STATE OF LOUISIANA	*	**NO. 2002-KA-2279**
VERSUS	*	**COURT OF APPEAL**
YASINE D. LEWIS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 409-188, SECTION "D"
HONORABLE FRANK A. MARULLO, JUDGE
* * * * * *
JUDGE MICHAEL E. KIRBY
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Michael E. Kirby, Judge Terri F. Love)

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STATEMENT OF CASE

The defendant was charged with violating La. R.S. 40:967 for possession of more than 28 grams but less than 200 grams of cocaine on July 23, 1999. On May 24, 2000, after several continuances for determination of defendant's counsel, the defendant waived his right to a jury trial and proceeded with a bench trial. The trial court found him guilty of attempted possession of more than 28 grams but less than 200 grams of cocaine. The defendant waived all delays, and the trial court sentenced him to fifteen years at hard labor, credit for time served, without benefit of probation, parole, or suspension of sentence. The state immediately filed a multiple bill affidavit, alleging the defendant to be a second felony habitual offender based on a 1995 conviction for possession of cocaine. The defendant admitted to the prior conviction. The trial court vacated the previous sentence and resentenced the defendant as a second felony habitual offender to fifteen years at hard labor with credit for time served. The minute entry indicates that the newly imposed habitual felony offender sentence was without benefit of probation, parole, or suspension of sentence.

On January 4, 2002, over seventeen months after he was sentenced,

the defendant served a pro se motion for reconsideration of sentence. On May 3, 2002, an attorney who was not trial counsel filed a motion for an out of time appeal on behalf of the defendant. On July 9, 2002, the defendant's trial counsel filed a motion for appeal, motion for reconsideration of sentence, and motion to quash multiple offender bill of information on behalf of the defendant. On July 10, 2002, the trial court granted the appeal. On July 12, 2002, the defendant filed a pro se motion for an out of time appeal. This appeal follows.

STATEMENT OF FACT

The defendant was tried by the court on May 24, 2000. The state first called New Orleans Police Department Officer Raymond Veit to testify. Officer Veit testified on direct examination that on July 23, 1999, he and his partner (Officer Randy Lewis) were on routine patrol driving in an uptown direction on North Johnson Street in New Orleans. As they approached the eleven hundred block of North Johnson Street, he observed the defendant exiting a white pick up truck parked on the right hand side of the road. He observed the defendant holding a plastic bag containing a white rock-like substance. The defendant reacted to the officers by reopening the truck door, throwing the bag inside, and then hurriedly walking across the street.

Officer Lewis detained the defendant while Officer Veit looked into the truck. He observed the same plastic bag containing the white rock-like substance which he seized. Officer Veit testified that he notified his partner of the plastic bag; Officer Lewis then placed the defendant under arrest and advised him of his rights. Officer Veit also testified that he recovered a Louisiana identification card in the name of the defendant from the truck's ashtray and the keys to the truck from the defendant.

On cross-examination, defense counsel had Officer Veit clarify his view of the defendant's movements from the passenger seat of the patrol car. Officer Veit explained that the defendant's truck was not running and was parked legally in the direction of traffic. Officer Veit did not observe anyone else in the area at the time the defendant exited the truck holding the plastic bag from the top in his right hand with no part of the contents concealed. Officer Veit admitted that the defendant's motions were very quick as he exited the truck, observed the officers, reopened the door, threw the bag inside, and closed the door. The windows, Officer Veit testified, were rolled up but not tinted; and the door was unlocked but closed. He used the defendant's key chain alarm to lock and secure the truck before transporting the defendant in the patrol car.

At this point, defense counsel attempted to impeach Officer Veit with

his previous testimony from a motion hearing that the truck was parked facing oncoming traffic, including his patrol car, and that his view would have actually been obscured. Officer Veit refreshed his memory by looking at the transcript and noted that he had been cut off in his answer. He testified that he had attempted to clarify the mistake at the time, as reflected on the next page of the transcript. During this attempted clarification on cross-examination, the court interjected a series of questions:

> BY THE COURT:
> Officer Veit, his car was parked in a direction facing the way you were traveling with your car?
>
> BY THE WITNESS:
> A Yes sir. He was going, he was facing the same way we were traveling.
>
> BY THE COURT:
> And when you saw him he had this bag in his hand?
>
> BY THE WITNESS:
> A Yes. He was getting out of the vehicle.
>
> BY THE COURT:
> Out of the vehicle?
>
> BY THE WITNESS:
> A Turned around and shut the door with his left hand, his right hand now was facing us.
>
> BY THE COURT:
> What time of day or night was this?
>
> BY THE WITNESS:
> A It was in the afternoon, I'm not sure exactly what

time.

BY THE COURT:
It was day time?

BY THE WITNESS:
A Yes. He was facing – when he closed the door with his left hand his right hand was facing us. When he turned around that's when he observed us and he did the same motion again.

BY THE COURT:
Okay. Now you were the driver or the passenger?

BY THE WITNESS:
A I was the passenger.

BY THE COURT:
The passenger? So it is correct to say that you were on the same side of the car that he was in front of you directly in front of you?

BY THE WITNESS:
A Yes, sir.

BY THE COURT:
He was exiting from the street side, right?

BY THE WITNESS:
A From the street side, right. And after he walked across the street he was closer to Officer Lewis that's why Officer Lewis detained him.

BY THE COURT:
Okay.

On redirect, Officer Veit testified that the defendant stated at the time he was detained that the drugs were not his, that he had parked the car there

overnight because he had been intoxicated.

The state then called Officer Randy Lewis to testify, and his testimony on direct and cross-examination corroborated that of Officer Veit. The state specifically asked this witness the time of day that the arrest of the defendant occurred, to which the officer testified that "[i]t was 11:00 o'clock or close to 11:00 o'clock during the day time." The officer also testified that during the course of the arrest, "some people did come out". He observed no one, however, in or near the truck other than the defendant.

The defense called Lloyd Cook. Mr. Cook testified that he lived in the "twenty hundred block of Governor Nicholls" half a block from the location of the defendant's arrest. Mr. Cook is a carpenter and had been doing work on his house, with the defendant helping him "move sheet rock" on July 23, 1999. The defendant had been helping Mr. Cook around the house "for about a month". The defendant had arrived at Mr. Cook's house about 9:00 o'clock that morning; and after working for a while, the defendant left to go to the corner grocery. Mr. Cook "went back inside to do some more nailing" and when he went back outside, he saw the defendant being arrested. Approximately ten to fifteen minutes had passed between the time the defendant left and the time Mr. Cook observed the defendant's arrest.

On cross-examination, the state asked Mr. Cook how long he had known the defendant. The witness responded variously as follows: "I know of him"; "I don't know him"; and that he had worked with the defendant for about a month when he came around Mr. Cook's house. The state clarified that Mr. Cook had known the defendant for at least a month, and Mr. Cook then claimed "I knew him longer than that". Mr. Cook then admitted he had known the defendant for "let's say the last three months prior to this little incident."

The state attempted to impeach Mr. Cook by asking if he had any prior felony convictions. Mr. Cook responded as follows:

> A Me?
>
> Q Yes, sir?
>
> A You have the paper right there.
>
> Q I'm asking you the question?
>
> A Yeah, I got them. You got the paper right there.
>
> Q What were you convicted of?
>
> A Possession of Marijuana With Intent to Distribute and Possession of Sawed Off Shotguns.
>
> Q Okay. And that's the only two that you've been convicted of?
>
> A The abbreviated serial number, that twenty-two with the abbreviated serial number, if that's on there, that too. What you got on that paper is the

only things.

The state then questioned Mr. Cook about how long the defendant was gone before Mr. Cook went back outside and observed his arrest. Mr. Cook had some difficulty answering the actual question asked, and the court instructed the witness to "[j]ust answer the questions, sir." The court then asked the following series of questions regarding Mr. Cook's relationship with the defendant.

BY THE COURT:
Sir, you saw the Defendant on a pretty regular basis for the last three months?

BY THE WITNESS:
A The last month prior to his arrest.

BY THE COURT:
And how often were you with the Defendant ?

BY THE WITNESS:
A In that month?

BY THE COURT:
Yes?

BY THE WITNESS:
A Twice

BY THE COURT:
Twice? You said he was helping you do carpentry work?

BY THE WITNESS:
A Twice or three times a week, at least .

BY THE COURT:

Okay.

The state resumed questioning Mr. Cook regarding the drugs at issue, and the court again intervened:

BY MR. ALEXANDER [ASSISTANT DISTRICT ATTORNEY]
Q Now State'e Exhibit "A", these drugs, they didn't belong to you, did they?

BY THE WITNESS:
A Me?
Q Yes, Sir?
A No.

BY THE COURT:
What do you do for a living, Sir?

BY THE WITNESS:
A Carpenter.

BY THE COURT:
Who do you work for?
BY THE WITNESS:
A For myself.

BY THE COURT:
You're self-employed?

BY THE WITNESS:
A Right.

BY THE COURT:
Okay.

The state again resumed its cross examination of Mr. Cook by confirming the witness had no knowledge of the contents of the defendant's

truck, and the court again intervened:

BY THE COURT:
And you've never seen these drugs before, Sir?

BY THE WITNESS:
A No, I haven't, your Honor.

BY THE COURT:
When was it that you were charged and found guilty of Distribution of Marijuana?

BY THE WITNESS:
A Myself?

BY THE COURT:
Yes, when was that?

BY THE WITNESS:
A Oh, back in the 70's if I'm not mistaken. It had to be '71, '72, somewhere in there, a five year probation is over with, did it, all of it, it's over with.

BY THE COURT:
Okay.

The state continued with the line of questioning regarding Mr. Cook's prior felony convictions, and the court intervened when the exchange became confusing:

BY MR. ALEXANDER:
Q Were you ever charged with Possession of Controlled Dangerous Substances, Schedule One in Section "A" back in 1986. That would have been, what, Miriam Waltzer?

BY THE WITNESS:

A That was, well, that was that. That was, Miriam Waltzer was the Judge on that case that I'm talking about. It might have been in the '80's, I don't know.

Q So you got five years on that?

A Five years probation, that's what you're reading right now, that's the same thing I told the Judge.

BY THE COURT:

Wait a minute, don't tell him what he's reading. Just answer the questions.

BY MR. ALEXANDER:

Q And in connection with that same case you pled guilty to possession of an Unregistered Firearm and you got five years probation as well?

A I got five years probation for all those charges that I was charged with.

Q Okay. In the same Court?

A Same Court, same Judge.

Q Different case numbers?

A No. I was arrested for all of it at the same time, so I don't see how it could have been different case numbers.

BY THE COURT:

Well, that's something that he doesn't understand.

BY MR. ALEXANDER:

One second, Judge. Tender to Re-Direct.

The trial court ruled immediately after the closing arguments:

I am ready to rule in this case. All right.

* * *

And we did have some testimony and some things that can be incredible even though the words spoken may make sense. It's the demeanor and the

> manner in which the people testify from the witness stand. It is my distinct feeling in this case that there's a half truth involved in what was told to the police. It's not my cocaine. I think that the testimony of this witness on the witness stand [leads] me to believe that he has a part to play, was an associate with the gentleman on Trial here today in this Cocaine. It is my belief, my feeling, it's not proof beyond a reasonable doubt but they ask you in the charge to the jury to judge the manner in which people testify and their demeanor. And when it became obvious and you asked about this Cocaine the head went down, the words got slower, he was defensive on his questions and sitting here for a longer period of time is that there is very things unlike in human beings when they get caught telling a lie. It [is] my distinct feeling that they were in concert with each other and were associated and not in the carpenter business.
>
> I find the Defendant guilty of Attempted Possession of Twenty-Eight to Two Hundred Grams of Cocaine. I think the police testimony was credible and I thought the witness' testimony in the manner in which he testified was incredible.

The court went on to discuss the minimum and maximum sentence possible for the defendant as a second felony offender: "And do you understand the discretion if you're found guilty of this [a second felony offender] begins at fifteen . . . that the beginning sentence starts at fifteen to sixty years?" The court then sentenced the defendant as follows:

> All right. I'm going to say that the Multiple Bill scheme allows me under, that I found him guilty of an Attempt which would make the sentences within the range of five to thirty rather than the range that we previously talked about which would

> have been the half of that where we started at thirty. We started at thirty years. I see that the Attempt starts at five to thirty and therefore fifteen is within that range. I resentence the defendant under the Multiple Bill Statute to fifteen years Department of Corrections, credit for all time served.

ERRORS PATENT AND DEFENDANT'S PRO SE ASSIGNMENT OF ERROR

A review of the record for errors patent reveals three sentencing errors, one of which is related to the defendant's pro se assignment of error. A discussion of the defendant's assignment of error will be followed by a discussion of the two errors patent.

First, the defendant argues that the trial court erred in sentencing him without benefit of probation, parole, or suspension of sentence. He claims that his initial penalty exposure was five to thirty years under La. R.S. 40:967(F)(1)(a). Because he was found guilty of attempt, he asserts that his penalty exposure dropped to two and one half years to fifteen years. Lastly, he argues that the 1997 amendment to the La. R.S. 40:967 means the trial court could deny him the benefit of parole, probation, and suspension of sentence for only the first five years of his sentence, citing *State v. Kirk*, 2000-0190 (La. App. 4 Cir. 11/15/00), 773 So. 2d 259. Thus, he concludes, after he serves thirty months, he becomes eligible for parole.

First, the defendant is mistaken as to the nature of his sentence. The trial court orally pronounced sentence as fifteen years at hard labor, with credit for time served and no restrictions on benefits. The oral pronouncement of sentence controls over the court minutes, which indicate the sentence is without benefit of probation, parole, or suspension of sentence. Thus, the question is whether the trial court erred by sentencing the defendant as a second felony habitual offender with no restrictions on benefits.

Restriction on Parole

The first issue is whether the defendant should have been sentenced with a restriction on his eligibility for parole. The multiple felony offender statute does not restrict parole eligibility; it restricts only probation and suspension of sentence. La. R.S. 15:529.1(G). Restrictions on parole eligibility must be based on the sentencing provision for the underlying conviction. *State v. Young*, 2002-1280, p. 6 (La. App. 4 Cir. 1/22/03), 839 So.2d 186, 191; *see State v. Pittman*, 95-382, p. 33 (La. App. 5 Cir. 10/1/96), 683 So. 2d 748, 765 (citing *State v. See,* 467 So. 2d 525 (La.1985)). In the instant case, the sentencing provision for the underlying conviction is La. R.S. 40:967(F)(1)(a), which provided for a sentence of not less than ten years nor more than sixty years at the time of his offense. *See State v.*

Mayeux, 2001-3195 (La. 6/21/02), 820 So. 2d 526 (noting well-settled general rule that the law in effect at the time of the commission of the offense is determinative of the penalty). La. R.S. 40:967(G) provided for denial of eligibility for probation or parole prior to serving the minimum sentence provided by Subsection F at the time of the offense.

The defendant, however, was convicted of attempted possession. The Louisiana Supreme Court has held that there is no minimum sentence for being convicted of an attempt pursuant to La. R.S. 14:27. *State v. Callahan*, 95-1331 (La. 03/29/96), 671 So. 2d 903. This court recently addressed whether a defendant charged and convicted as in the instant case should be sentenced with any restrictions on probation or parole:

> The trial court sentenced defendant to imprisonment without benefit of parole, probation or suspension of sentence. La. R.S. 40:967(F)(1)(a) provides that a person convicted of possessing cocaine in the amount of twenty-eight grams or more, but less than two hundred grams, shall be sentenced to imprisonment at hard labor for not less than ten years, nor more than sixty years. La. R.S. 40:967(G) provides that the sentence of a person sentenced under Subsection F shall not be suspended. The provision bars a defendant's eligibility for probation or parole only prior to his serving the minimum sentence. Defendant was convicted of an attempt. La. R.S. 14:27 provides that a person convicted of an attempt of the variety in the instant case shall be imprisoned in the same manner as for the offense attempted, with such imprisonment not exceeding one-half of the longest term of imprisonment prescribed for the

> offense so attempted. Thus, there effectively is no minimum sentence for a person convicted of attempted possession of cocaine in an amount more than twenty-eight grams but less than two hundred grams. Therefore, defendant's sentence must be amended to delete the provision denying him the benefits of probation and parole. *State v. Rodriguez*, 2000-0519 (La. App. 4 Cir. 2/14/01), 781 So.2d 640.

State v. Brown, 2000-2120, 1- 2 (La.App. 4 Cir. 12/19/01), 804 So.2d 863, 864.

The basis for the defendant's conviction for attempt in the instant case, however, is not specifically designated as pursuant to La. R.S. 14:27. That is, attempt to possess cocaine is punishable either under the penalty provision for attempt contained in Uniform Controlled Dangerous Substances Law (La. R.S. 40:979) or the attempt statute (La. R.S. 14:27). Under the Title 14 attempt statute, there is no statutory minimum sentence and no requirement that a portion of the sentence be served without benefits. Under the attempt provision in La. R.S. 40:979, there is a mandatory minimum sentence and a portion of the attempt sentence must be served without the benefit of parole, probation, or suspension of sentence. *State v. Odle*, 2002-0226, p. 36 (La. App. 3 Cir. 11/13/02), 834 So.2d 483, 506. In *Odle*, the trial court sentenced the defendant with restrictions on benefits, but the basis for the attempt conviction was not designated in the record. The

court in *Odle*, concluded that it could not determine whether to delete the restrictions of benefits without knowing which attempt statute was applied, and remanded for a hearing on the issue. *Odle*, 2002-0226, p. 36, 834 So.2d 483, 506.

The underlying statute in this case is La. R.S. 40:967(F)(1)(a), possession of twenty-eight grams or more, but less than two hundred grams, of cocaine. The sentence for the completed crime would be "a term of imprisonment at hard labor of not less than ten years, nor more than sixty years, and to pay a fine of not less than fifty thousand dollars, nor more than one hundred fifty thousand dollars." La. R.S. 40:967(F)(1)(a). A defendant who is subject to subsection F is further subject to subsection G, which provides that "the adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall such person be eligible for probation or parole prior to serving **the minimum sentence provided by Subsection F**." La. R.S. 40:967(G) (emphasis added).

La. R.S. 40:979(A), the penalty provision for attempt contained in the Uniform Dangerous Substances Law in effect at the time of the defendant's offense in 1999, stated:

> Except as otherwise provided herein, any person who attempts or conspires to commit any offense denounced and or made unlawful by the provisions of this Part shall, upon conviction, be fined or imprisoned in the same manner as for the offense

> planned or attempted, but such fine or *imprisonment shall not exceed one-half of the* ***punishment*** *prescribed for the offense,* the commission of which was the object of the attempt or conspiracy.

In contrast, La. R.S. 14:27(D)(3), the attempt statute, states:

> D. Whoever attempts to commit any crime shall be punished as follows:
> (3) In all other cases he shall be fined or imprisoned or both, *in the same manner as for the offense attempted;* such fine or imprisonment *shall not exceed* one-half of the largest fine, or *one-half of the longest term of* ***imprisonment*** *prescribed for the offense so attempted,* or both.

The Louisiana Supreme Court has noted, "La.Rev.Stat. 14:27D(3) by its terms provides only a maximum sentence for a conviction of attempting to commit a crime. There is no express statutory minimum sentence for being convicted of an attempt, and principles of lenity require that the statute be strictly construed." *State v. Callahan*, 95-1331, p. 1 (La. 3/29/96), 671 So.2d 903. As noted by the Third Circuit in. *Odle*, if La. R.S. 40:979 is applied, Louisiana courts routinely find that there is a mandatory minimum sentence. *Odle*, 2002-0226, p. 34, 834 So.2d 483, 505, *citing State v. Haley*, 97-1385 (La.App. 3 Cir. 3/6/98), 709 So.2d 992; *State v. Chatman*, 599 So.2d 335 (La.App. 1 Cir. 1992); *State v. Williams*, 588 So.2d 1239 (La.App. 1 Cir. 1991) (abrogated on other grounds); *State v. Laprime*, 521 So.2d 538 (La.App. 4 Cir. 1988); *State v. Caldwell*, 32,377 (La.App. 2 Cir.

9/22/99), 742 So.2d 91; and *State v. Dunbar*, 00-1896 (La.App. 4 Cir. 8/8/01), 798 So.2d 178.

More particularly, this court in *State v. Johnson*, 00-0056 (La.App. 4 Cir. 11/29/00), 780 So.2d 403, discussed the interplay of La. R.S. 40:979 and La. R.S. 40:967 and the resulting minimum sentence that must be served without benefits:

> La. R.S. 40:979 provides that upon conviction punishment will be "in the same manner as for the offense planned or attempted, but such fine or imprisonment shall not exceed one-half of the punishment prescribed for the offense, the commission of which was the object of the attempt ...". Possession with intent to distribute, the offense attempted, requires that a portion of the sentence be served without benefits. La. R.S. 40:967. Hence, the combination of La. R.S. 40:979 and La. R.S. 40:967 would require that a portion of the attempt sentence be served without benefits**.** The court's failure to direct that any of Johnson's attempt sentence be served without benefits appears to be illegally lenient. However, because the state failed to appeal this issue, the court will not correct the sentence**.** *State v. Fraser*, 484 So.2d 122 (La.1986)**.**

State v. Johnson, 2000-0056, p. 12 (La.App. 4 Cir. 11/29/00), 780 So.2d 403, 411. In the instant case, as in *Johnson*, the offense attempted (possession of twenty-eight grams or more, but less than two hundred grams, of cocaine) requires that a portion of the sentence be served without benefits. La. R.S. 40:967(F)(1)(a) and 40:967(G). Hence, the combination of La. R.S.

40:979(A), La. R.S. 40:967(F)(1)(a), and La. R.S. 40:967 (G) requires that the defendant serve five years (i.e. half the minimum sentence specified in La. R.S. 40:967(F)(1)(a)) without benefit of parole.

In the instant case, we conclude the trial court utilized La.R.S. 40:979 because of the court's repeated references to a minimum sentence during the sentencing hearing. If La. R.S. 14:27 had been applied in the instant case, there would be no minimum mandatory sentence, and the defendant would be correct that there is no restriction on his right to parole. The use of La. R.S. 40:979 renders the defendant's sentence illegally lenient and subject to recognition by this court under La. R.S. 15:301.1 as containing a restriction on his right to parole.

Pursuant to La.C.Cr.P. art. 882(A), an illegally lenient sentence can be noticed or recognized by the appellate court *sua sponte* without the issue being raised by the State in the trial court or on appeal. *State v. Williams,* 2000-1725 (La.11/29/01), 800 So.2d 790. La. R.S. 15:301.1 provides that "[t]he failure of a sentencing court to specifically state that all or a portion of the sentence is to be served without benefit of probation, parole, or suspension of sentence shall not in any way affect the statutory requirement that all or a portion of the sentence be served without benefit of probation, parole, or suspension of sentence." In reference to La. R.S. 15:301.1, the

Louisiana Supreme Court stated in *Williams* that "[w]hen an illegal sentence is corrected, even though the corrected sentence is more onerous, there is no violation of the defendant's constitutional rights." *Williams*, 2000-1725, p. 9-10, 800 So.2d 790, 798; *see State v. Davis*, 2002-0565, p. 4-5 (La. App. 4 Cir. 12/11/02), 834 So.2d 1170, 1173. After finding that La. R.S. 15:301.1 does not conflict with constitutional principles, the Louisiana Supreme Court addressed the 180-day time limit provided in Section D. The Supreme Court found that the 180-day time period in La. R.S. 15:301.1(D) did not apply to Section A because the sentence is self-activated as the sentence "is **recognized** as having existed statutorily without pronouncement being necessary." *Williams*, 2000-1725, p. 15, 800 So.2d 790, 801. Thus, we find the defendant's sentence should be recognized under *Williams* as including a restriction on his right to eligibility for probation or parole prior to serving the minimum sentence.

Restrictions on Probation and Suspension of Sentence

Second, we note the trial court imposed an improperly lenient sentence when it failed to impose any restrictions on the defendant's right to probation or suspension of sentence as part of his habitual felony offender sentence. La. R.S. 15:529.1(G) provides that "[a]ny sentence imposed under

the provisions of this Section shall be without benefit of probation or suspension of sentence." The State did not object at sentencing or seek review of the illegally lenient sentence. The restriction on the defendant's eligibility for probation or suspension of sentence is self-activating as part of the habitual felony offender sentencing statute even without oral pronouncement. Thus, the defendant's sentence will be **recognized** under *Williams* as containing those restrictions mandated by statute.

Failure to Impose a Fine

Third, it appears that the trial court imposed an improperly lenient sentence when it failed to impose a fine as part of his sentence. A fine "of not less than fifty thousand dollars, nor more than one hundred fifty thousand dollars" was mandatory pursuant to La. R.S. 40:967(F)(1)(a). The state, however, did not object to the illegally lenient sentence and did not seek review. This court recently declined to remand for correction of this patent sentencing error where the state failed to object or otherwise seek review of trial court's failure to impose the fine. *State v. Major*, 2002-0133, p. 6 (La. App. 4 Cir. 10/2/02), 829 So. 2d 625, 631. Therefore, we will

likewise decline to remand the instant case for imposition of a fine.

DISCUSSION

ASSIGNMENT OF ERROR NUMBER 1 (BY APPELLATE COUNSEL)

Appellate counsel for defendant argues that the trial judge erred by taking over questioning on two occasions during the bench trial, thereby both relieving the state of its burden of proof and thwarting the defendant's right to confrontation.

> Initially, this Court is not at liberty to consider the correctness of the trial court's actions in light of the fact that the defendant failed to raise contemporaneous objection. "An irregularity of error cannot be availed of after verdict unless it was objected to at the time of occurrence." [La.] C.Cr.P. art. 841. On the contrary, the record reveals that counsel for the defense specifically acquiesced in the judge's examination of witnesses.

State v. Johnson, 389 So. 2d 1302, 1305 (La., 1980). Appellate counsel admits that trial counsel failed to object to the trial court's questioning of the witnesses. Accordingly, the claim is not subject to appellate review. La. C. Cr. P. art. 841.

Appellate counsel, however, urges this court to review the matter on Fifth and Sixth Amendment grounds despite the lack of a contemporaneous

objection. The Louisiana Supreme Court recently reiterated that "[t]he general rule established by this Court is that issues not submitted to the trial court for decision will not be considered by the appellate court on appeal. Constitutional issues are no exception." *State v. Williams*, 2002-1030, p. 7 (La. 10/15/02), 830 So. 2d 984, 988. The exceptions to the general rule were reiterated by the Louisiana Supreme Court on the same day in a different case:

> The longstanding jurisprudential rule of law in Louisiana is that litigants must raise constitutional attacks in the trial court, not the appellate courts, and that the constitutional challenge must be specially pleaded and the grounds for the claim particularized. *Vallo v. Gayle Oil Company, Inc.*, 94-1238 (La.11/30/94), 646 So.2d 859, 864. [FN2] Further, appellate courts generally will not consider issues raised for the first time on appeal. *Segura v. Frank*, 93-1271 (La.1/14/94), 630 So.2d 714, 725. [FN3]
>
> FN2. Several exceptions to this general rule have been recognized: (1) when a statute attempts to limit the constitutional power of the courts to review cases; (2) when the statute has been declared unconstitutional in another case; (3) when the statute applicable to the specific case becomes effective after the appeal is lodged in the higher court; or (4) when an act which is the basis of a criminal charge is patently unconstitutional on its face and the issue is made to appear as an error patent on the face of the record. *State v. Wright*, 305 So.2d 406, 409 (La.1974), Summers, J., dissenting.
>
> FN3. An exception to this general rule exists when

> the issue can only be argued for the first time on appeal, such as, for example, where the law has changed after the trial court's decision and the new law can be applied retroactively. *Segura v. Frank,* 630 So.2d at 725.

Mosing v. Domas, 2002-0012, p. 10-11 (La. 0/15/02), 830 So. 2d 967, 975. The facts of the instant case do not fall into any of the exceptions to the general rule. Therefore, the issue was not preserved for appellate review.

In addition, our review of the record shows the actions of the trial court were justified and do not rise to the level of error. A trial judge may examine a witness in order to bring out needed facts not elicited by the parties. *State v. Mitchell*, 598 So.2d 1271, 1273 (La.App. 4 Cir. 1992).

> Being the lone trier of fact, the judge was merely trying to clarify issues in his mind which had been befuddled by cryptic testimony. This Court, in *State v. Layssard*, 310 So.2d 107 (La. 1975) stated that: "Where the judge is the trier of fact he has the right to question the witness to clarify the evidence in his mind. Unless his participation in the trial is to such an extent and of such a nature that it deprives the defendant of a fair trial, there is no error." Additionally, it should be noted that the bulk of the court's questioning was aimed at the elucidation of issues, the confusion of which might as easily have worked to defendant's detriment as to his advantage.

Johnson, 389 So. 2d 1302, 1305. The record reveals that the judge's examinations of state witness Officer Veit and defense witness Mr. Cook were purely for the purpose of clarification and to keep the proceeding

moving. The court's interjection of a series of questions during defense counsel's impeachment of Officer Veit clearly was an attempt by the court to clarify the issue of which direction the defendant's truck was parked as the officers approached in their patrol car. The trial judge asked only one question that had not previously been asked by counsel: the time of day the incident took place.

The second series of questions by the trial court, regarding Mr. Cook's contact with the defendant, were prompted because the witness had contradicted himself during questioning. Lastly, the court intervened after the state attempted to impeach the defense witness Mr. Cook with his prior felony convictions. Mr. Cook, as the trial court points out after the close of evidence, was slow to answer , was not telling the truth. The trial judge injected the questions only after the witness apparently became confused or evasive regarding the various charges, case numbers, and sentences of his prior felonies. In this case, the transcript does not reflect the demeanor of the witness, and the trial judge's questioning does not appear to be inappropriate. Thus, there was no error.

CONCLUSION

For the above reasons the defendant's conviction is affirmed.

Pursuant to *State v. Williams, supra* and La. R.S. 40:967(F)(1)(a) and 40:967 (G), we recognize that although not actually pronounced by the trial court, the defendant's sentence under La. R.S. 40:979(B) is to be served without benefit of parole, probation or suspension of sentence. Finally, we decline to remand this case for imposition of a fine because the state failed to object to the illegally lenient sentence.

CONVICTION AFFIRMED; SENTENCE AFFIRMED AS AMENDED.