

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2018 KA 0428

STATE OF LOUISIANA

VERSUS

KEVIN NAWADNY

Judgment Rendered: NOV 06 2018

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On Appeal from
The 20th Judicial District Court,
Parish of West Feliciana, State of Louisiana
Trial Court No. 16-WFLN-642
The Honorable Kathryn E. Jones, Judge Presiding

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BEFORE: McDONALD, CRAIN, AND HOLDRIDGE, JJ.

McDonald, J. concurs.

CRAIN, J.

The defendant, Kevin Nawadny, was found guilty of third-offense DWI and sentenced to five years imprisonment at hard labor, to be served consecutively to any other sentence he may be serving. *See* La. R.S. 14:98 and 14:98.3. The defendant appeals, asserting the trial court imposed an excessive sentence by ordering his five-year sentence to run consecutively to all other sentences being served. We affirm the conviction but, finding a sentencing error, vacate the sentence and remand for resentencing.

FACTS

In the early morning hours of October 29, 2016, the defendant was traveling at a high rate of speed on U.S. Highway 61, approaching St. Francisville. State Trooper Joseph Nations, traveling in the opposite direction, confirmed his speed by radar at 92 m.p.h. At the ensuing traffic stop, Trooper Nations observed the defendant was off-balance, swayed as he walked, and had slurred speech, a very strong odor of alcohol, and bloodshot eyes. The defendant refused a field sobriety test and, after being *Mirandized* and placed under arrest, told Trooper Nations he consumed five or six beers that night.

A jury found the defendant guilty of third-offense DWI. The defendant filed motions for new trial and postverdict judgment of acquittal, which were denied. Immediately after those motions were denied, the defendant was sentenced to five years at hard labor, to run consecutively to any other sentence the defendant may be serving.

DISCUSSION

Louisiana Code of Criminal Procedure article 873 requires at least a twenty-four hour delay between the denial of a motion for new trial and sentencing unless the defendant “expressly waives” the required delay. Where a defendant does not expressly waive the delay required by Article 873 and challenges his sentence on

appeal, the sentence must be vacated and the matter must be remanded so a sentence can be legally imposed. *See State v. Augustine*, 555 So. 2d 1331, 1334-35 (La. 1990); *State v. Gardner*, 16-0192 (La. App. 1 Cir. 9/19/16), 204 So. 3d 265, 270. The record does not reflect an express waiver by the defendant of the delay required by Article 873, and the defendant has challenged his sentence on appeal. Since the sentence imposed was not a mandatory one, the sentence must be vacated and the matter remanded for a legally imposed sentence. *See Augustine*, 555 So. 2d at 1334; *Gardner*, 204 So. 3d at 270-71.¹

CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED FOR RESENTENCING.

¹ We further note the applicable sentencing statute requires a number of years of the sentence be served without benefit of parole, probation, or suspension of sentence and a mandatory \$2,000 fine. *See* La. R.S. 14:98.3A and B.