged with possession of more than 400 grams of cocaine in violation of La. R.S. 40:967(F)(1)(c). At his arraignment the defendant pled not guilty. The trial court granted the defendant's motion to suppress the search warrant and the State announced its intent to apply for writs. This Court granted the writ application, reversing the trial court's ruling. State v. McClay, 98-0862 (La. App. 4 Cir. 5/13/98). After being advised of his right to a jury, the defendant elected a bench trial. He was tried and found guilty of attempted possession of 400 grams or more of cocaine. He was sentenced to serve seven years at hard labor without benefit of parole, probation, or suspension of sentence. The defendant filed a pro se motion for reconsideration of sentence, which was denied.

STATEMENT OF FACTS

At trial Officer Maurice Palmer testified that on May 23, 1997, he set

up a surveillance of 9014 Green Street and then received a search warrant for the residence. When Officer Palmer and several other offices executed the warrant, they found six people in the house. The defendant was stopped at the back door as he was trying to leave. In the house the officer found more than $500 in cash, three large plastic bags containing cocaine, and ten clear plastic bags containing rock cocaine. The total weight of the three bags was 397.08 grams and that of the ten bags was 40.10 grams. The officer also found one aluminum tube with a white residue, two glass tubes, and a razor blade. The parties stipulated that the white powder and rocks seized in this case were tested and proved to be crack cocaine.

Officer Terry Wilson testified that he also took part in the execution of the search warrant of the house on Green Street. He covered the back door of the residence and arrested Elgin McClay as he tried to leave. When McClay was arrested he had no drugs on his person and was carrying about $70.

Attorney Ike Spears testified that he met with the defendant and witnessed and notarized an affidavit signed by Elgin McClay. In the affidavit, the defendant stated that the drugs belonged to him. The affidavit was presented as evidence at trial.

ERRORS PATENT

A review of the record reveals an error patent. La. R.S. 40:967(F)(1)(c) provides for imposition of a fine of between $250,000 and $600,000. The trial court failed to assess a fine as required by La. R. S. 40:967(F)(1)(c), and by La. R.S. 40:979, which requires that a sentence be imposed in the same manner as for the offense attempted. In State v. Major, 2002-0133 (La. 4 Cir. 10/2/02) 2002 WL 31256433, __ So.2d __, this Court recently discussed the issue of an illegally lenient sentence resulting from a trial judge's failure to impose a fine as required by statute:

> Although we recognize that State v. Williams, 00-1725 (La.11/28/01), 800 So.2d 790, arguably calls into question the jurisprudential rule against correcting a patent sentencing error favorable to the defendant when the state fails to appeal, we read the holding in Williams as applying only to sentencing errors subject to automatic correction under La. R.S. 15:301.1 (A). Our holding is consistent with that espoused by the dissent in State v. Paoli, 2001-1733, p. 1 (La.App. 1 Cir. 4/11/02), 818 So.2d 795, 800-01 (Guidry, J., dissenting); as Judge Guidry, joined by Judge Pettigrew, aptly stated:
>
> > Although State v. Williams, 00-1725 (La.11/28/01), 800 So.2d 790, arguably cast some doubt upon the reasoning in State v. Fraser, 484 So.2d 122 (La.1986), it does not overrule Fraser and I do not interpret Williams as applicable to sentencing errors of a type different than those subject to automatic correction under La. R.S. 15:301.1.
>
> In this case, the patent sentencing error--a mandatory fine--falls under La. R.S. 15:301.1(B). See Williams, 2000-1725, pp. 10-11, 800 So.2d at 799 (citing, by way of example, failure to impose mandatory fine). La. R.S. 15:301.1(B) provides that an amendment of a sentence to conform with an applicable

> statutory provision may be made on the trial court's own motion or if the district attorney seeks such an amendment; however, La. R.S. 15:301.1(D) provides that such action must be taken within one hundred and eighty days of the initial sentencing. Construing those provisions together, the appellate court in State v. Esteen, 2001-879 (La.App. 5 Cir. 5/15/02), 821 So.2d 60, declined to remand to correct an illegally lenient sentence resulting from failure to impose a mandatory fine given the state's failure to
> object before La. R.S. 15:301.1(D)'s one-hundred eighty day period elapsed. We likewise conclude, that given the state's failure to seek relief in either the trial court or this court, it is inappropriate to remand for correction of the illegally lenient sentence resulting from the failure to impose a fine.

In the instant case, the State has failed to timely seek relief from the illegally lenient sentence that was imposed by the trial court. Therefore, it would be inappropriate to remand this case to the trial court for imposition of a fine.

ASSIGNMENT OF ERROR

In this assignment of error, defendant claims that his seven-year sentence is unconstitutionally excessive, and argues that the trial court failed to consider the sentencing guidelines in La. C.Cr.P. art. 894.1.

La. C.Cr.P. art. 881.1 provides in pertinent part:

> A. (1) Within *thirty days following the imposition of sentence* or within such longer period as the trial court may set at sentence, the state or the defendant may make or file a motion to reconsider sentence.
> (2) The motion shall be oral at the time of sentencing or in writing thereafter and shall set forth the specific grounds on which the motion is based.

* * *

> D. Failure to make or file a motion to reconsider sentence or to include a specific ground upon which a motion to reconsider sentence may be based, including a claim of excessiveness, shall preclude the state or the defendant from raising an objection to the sentence or from urging any ground not raised in the motion on appeal or review. [Emphasis added].

In the instant case, defense counsel failed to object to the sentence in any way at sentencing, and the defendant's pro se motion for reconsideration was filed on September 13, 1999, or five and one-half months after sentencing. Therefore, defendant is precluded from raising both the claim of excessive sentence and the claim that the trial court failed to consider the sentencing factors enunciated in La. C.Cr.P. art. 894.1. State v. Tyler, 98-1667, p. 14 (La. App. 4 Cir. 11/24/99), 749 So.2d 767, 775.

CONCLUSION

Accordingly, for reasons cited above, the defendant's conviction and sentence are affirmed.

AFFIRMED.