


NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA **COURT OF APPEAL,
FIFTH CIRCUIT** NO. 04-KA-925

VERSUS **FILED JAN 11 2005** FIFTH CIRCUIT

TYRONE NOEL  COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 04-0514, DIVISION "E"
HONORABLE GREG G. GUIDRY, JUDGE PRESIDING

JANUARY 11, 2005

**THOMAS F. DALEY
JUDGE**

Panel composed of Judges Sol Gothard,
Thomas F. Daley and Walter J. Rothschild

PAUL D. CONNICK, JR.,
DISTRICT ATTORNEY
TERRY M. BOUDREAUX,
ASSISTANT DISTRICT ATTORNEY
Parish of Jefferson
200 Derbigny Street
Gretna, Louisiana 70053
COUNSEL FOR PLAINTIFF/APPELLEE

BRUCE G. WHITTAKER
3316 Canal Street
New Orleans, Louisiana 70119
COUNSEL FOR THE DEFENDANT/APPELLANT

AFFIRMED

T.D.
S
WFL

STATEMENT OF THE CASE

On January 22, 2004, the Jefferson Parish District Attorney filed a Bill of Information charging the defendant, Tyrone Noel, with Counts 1 and 2, armed robbery in violation of LSA-R.S. 14:64, and Count 3, simple robbery in violation of LSA-R.S. 14:65.

On February 2, 2004, the defendant withdrew his pleas of not guilty and pled guilty to Counts 1, 2, and 3. The trial court sentenced the defendant to imprisonment at hard labor for thirty-eight years on Counts 1 and 2 without benefit of parole, probation, or suspension of sentence, and seven years on Count 3, with all sentences to run concurrently.

On February 3, 2004, the State filed a multiple bill alleging the defendant to be a second felony offender. The defendant stipulated to the multiple bill on February 4, 2004. On that same date, the trial court vacated the original sentence on Count 3 and re-sentenced the defendant under the multiple bill statute to

imprisonment at hard labor for fourteen years to run concurrently with the original sentences on Counts 1 and 2.

On February 17, 2004, the defendant filed a timely pro se Motion for Appeal that was granted. On July 1, 2004, the defendant filed an untimely pro se Motion to Reconsider Sentence. On July 12, 2004, the trial court ordered the defendant to re-file his motion and attach any Boykin transcripts and sentencing hearings within thirty days of receiving his Boykin transcript.¹

FACTS

The defendant entered a guilty plea to two counts of armed robbery and one count of simple robbery. The Bill of Information indicates that the defendant was charged with two counts of armed robbery: Count 1 occurred on or about October 28, 2003 and Count 2 on or about February 2, 2003², and with one count of simple robbery that occurred on or about October 8, 2003.

In the defendant's November 19, 2003 statement, he admitted to committing the February 22, 2003 armed robbery.

ASSIGNMENT OF ERROR NUMBER ONE

The defendant has filed an Anders³ brief assigning as error any and all errors patent.

DISCUSSION

In the present case, the defense counsel has filed a brief that follows the procedure approved by the United States Supreme Court in Anders, discussed in

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

² The record indicates that the Bill of Information is incorrect, and that the defendant committed the armed robbery on February 22, 2003.

³ Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), reh'g denied, 388 U.S. 924, 87 S. Ct. 2094, 18 L. Ed. 2d 1377 (1967).

State v. Benjamin, 573 So. 2d 528 (La. App. 4 Cir. 1990), and adopted in State v. Bradford, 95-929, 95-930, p. 4 (La. App. 5 Cir. 6/25/96), 676 So.2d 1108, 1111.

This Court sent a letter advising the defendant that he could file a supplemental brief by September 30, 2004, but that it must comply with Rule 2-12 of the Uniform Rules of Louisiana Courts of Appeal. The defendant has not filed a supplemental brief with this Court.

In State v. Jyles, 96-2669 (La. 12/12/97), 704 So.2d 241, the Louisiana Supreme Court revisited the procedures outlined in State v. Benjamin, 573 So.2d 528 (La. App. 4 Cir. 1990), and stated that the brief filed by counsel must review not only the procedural history of the case and the evidence presented at trial, but must also provide . . . detailed and reviewable assessment for both the defendant and the appellate court of whether the appeal is worth pursuing in the first place. See also, State v. Mouton, 95-0981 (La. 4/28/95), 653 So.2d 1176.

After an independent review of the record and of appellant counsel's brief, it appears that the appellant counsel adequately reviewed the procedural history of the case and the evidence presented at trial, and provided a detailed and reviewable assessment for both the defendant and the appellate court of whether the appeal is worth pursuing in the first place, as required by the Louisiana Supreme Court in Jyles. See also, State v. Mouton, 653 So.2d at 1177. There are not any errors or issues which, if raised, would arguably support an appeal. State v. Haynes, 96-84, p. 4 (La. App. 5 Cir. 6/25/96); 676 So.2d 1120, 1122.

ERROR PATENT DISCUSSION

The record was reviewed for errors patent, according to LSA-C.Cr.P. art. 920; State v. Oliveaux, 312 So.2d 337 (La. 1975); and State v. Weiland, 556 So.2d 175 (La. App. 5 Cir. 1990). The review reveals two errors patent in this case.

First, the defendant filed a pro se Motion for Appeal on February 17, 2004 that was granted and an untimely pro se Motion to Reconsider Sentence on July 1, 2004. The trial court failed to rule on the defendant's untimely Motion to Reconsider Sentence. After an order of appeal has been entered, a trial court is not divested of jurisdiction to "take appropriate action pursuant to a properly made or filed motion to reconsider sentence." LSA-C.Cr.P. art. 916(3). State v. Brooks, 04-22, p. 3 (La.App. 5 Cir. 4/27/04), 873 So.2d 815, 817. However, in this case, the defendant did not file his Motion to Reconsider Sentence within thirty days following the imposition of sentence. See, State v. Mickel, 03-795, p. 2 (La.App. 5 Cir. 12/9/03), 864 So.2d 661, 662. Therefore, upon entering the order of appeal, the trial court lacked jurisdiction to rule on the untimely motion. LSA-C.Cr.P. art. 916(3).

Second, the trial judge failed to impose the enhanced sentence without benefit of probation or suspension of sentence as required by LSA-R.S. 15:529.1(G). These restrictions are deemed to exist by operation of law. LSA-R.S. 15:301.1; State v. Williams, 00-1725 (La.11/28/01), 800 So.2d 790, 799. Therefore, this Court need take no corrective action. State v. Hogan, 02-924, p. 6 (La. App. 5 Cir. 1/28/03), 839 So.2d 296, 301.

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

AFFIRMED

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



FIFTH CIRCUIT
101 DERBIGNY STREET (70053)
POST OFFICE BOX 489
GRETNA, LOUISIANA 70054
www.fifthcircuit.org

PETER J. FITZGERALD, JR.
CLERK OF COURT

GENEVIEVE L. VERRETTE
CHIEF DEPUTY CLERK

GLYN RAE WAGUESPACK
FIRST DEPUTY CLERK

JERROLD B. PETERSON
DIRECTOR OF CENTRAL STAFF

(504) 376-1400

(504) 376-1498 FAX

JUDGES

CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED ON OR DELIVERED THIS DAY **JANUARY 11, 2005** TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

A handwritten signature in black ink, appearing to read "Fitzgerald", written over a horizontal line.

PETER J. FITZGERALD, JR.
CLERK OF COURT

04-KA-925

Terry M. Boudreaux
Assistant District Attorney
Parish of Jefferson
200 Derbigny Street
Gretna, LA 70053

Bruce G. Whittaker
Attorney at Law
3316 Canal Street
New Orleans, LA 70119