

STATE OF LOUISIANA

*

NO. 2015-KA-1325

VERSUS

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COURT OF APPEAL

JOSEPH A. DAVIS

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

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LANDRIEU, J., CONCURS WITH REASONS

The majority remands this matter for correction of the defendant’s fifteen-year sentence imposed upon his conviction of count one, possession of a firearm by a convicted felon. I agree that there are two patent errors affecting the defendant’s sentence: (1) the trial court failed to state that the sentence must be served without benefit of probation or suspension, as required by La. R.S. 15:529.1 (G), and (2) the trial court failed to impose a fine of \$1,000 to \$5,000, as mandated by La. R.S. 14:95.1 (B). As the majority notes, the first error is self-correcting and would not require a remand but for the trial court’s need to correct the second error, the failure to impose a fine within a certain range, which can only be done on remand. For the reasons explained herein, I concur in the remand for the imposition of the mandatory fine.

As a matter of policy, I do not believe that an appellate court should remand for the correction of a patent error favorable to the defendant when the defendant alone has appealed, and the State has not complained of the error. *See, State v. Williams*, 2000-1725 (La. 11/28/01), 800 So.2d 790, 803-05 (Calogero, Chief Justice, dissenting). Nevertheless, we are constrained to follow the Fourth Circuit’s prior jurisprudence directing that we remand for correction of the

defendant's sentence where the trial court has failed to impose a statutorily mandated fine.

In *State v. Williams*, 2003-0302 (La. App. 4 Cir. 10/6/03), 859 So.2d 751, this court discussed Louisiana Supreme Court jurisprudence, which directs that an appellate court may correct an illegally lenient sentence by remanding to impose a mandatory fine but is not required to do so. *Id.*, p. 3, 859 So.2d at 753 (citing *State v. Decrevel*, 2003-0259 (La. 5/16/03), 847 So.2d 1197). We noted that *Decrevel* was a split decision, with Chief Justice Calogero, Justice Weimer and Justice Johnson dissenting. Justice Weimer, joined by Chief Justice Calogero, expressed the view that an appellate court has no authority to remand for the imposition of a mandated fine unless the State has raised that issue on appeal. *Williams*, 2003-0302, p. 4, n.2, 859 So.2d at 753, n.2. Further noting that the Fourth Circuit had rendered conflicting opinions on this issue, this court in *Williams* resolved to cure the conflict by submitting the issue to an *en banc* vote. 2003-0302, pp. 3-4, 859 So.2d at 753. As reported in that opinion, the result of the *en banc* vote was that the Fourth Circuit would follow the procedure of remanding these matters to the trial court for the imposition of the mandatory fine. *Id.* Since *Williams*, this court has consistently followed this directive. See *State v. Brown*, 2012-0626, p.3 (La. App. 4 Cir. 4/10/13), 115 So.3d 564, 570 n.7 (citing cases).

This court's practice, however, differs from the approach adopted by the majority of the Circuits. A review of the jurisprudence suggests that, while the Third Circuit has followed the same procedure as the Fourth (See, e.g.: *State v. Leday*, 2005-1641 (La. App. 3 Cir. 5/3/06), pp. 4-5, 930 So.2d 286, 289; *State v. M.L.M.*, 2007-0757, p. 2 (La. App. 3 Cir. 1/30/08), 974 So.2d 905, 907), the First, Second and Fifth Circuits generally have declined to remand for the imposition of mandatory fines in cases where the State has not complained of the error. See, e.g.: *State v. Price*, 2005-2514, p. 22 (La. App. 1 Cir. 12/28/06), 952 So.2d 112, 125-25;

State v. Hollingsworth, 2012-1035, p. 3 (La. App. 1 Cir. 2/15/13), 2013 WL 595926 (unpublished); *State v. Young*, 46,575, pp. 8-9 (La. App. 2 Cir. 9/21/11), 73 So.3d 473, 479; *State v. Fuller*, 48,663, pp. 7-8 (La. App. 2 Cir. 12/11/13), 130 So.3d 960, 965; *State v. Moran*, 49,196, pp. 5-6 (La. App. 2 Cir. 10/1/14), 151 So.3d 116, 120; *State v. Kinard*, 2012-0446, pp. 8-9 (La. App. 5 Cir. 11/27/12), 105 So.3d 974, 980; *State v. Pollard*, 2012-0346, pp. 14-15 (La. App. 5 Cir. 12/18/12), 106 So.3d 1194, 1203; *State v. Morton*, 2014-0510, p. 4 (La. App. 5 Cir. 12/16/14), 167 So.3d 52, 54-55; *State v. Dadney*, 2014-0511, pp. 12-13 (La. App. 5 Cir. 12/16/14), 167 So.3d 55, 63; and *State v. Alexander*, 2016-0084, p. 10 (La. App. 5 Cir. 7/27/16), ___ So.3d ___, 2016 WL 4037319. In many of these cases, the appellate courts have cited the defendant's indigent status as the reason they have exercised their discretion to decline to remand for the imposition of a fine. See, e.g.: *State v. Moran, supra*; *State v. Kinard, supra*; *State v. Pollard, supra*; *State v. Morton, supra*; *State v. Dadney, supra*; and *State v. Alexander, supra*.

Given the current burden on the criminal justice system, particularly the limitation on representation of defendants, remanding these matters for the imposition of a fine seems to serve no useful purpose. Additionally, the split among the circuits results in the disparate treatment of defendants. As this court expressed in *Williams*: "This is a significant issue of law on which the judiciary has voiced conflicting views and which the Louisiana Supreme court should revisit." 2003-0302, p. 4, n. 2, 859 So.2d at 753, n.2.

For the reasons stated, I respectfully concur in the remand of the present case in light of this court's binding precedent.