STATE OF LOUISIANA	*	**NO. 2000-K-2629**
VERSUS	*	**COURT OF APPEAL**
TREMELL CONDOLL	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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SUPERVISORY WRIT DIRECTED TO
CRIMINAL DISTRICT COURT, ORLEANS PARISH
NO. 361-063, SECTION "E"
HONORABLE CALVIN JOHNSON, JUDGE

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CHARLES R. JONES
JUDGE

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(Court composed of Judge Steven R. Plotkin, Judge Charles R. Jones, and Judge Miriam G. Waltzer)

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WRIT GRANTED;
RELIEF DENIED

The State of Louisiana seeks review of the ruling of the district court finding that Tremell Condoll is entitled to a new trial. For the reasons which follow, we grant the State's writ application, but deny relief.

PROCEDURAL HISTORY

On January 14, 1993, Tremell Condoll was indicted for one count of aggravated kidnapping. Also charged in the same indictment were Kermit Green, Steven Taylor, and Charles Holmes. All four defendants pled not guilty to the charges. The trial of all four men was set for July 6, 1993. On that date, Condoll's attorney, Gary Wainwright, appeared in court requesting a continuance because of his ill health. The district judge, at that time Pro Tempore Judge Joe Meyer, denied the motion for a continuance and ordered the trial to begin. Mr. Wainwright filed a writ to this Court which was granted and the trial stayed. Judge Meyer then severed Condoll from the other three defendants, who were tried with the jury finding Taylor guilty as charged, Green and Holmes guilty of simple kidnapping. Trial was reset for Condoll on August 31, 1993. On that date, the State moved for a continuance, which the judge denied. The State then sought writs to this Court, which granted the writ application and ordered the trial continued.

On September 23rd , Condoll elected a judge trial, and at the conclusion of the trial Judge Meyer found him guilty as charged. On October 20th, Condoll filed a motion for new trial.

On December 7th, newly-elected Judge Raymond Bigelow recused himself from consideration of the case which was reallotted to Section "A", Judge Morris Reed. On February 17, 1994, a hearing was held on the motion for new trial before Judge Reed wherein Mr. Meyer and Mr. Wainwright both testified. Although the docket master entry for this date indicates Judge Reed took the matter under advisement, the transcript indicates the judge denied the motion at the conclusion of this hearing. Mr. Wainwright noted his intent to seek supervisory writs, but no application was filed at that time. According to the docket master, the case was then reset repeatedly for "motions" until September 23rd, at which time Mr. Wainwright withdrew as counsel of record and the court appointed O.I.D.P. to represent Condoll. Also on that date, the court apparently reconsidered the motion for new trial, ordered that the transcript of the prior hearing be prepared, and reset the matter for a hearing for October 28, 1994. The matter was again repeatedly reset, and in each instance the docket master refers to Mr. Wainwright as counsel. There are also references in the docket master to Condoll having taken supervisory writs, but no writs taken by

Condoll during this time are found in this record. Apparently, however, the district court thought Condoll had taken supervisory writs because the entry for March 12, 1996 indicates a status hearing was reset for April 15th because the case was still on writs.

On October 21, 1996, Condoll appeared in court attended by an O.I.D.P. attorney, and the matter was reset for sentencing on November 14, 1996. The matter was again continued several more times, and in January 1997 Mr. Wainwright again appeared with Condoll for sentencing. The matter was then again reset repeatedly for "ruling" and sentencing. In 1997 and 1998, the matter was transferred back and forth between Sections "A" and "I". In July 1998, the matter was reallotted to Section "H". The docket master entry for January 27, 1999 indicates that because the motion for new trial had been denied on February 17, 1994, the matter was reset for sentencing. On January 28, 1999 Judge Camille Buras recused herself from consideration of the case, and the matter was reallotted to Section "E". On April 14th, Judge Calvin Johnson set Condoll's matter for sentencing on April 19. On that date, counsel filed an oral motion for new trial, and Judge Johnson set the matter for a hearing. On July 16, 1999 the court held a combined hearing on Condoll's motion for new trial and on codefendant Green's application for post conviction relief. Mr. Meyer testified at this

hearing; however, both matters were reset, and another hearing was held on August 27, most of which pertained to Green's post conviction application. Mr. Wainwright testified at a hearing on October 15, 1999, but his testimony concerned Green's application only. At the conclusion of this hearing, the court granted Green's application for post conviction relief. Mr. Wainwright re-urged the motion for new trial on behalf of Condoll, and the court reset sentencing. On January 18, 2000, Mr. Wainwright appeared in court and filed an affidavit from the mother of the victim in this case. On February 8th, Mr. Wainwright filed another motion for new trial, which was reset, and at a hearing on June 9, 2000, the victim's mother and Condoll both testified. Another hearing was held on September 1st at which former Judge Reed and Condoll testified. On October 13, 2000, the court granted Condoll's motion for new trial, the State noted its intent to seek writs and the court granted the State until November 20th to file its writ application. The court also set trial for November 20th and on that date the court extended the return date of the writ application to December 4th and reset trial for December 4th.

On December 1st, the State filed the original application for supervisory writs in this matter, requesting a stay of the new trial and requesting the production of various transcripts. On that date, this Court stayed the trial, ordered a response from the defense, and ordered a per

curiam from Judge Johnson. On December 18th, Judge Johnson filed his per curiam and one transcript. On January 18, 2001, the State filed various transcripts and also filed a supplemental application wherein it contended the court erred by granting the motion for new trial. The defense responded on January 29th.

FACTS

The facts of the actual crime are incidental to this writ application. All four defendants were charged with kidnapping a small child from the child's home. The child's mother appears to have identified Condoll as one of the perpetrators. The original motion for new trial was based on what Condoll's counsel deemed to be an involuntary waiver of his right to a jury trial because a misunderstanding between counsel and Pro Tempore Judge Meyer. Mr. Wainwright argued that Judge Meyer promised to find Condoll guilty of a lesser included offense if Condoll waived the jury. Mr. Meyer insisted he made no such promise.

At the February 17, 1994 hearing before Judge Reed, Mr. Meyer denied promising Mr. Wainwright that he would render a lesser verdict if Condoll waived the jury. He further denied telling Mr. Wainwright that he could not conduct the bench trial that day because he had just issued attachments for the State's witnesses and it would not "appear to be fair" if

he held the bench trial that day. Mr. Meyer insisted that the only discussion of a bench trial occurred on September 23rd, the actual day the trial was held and that he was willing to force the State to go to trial on August 23rd, but it was Mr. Wainwright who joined in the State's motion for continuance. Mr. Meyer admitted he thought the mandatory life sentence for a conviction of guilty as charged in this case would be excessive for a first offender, and he acknowledged that he could render a lesser included verdict. He maintained, however, that he based his verdict on the evidence presented at trial.

At that same hearing, Mr. Wainwright withdrew from representation of Condoll, and another attorney enrolled for purposes of the hearing. Mr. Wainwright testified as to his medical condition in 1993. He further stated that when Condoll's case was reset for trial, he approached Judge Meyer and stated that he (Wainwright) was still under a doctor's care and could not try the case. Mr. Wainwright testified he asked Judge Meyer if the judge thought a life sentence was justified considering the facts of the case (which Judge Meyer had heard in the trial of the three codefendants). Mr. Wainwright testified Judge Meyer told him that he felt a life sentence would be unjust. Mr. Wainwright further testified he told Judge Meyer that he had tried to confect a plea bargain agreement whereby Condoll would plead guilty to second degree kidnapping in exchange for a thirty-year sentence.

Mr. Wainwright also testified Judge Meyer indicated he thought this would be a fair sentence because the kidnapping was a part of a scheme to collect money for the sale of cocaine. Mr. Wainwright also testified that he and Judge Meyer discussed this matter on both August 31st and September 23rd. He insisted that on August 31st, Judge Meyer then told him he could not hold the bench trial that day because he had forced the State to trial in the absence of its witnesses, and he would feel uncomfortable rendering a reduced verdict. Mr. Wainwright testified that he then joined the State in its continuance. Mr. Wainwright further testified that on September 23rd, Judge Meyer again indicated he thought a life sentence would be excessive and that he would impose a thirty-year sentence on Condoll for attempted aggravated kidnapping. Mr. Wainwright testified that he told Condoll about the proposed agreement and that Condoll was hesitant to waive his right to a jury, but he eventually agreed to do so with the expectation that he would be found guilty of attempted aggravated kidnapping and would be sentenced to serve thirty years. Mr. Wainwright testified he informed Condoll, his mother, and his aunt of the proposed agreement.

At the hearing on February 17th, Mr. Wainwright sought to call Condoll to the stand, but Judge Reed immediately denied the motion for new trial, stating:

> Let the record reflect that Mr. Wainwright is an

> experienced criminal trial attorney, and he had extensive communications with his client before the decision was made to waive a jury and proceed to trial with Judge Meyers [sic]. Judge Meyers [sic] has categorically denied the representations made by Mr. Wainwright, at this time, concerning any commitment, as I understand it, to be locked into a specific sentence regarding that case prior to the case being tried.

Judge Reed stated he would not listen to further testimony and indicated he was denying the motion based upon Mr. Meyer's testimony.

As noted above, the docket master entry for February 17, 1994 indicates the court took the matter under advisement, but the transcript indicates the court ruled from the bench. The docket master also notes Condoll noted his intent to seek writs, but he did not do so. Apparently the court believed he did, and in any event the court apparently decided to reconsider its ruling because the matter was reset for "motions" for over five years, with the case being transferred back and forth between Sections "A" and "I", then to "H", and ultimately to Section "E". The next actual hearing was held on July 16, 1999. Most of the testimony at that hearing was devoted to Green's post-conviction claim that he was forced to go to trial in prison garb against his wishes. However, at that hearing Judge Meyer reiterated that he thought life imprisonment as a blanket penalty was excessive. He also agreed that if an inexperienced attorney interpreted his

statements to mean he would consider returning a verdict of attempted aggravated kidnapping and would impose a thirty-year sentence, the attorney would have misconstrued his statements.

The August 27th and October 15, 1999 hearings, transcripts of which were provided by the State, do not concern this writ. However, at the end of the October 15th hearing, Judge Johnson indicated he could not rule on the motion for new trial because Judge Reed had already denied it. Mr. Wainwright disputed this conclusion and then orally re-urged the motion. Judge Johnson denied the motion. Mr. Wainwright filed a new motion for new trial on February 8, 2000. At the June 9, 2000 hearing, Condoll testified that Mr. Wainwright told him that he (Wainwright) and Judge Meyer had agreed that Judge Meyer would find him (Condoll) guilty of attempted aggravated kidnapping and impose a thirty-year sentence if he would waive his right to a jury trial. Condoll testified this was his first offense, and he emphasized his decision to waive the jury was based solely upon this agreement. He testified he knew Mr. Wainwright was still ill and would have difficulty trying the case before a jury. Mr. Wainwright then argued to Judge Johnson that a new trial should be granted because Condoll's waiver of his right to a jury was involuntary due to his reliance on the supposed agreement between Mr. Wainwright and Judge Meyer.

Judge Johnson reiterated that he did not believe he could reconsider the matter because Judge Reed had already denied the motion.

The final hearing on the motion for new trial occurred on September 1, 2000. At that hearing, Judge Reed testified that although he originally denied the motion, Mr. Wainwright subsequently approached the bench and requested that the matter be reopened to allow him to present Condoll's testimony. Judge Reed admitted the record did not reflect this happened, but he maintained that he did not then sentence Condoll because it was his intention to keep the matter open until Condoll could testify. Condoll then reiterated his earlier testimony that Mr. Wainwright told him that he should waive the jury and be tried by Judge Meyer because Judge Meyer would find him guilty of attempted aggravated kidnapping and would sentence him to serve thirty years.

DISCUSSION

In their writ application, the State argues that the trial court erred by granting Condoll's motion for new trial. It first argues that Judge Johnson could not consider the motion because Judge Reed had previously denied the motion. The State cites us to Judge Reed's testimony at the September 1, 2000 hearing wherein he admitted he denied the motion. However, the State omits Judge Reed's further testimony which indicates he agreed to allow Mr.

Wainwright to present further testimony on the motion:

> But I do recall that after my ruling—and I abruptly denied your request to keep it open—that you approached the bench with one of the assistant DA's. It could have been Miss Kim Graham. I'm not sure. And you made the--you made your appeal. You supplemented the record by making a verbal appeal at the bench, requesting me to allow you to supplement the record with testimony from Mr. Blake Williams [a codefendant's attorney], I believe, and Mr. Condoll, the defendant. In reviewing the record—and I may have even told you and Miss—and the prosecutor that my intentions were to allow you to call additional witnesses.

Judge Reed acknowledged the record did not reflect this happened. He testified that in hindsight, he definitely would have allowed Mr. Wainwright to present Condoll's testimony. He further noted:

> So I purposely had not sentenced Mr. Condoll. And I believe that the record would reflect that it was being held open, awaiting sentencing. And the reason why I had not imposed sentence is that the intention—my intention was I was considering allowing additional testimony to be taken concerning whether or not he intelligently waived his right to a jury trial, based upon communications by defense counsel.

The State argues Judge Johnson was collaterally estopped from considering the motion for new trial. The cases cited by the State in support, thereof, are not applicable to this case because both involved claims of double jeopardy and collateral estoppel where the State tried the defendants

on new charges after the defendants had been acquitted on earlier charges. Herein, based upon Judge Reed's own testimony concerning his intentions, it appears the matter may have not been concluded in 1994. Indeed, Judge Reed did not sentence Condoll after "denying" the motion, and the case continued to be reset for hearings on "motions". Based upon these factors, there is no basis for this Court to conclude that Judge Reed was untruthful in his testimony concerning his intention to allow Mr. Wainwright to present additional testimony on the motion for new trial. As such, it appears the matter was not final, as urged by the State, but rather the "denial" reflected in the February 1994 transcript had been reconsidered by Judge Reed.

In any event, the docket master indicates Mr. Wainwright filed a new motion for new trial on February 8, 2000. It is unclear upon what basis this motion was grounded, as neither party provided this Court with a copy of this motion. Considering the affidavit of the victim's mother filed in January 2000 and her testimony at the June 9, 2000 hearing, the motion may have been based upon newly-discovered evidence, as alleged in the State's application. Condoll had not yet been sentenced. Thus, a motion for new trial was pending before Judge Johnson at the time he granted the new trial.

With respect to the merits of this writ application, the State argues that Judge Johnson erred by granting the motion, either based upon the allegation

that Condoll's waiver of his jury trial was involuntary due to his belief there was an agreement between Mr. Wainwright and Judge Meyer, or based upon the "newly-discovered evidence" of the victim's mother's affidavit wherein she recanted her identification of Condoll. However, a reading of the October 13, 2000 ruling and of the per curiam filed by Judge Johnson indicates Judge Johnson did not grant relief on either of these grounds, but instead he granted relief because he believed "the ends of justice" required that he grant a new trial. La. C.Cr.P. art. 851 provides in pertinent part: "The court, on motion of the defendant, shall grant a new trial whenever: . . . (5) The court is of the opinion that the ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right." This Court and other appellate courts have held that a trial court's ruling on a motion for new trial under La. C.Cr.P. art. 851(5) is discretionary and presents nothing to review for error of law. See State v. Lewis, 97-2854, p. 35 (La. App. 4 Cir. 5/19/99), 736 So. 2d 1004, 1024; State v. Smith, 96 0961 (La. App.1 Cir. 6/20/97), 697 So. 2d 39; State v. Collins, 540 So. 2d 1046 (La. App. 2 Cir. 1989); State v. Savoie, 448 So. 2d 129 (La. App. 1st Cir. 1984). Indeed, even though the Louisiana Supreme Court appeared to allow an appellate court to reverse a ruling either granting or denying a motion for new trial under art. 851(5) using an abuse

of discretion standard. See State v. State v. Howard, 325 So. 2d 812, 818 (La. 1976); State v. Truax, 222 La. 463, 467, 62 So. 2d 643, 644 (1952). The Court later found that such ruling presents nothing for review. In State v. Snyder, 98-1078, p. 38, fn 22 (La. 4/14/99), 750 So. 2d 832, 859, the Court stated:

> It is settled that a judgment on these grounds (invariably denying the motion) is unreviewable by an appellate court, which may review the grant or denial of a new trial only "for error of law." La.C.Cr.P. art. 858. See *State v. Toomer*, 395 So.2d 1320, 1328 (La.1981) (grant or denial of a new trial under Article 851(5) "presents nothing for this Court's appellate review"); *State v. Williams*, 343 So.2d 1026, 1037 (La.1977) (same), *cert. denied*, 434 U.S. 928, 98 S.Ct. 412, 54 L.Ed.2d 287 (1977); *State v. Cortez*, 503 So.2d 76, 78 (La.App. 5 Cir.1987) (same); *State v. Savoie*, 448 So.2d 129, 135 (La.App. 1 Cir.1984) (same), *writ denied*, 449 So.2d 1345 (La.1984).

In the matter *sub judice*, it is clear that Judge Johnson granted the motion for new trial on the basis of art. 851(5). As such, there is no review by this Court. Even if this Court were to use an abuse of discretion standard, it does not appear that the district court abused its discretion by granting the motion for a new trial, given the circumstances of this case and the tortured path it has taken for over seven years. Accordingly, the State of Louisiana's application for supervisory writs is granted, but the ruling of the district court is affirmed.

WRIT GRANTED;
RELIEF DENIED