NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-KA-1846**
VERSUS	*	**COURT OF APPEAL**
JAMES J. YOUNG, JR.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 428-802, SECTION "J"
Honorable Leon Cannizzaro, Judge
* * * * * *

Judge Terri F. Love

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(Court composed of Chief Judge William H. Byrnes III, Judge Terri F. Love, Judge David S. Gorbaty)

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AFFIRMED; REMANDED FOR SENTENCING

On March 15, 2002, the State charged the defendant James J. Young, Jr. with one count of violating La. R.S. 40:967(C) relative to simple possession of cocaine. At his arraignment on April 3, 2002, the defendant entered a plea of not guilty. His counsel later waived motions. The defendant withdrew his initial plea and entered a plea of guilty as charged. The court then ordered a pre-sentence investigation report and set sentencing for June 18, 2002. However, sentencing did not proceed; instead on July 17, 2002, the defendant filed a motion to withdraw his guilty plea which motion the court granted. On July 29, 2002, the defendant proceeded to trial before a six-person jury that returned a responsive verdict of guilty of attempted possession of cocaine. The defendant waived sentencing delays, and the court sentenced him to thirty months in the Department of Corrections with a recommendation that he be placed in the About Face Program. The defendant's motion for an appeal was granted.

The State subsequently filed a multiple bill of information charging the defendant as a third offender based upon two 1989 convictions for possession of cocaine. On September 5, 2002, the court heard argument on

whether the defendant could be adjudicated as a multiple offender because the ten year expiration period from the prior convictions had passed, then found the defendant to be a third offender after the defendant admitted to all other aspects of the multiple bill. The court vacated the original sentence and sentenced the defendant as a third offender to thirty months at hard labor under the provisions of La. R.S. 15:574.5, the About Face Program in Orleans Parish Prison. A motion to reconsider sentence was filed on behalf of the defendant, with the court specifically stating that, if the defendant successfully completed the About Face program, the court would reduce his sentence from thirty months to twenty months.

The defendant's conviction was based on the testimony of two State's witnesses. Officer Louis Faust testified that, on February 26, 2002, at approximately midnight, he and his partner were driving on Lizardi Street when they pulled behind the defendant and another man who were walking down the middle of the street. They were unable to pass the defendant and his companion, who failed to move out of the way, so the officers decided to stop and give them a verbal warning. As a routine matter, the officers checked the computer to determine if the defendant and his companion had any outstanding warrants. The defendant had a municipal attachment outstanding, so the officers arrested him. In a search incidental to that arrest,

they seized a crack pipe from the defendant's shirt pocket. Inside they could see a burned residue. Nhon V. Hoang, a criminalist with the New Orleans Police Department, testified that he tested a residue from the crack pipe submitted into evidence by Officer Faust and that it was positive for cocaine.

In his sole assignment of error, the appellant argues that the State failed to prove that less than ten years had elapsed since the expiration of the maximum sentences of the prior convictions. However, consideration of this issue is procedurally barred because the record clearly shows that the court did not rule on the motion to reconsider the multiple offender sentence.

Louisiana appellate courts have considered cases in which there had been no ruling on a motion to reconsider sentence. The approach of the First and Fifth Circuits was set forth in State v. Wilson, 99-214, pp. 4-5 (La. App. 5 Cir. 6/30/99), 743 So. 2d 728, 730:

> This Court addressed the same problem in State v. Winfrey, 97-427 (La. App. 5th Cir. 10/38/97) (sic), 703 So.2d 63; writ denied, 98-0264 (La. 6/19/98), 719 So.2d 481. In that case, the defendant filed a motion to reconsider his one-hundred year enhanced sentence, which, on appeal, defendant claimed was excessive. This Court found that it would be premature to rule on the excessiveness issue while a motion to reconsider sentence was pending, and remanded the case with these instructions:
>
> > Rather than rule on the excessiveness issue while a motion for reconsideration is pending which may vacate the present sentence, we remand the case for a ruling on the motion and supplementation of the record with the results. If the motion to

> reconsider is granted and defendant is re-sentenced, he may appeal the new sentence. If the motion is denied or if it has already been ruled on, defendant must move to re-lodge this appeal within sixty days of the date of the ruling on the motion to reconsider sentence or the date of this opinion, whichever is later. (Internal citations omitted).

In State v. Allen, 99-2579 (La. App. 4 Cir. 1/24/01), 781 So.2d 88, writ denied, 2001-1187 (La. 3/15/02), 811 So.2d 897, this Court followed the above reasoning, and considered the merits of the argument pertaining to the conviction, but refused to address the sentencing issues: "[C]onsidering that the record in the instant case reflects that the trial court has not held a hearing on the motion to reconsider sentence, and that a trial court has discretion to reduce the defendant's sentence if it believes such reduction is appropriate, we will not address the issue of the excessiveness of the sentence until the trial court has ruled upon the motion to reconsider." Allen, p. 12, 781 So.2d at 95.

In State v. Roberts, 01-0283, pp. 2-3 (La. App. 4 Cir. 1/23/02), 807 So.2d 1072, 1074, this Court stated:

> A motion to reconsider sentence under C.Cr.P. art. 881.1 must be made by the defendant or the state. It cannot be made by the court on the defendant's behalf. The statute specifically lets the court extend the time for filing a motion to reconsider. Thus, if, as in the case at bar, the trial judge was trying to let the convicted defendant complete the now illegal About Face Program in order to reduce his sentence, he should have extended the period of time for the defendant to file his motion to reconsider to a date certain or within a specific period of

time. No provision of law authorizes a trial court to defer ruling on a defendant's motion to reconsider sentence. In State v. Temple, 2000-2183, p. 9 (La. App. 4 Cir. 5/16/01), 789 So.2d 639, 646, we stated:

> If the trial court granted an indefinite period within which to file a motion to reconsider the sentence, until the motion is filed *and acted upon*, a defendant would be precluded from appealing his conviction and sentence because a conviction without a final sentence is a non-appealable judgment. (Italics added.)

Moreover, in cases where the defendant has argued that his sentence was excessive, this Court has held that it is not procedurally correct to review a sentence prior to the trial court's ruling on the motion. State v. Allen, 99-2579 (La. App. 4 Cir. 1/24/01), 781 So.2d 88; State v. Boyd, 2000-0274 (La. App. 4 Cir. 7/19/00), 775 So.2d 463.

In this case, the defendant did not object to the deferred ruling by the trial court and does not seek review of his sentence on appeal. However, by deferring the ruling, the trial court is able to amend or change a hard labor sentence after the execution of the sentence in violation of La. C.Cr.P. art. 881 (but as apparently authorized by C.Cr.P. art. 881.1(B)). Thus, as noted in Temple, supra, without a final sentence the conviction is not appealable. Accordingly, the case must be remanded for a ruling on the motion to reconsider the sentence.

For the foregoing reasons, the case is remanded to the trial court for a ruling on the motion to reconsider the sentence, reserving the defendant's right to appeal his conviction and sentence once the court has ruled on the motion.

Here, the appellant has raised no issues pertaining to his conviction. He also does not allege that his sentence is excessive. However, he does attack his sentence indirectly by alleging that he was improperly adjudicated

as a multiple offender. Therefore, because a sentencing issue has been raised, this appeal is remanded for a ruling on the motion to reconsider sentence, reserving to the appellant the right to appeal after the court has ruled.

Accordingly, the appellant's conviction is affirmed, and the matter remanded for a ruling on the motion to reconsider sentence.

AFFIRMED;
REMANDED FOR
SENTENCING