STATE OF LOUISIANA	*	**NO. 2000-KA-1637**
VERSUS	*	**COURT OF APPEAL**
ELLIOTT J. LOVE, JR.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 406-527, SECTION "J"
HONORABLE LEON CANNIZZARO, JUDGE
* * * * * *
JAMES F. MC KAY, III
JUDGE
* * * * * *

(Court composed of Judge James F. McKay, III, Judge Terri F. Love, Judge Max N. Tobias, Jr.)

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REVERSED AND VACATED

Elliot Love, Jr., was charged by bill of information on April 27, 1999, with possession of heroin in violation of La. R.S. 40:966(C). At his arraignment on May 8, 1999 he pleaded not guilty; however, on May 24, 1999 he withdrew his earlier plea and entered a plea of guilty as charged. He was sentenced that same day to serve four years at hard labor without benefit of probation or suspension of sentence under the provisions of La. R.S. 15:574.4, the About Face Program. On April 26, 2000, the defendant's motion to reconsider the sentence was granted after he successfully completed the About Face Program in Orleans Parish Prison. The court then resentenced the defendant to four years in the Department of Corrections; the sentence was suspended and the defendant was placed on five years active probation with special conditions.

Because the defendant pleaded guilty, there is no transcript of facts in the record. However, according to the state's brief, the defendant was stopped in the Fischer Housing Development by two liaison officers who intended to issue a summons. He broke away and ran but was quickly apprehended. In a search incident to arrest, ten aluminum foils containing heroin were found in his waistband.

The state appeals arguing (1) the trial court acted contrary to La. C.Cr.P. art. 881 by amending a legal sentence after execution of the sentence, and (2) the trial court erred in reconsidering the sentence twelve months after its imposition.

In its first argument, the state notes that the defendant was sentenced to a legal sentence on May 24, 1999, and under La. C.Cr.P. art. 881(A), the trial court may amend the sentence only up until the beginning of its execution; once the sentence begins, the trial court has no authority to amend or change it. Under La. C.Cr.P. art. 881(B) the trial court may amend a sentence in felony cases only when the defendant was **not** sentenced to hard labor. In this case the defendant was sentenced to hard labor. Nevertheless, in this case the trial court amended the sentence on April 26, 2000, after the defendant completed the About Face Program. The defense maintains that the trial court had the discretion to amend the sentence, but cites no statutory or jurisprudence as authority for this position.

Clearly, the trial court had no authority to resentence the defendant who was accepted in the About Face Program. Under La. R.S. 15:574.4(A)(2)(g)(i), only when an offender is **denied** entry into the program, the Department of Corrections must "notify the sentencing court, and based upon the court's order, shall either return the offender to court for

resentencing in accordance with the provisions of Code of Criminal Procedure Article 881.1 or return the offender to a prison to serve the remainder of his sentence as provided by law." If the offender is accepted and completes the program, "the Board of Parole shall review the case of the offender and recommend either that the offender be released on intensive parole supervision or that the offender serve the remainder of his sentence as provided by law." La. R.S. 15:574.4(A)(2)(h). Thus, the Board of Parole was responsible for determining if the defendant should be released. *See* State v. Henry Temple, 2000-K-2183 (La. App. 4 Cir. 5/16/01). The state is correct in its position.

The state next argues that the trial court erred in reconsidering the defendant's sentence when the defendant moved for reconsideration of sentence twelve months after sentencing because the Louisiana Code of Criminal Procedure allows only a thirty day period for such a motion. (There is no motion for reconsideration in the record and none is mentioned in the minute entries or the docket master. However, the state refers to the defendant's filing the motion twelve months after sentencing, and the judge's granting the motion; therefore we assume the motion was filed and was inadvertently left out of the record).

La. C.Cr.P. art. 881.1 provides that a motion to reconsider a sentence

must be filed within thirty days of sentencing or "within such longer period as the trial court may set at sentence." When the original sentence was imposed in May of 1999 the trial court did not set such a period.

In response to the state's argument, the defense cites the dialogue at the May 1999 sentencing when the trial court sentenced the defendant under La. R.S. 15:574.4, the About Face Program in the Department of Corrections. The judge told the defendant that if he successfully completed the program he would be placed on parole for the remainder of his sentence. The defense attorney asked if the judge would be notified if the defendant was not accepted, and the judge stated that he wanted to be notified if the defendant was not accepted in the program. According to the defense, this exchange constituted a sentencing agreement, and the granting of the motion to reconsider the sentence was simply the fulfillment of the agreement. The defense is correct that after completion of the About Face Program an offender will be placed on parole, but it is the Board of Parole and not the trial court that is responsible for actually placing the offender on parole. The judge has no authority over a defendant who has successfully completed the About Face Program.

This case is similar to State v. Neville, 95-0547 (La. App. 4 Cir. 5/16/95), 655 So. 2d 785, writ denied, 95-1521 (La. 9/29/95), 660 So. 2d

851, where the defendant filed a motion to reconsider his sentence of nine years at hard labor after serving about eighteen months of the term. The trial court granted the motion, resentenced the defendant to five years, and suspended the sentence, placing the defendant on five years of active probation. The state objected and filed a writ. This Court found that the trial court had not stated for the record at the original sentencing that the defendant had additional time to file a motion to reconsider the sentence, and under these circumstances, the trial court had no authority to reconsider the sentence. However, the trial court should allow the defendant the opportunity to withdraw his plea of guilty based upon his reliance and understanding that the completion of the "About Face Program" was to be considered in his sentencing.

Accordingly, because the trial court erred in reconsidering the defendant's sentence, the decision is reversed and vacated.

REVERSED AND VACATED