

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL,  
FIFTH CIRCUIT**

**COURT OF APPEAL**

**VERSUS**

**FIFTH CIRCUIT**

**KENNETH RUSSELL**

FILED MAY 30 2002

**STATE OF LOUISIANA**

**02-KA-155**

APPEAL FROM  
THE TWENTY-FOURTH JUDICIAL DISTRICT COURT,  
PARISH OF JEFFERSON, STATE OF LOUISIANA,  
NUMBER 00-5378, DIVISION "C,"  
HONORABLE ALAN J. GREEN, PRESIDING.

**MAY 29, 2002**

**WALTER J. ROTHSCHILD  
JUDGE**

Panel composed of Judges Sol Gothard,  
Marion F. Edwards and Walter J. Rothschild.

**PAUL D. CONNICK, JR.**

District Attorney  
24<sup>th</sup> Judicial District  
Parish of Jefferson  
State of Louisiana

**TERRY M. BOUDREAUX**

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Assistant District Attorneys  
Court house Annex  
Gretna, Louisiana 70053  
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**PEYTON B. BURKHALTER**

Courcelle & Burkhalter, L.L.C.  
3500 North Causeway Boulevard  
Suite 415  
Metairie, Louisiana 70002  
Counsel for Kenneth Russell, Defendant-Appellee.

**APPEAL DISMISSED.**

WJR  
On September 14, 2000, the defendant, Kenneth Russell, was charged by bill of information with operating a vehicle while intoxicated (DWI), third offense, in violation of LSA-R.S. 14:98D. The defendant was arraigned on June 6, 2001, and he pled not guilty.

On October 15, 2001, the State amended the bill of information, reducing the charge to second offense DWI, pursuant to LSA-R.S. 14:98C, which is a misdemeanor. The trial court advised the defendant of his Boykin<sup>1</sup> rights. He stated that he understood those rights, and that he wished to waive them. The defendant and his attorney also completed and signed a waiver of rights form. The defendant then withdrew his plea of not guilty and entered a plea of guilty to the charge of second offense DWI. Thereafter, the trial judge sentenced the defendant to six months in parish prison. He suspended the sentence and placed the defendant on inactive probation for six months with special conditions that the defendant serve 48 hours in jail and that he perform 30 eight-hour days

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<sup>1</sup>Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

of community service.<sup>2</sup> The trial judge also imposed a fine of \$750.00 and ordered the defendant to pay all court costs.

The prosecutor objected to the sentence, arguing that a serious offender such as the defendant required supervised probation rather than inactive probation. The trial judge denied the State's objection. On October 18, 2001, the State filed a timely motion for appeal.

## **DISCUSSION**

In its sole assignment of error, the State contends that "the trial court erred by not sentencing defendant to fifteen (15) days in jail and by placing defendant on inactive probation where no one would monitor defendant's compliance with statutory requirements in violation of LSA-R.S. 14:98." The State essentially argues that the trial court imposed an illegally lenient sentence. However, we will not address the merits of the State's claim, because this case does not fall under this Court's appellate jurisdiction.

A court of appeal generally has appellate jurisdiction over criminal cases triable by a jury. La. Const. 1974, Art. 5, § 10(A). In the present case, the defendant was initially charged with third offense DWI, which is a felony triable by a jury. However, the State subsequently reduced the charge to second offense DWI, which is a misdemeanor not triable by jury, and the defendant pled guilty to this charge. A conviction for a misdemeanor offense is not appealable. La. Const. 1974, Arts. 1, § 17 and 5, § 10(A); LSA-C.Cr.P. art. 912.1; State v. Suthon, 99-661 (La. App. 5 Cir. 10/29/99), 746 So. 2d 240, 241. Therefore, the State should have challenged the defendant's sentence by filing an application for a supervisory writ. LSA-C.Cr.P. arts. 912, 912.1; State v. Ainsworth,

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<sup>2</sup>The sentencing transcript does not reveal that the trial judge orally informed the defendant that he was required to perform community service. However, the record contains a form entitled "Conditions of Probation-Misdemeanor," which indicates that the community service was a special condition of the defendant's probation. Furthermore, the trial judge stated on the record that special conditions would be placed on the defendant's probation, and the defendant confirmed that his attorney had informed him of those provisions.

528 So.2d 599, 600 (La. App. 2 Cir. 1988); State v. Drury, 506 So.2d 772, 773 (La. App. 1 Cir. 1987).

On December 9, 1994, this Court issued an En Banc Order providing that effective January 1, 1995, all non-appealable matters filed as an appeal will be dismissed.<sup>3</sup> State v. Suthon, 99-661 (La. App. 5 Cir. 10/29/99), 746 So. 2d 240, 241. Accordingly, we dismiss the appeal, but we reserve the State's right to seek relief by filing an application for supervisory writs within 30 days of the date of this opinion.

**APPEAL DISMISSED.**

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<sup>3</sup>The En Banc Order provides:

It has come to the attention of this Court that an increasing number of non-appealable matters are being incorrectly filed and lodged as appeals. In the past, this Court has customarily converted these appeals into the more appropriate procedural mechanism of writs under the guise of judicial economy. However, we have come to realize that this approach is inconsistent with our legislative scheme for the appropriate exercise of our supervisory jurisdiction. Hence, we will no longer continue such practice.

It is hereby ordered that, as of January 1, 1995, all non-appealable matters filed as an appeal will be dismissed. Accordingly, all parties will be required to follow the procedural schemes set forth in our Louisiana Codes of Civil and Criminal Procedure.



EDWARD A. DUFRESNE, JR.  
CHIEF JUDGE

SOL GOTHARD  
JAMES L. CANNELLA  
THOMAS F. DALEY  
MARION F. EDWARDS  
SUSAN M. CHEHARDY  
CLARENCE E. MCMANUS  
WALTER J. ROTHSCHILD

JUDGES

# Court of Appeal

FIFTH CIRCUIT  
STATE OF LOUISIANA

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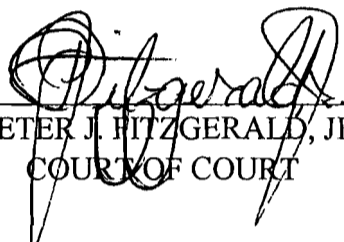
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I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED OR DELIVERED THIS DAY MAY 29, 2002 TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

  
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