

STATE OF LOUISIANA

*

NO. 2004-KA-0877

VERSUS

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COURT OF APPEAL

GREGORY FRED

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 443-172, SECTION "J"
HONORABLE DARRYL A. DERBIGNY, JUDGE

JAMES F. MCKAY III
JUDGE

(Court composed of Judge James F. McKay III, Judge Dennis R. Bagneris Sr., Judge Edwin A. Lombard)

EDDIE J. JORDAN, JR.
DISTRICT ATTORNEY OF ORLEANS PARISH
BATTLE BELL IV
ASSISTANT DISTRICT ATTORNEY OF ORLEANS PARISH
New Orleans, Louisiana 70119
Counsel for Plaintiff/Appellee

WILLIAM R. CAMPBELL, JR.
LOUISIANA APPELLATE PROJECT
New Orleans, Louisiana 70130-3702
Counsel for Defendant/Appellant

**MOTION TO WITHDRAW AS COUNSEL
GRANTED;CONVICTION AFFIRMED;SENTENCE VACATED AND
THE MATTER IS REMANDED FOR RESENTENCING**

On October 30, 2003, the State filed a bill of information charging Gregory Fred with attempted simple burglary in violation of La. R.S. 14:27 (62). At his arraignment on November 4th he pleaded not guilty. A six-member jury found him guilty as charged at trial on March 2, 2004. The defendant filed a pro se motion for a post verdict judgment of acquittal, which was denied on March 19th. On March 26th the defendant was sentenced to serve four years at hard labor. The State filed a multiple bill charging the defendant as a third offender. After a hearing on April 27th at which the State proved the charge, his earlier sentence was set aside, and Mr. Fred was sentenced to serve eight years at hard labor. His motion for an appeal was granted.

At trial Sergeant Kevin Guillot testified that he was on patrol in the area of Josephine and Camp Streets about 5:30 a.m. on October 18, 2003, when he noticed the defendant walking on Camp Street. He had a flashlight in one hand, and he was looking into parked cars. He stopped at a silver Hyundai and took a screwdriver from his pocket. He put the tip of the screwdriver between the window and the frame of the car and cracked the

window open. The sergeant drove very close to the defendant and announced his presence. The defendant began to run, but he was apprehended in the 1100 block of Josephine Street. Mr. Fred was wearing an Oakland Raiders football jersey with the number twenty-four and the name “Woodson” on the back of it. The sergeant never lost sight of him during the chase. Mr. Fred was carrying the flashlight and screwdriver when he was caught.

Mr. David L. Eidler testified that he owned a silver Hyundai Excel. He was walking his dogs early on the morning of October 18th when he noticed policemen near his car. He approached and identified himself as the car’s owner; he found the passenger side window was open about three inches, and he had not left it in that position. He did not know the defendant and did not give him permission to enter his car.

Counsel filed a brief requesting a review for errors patent. Counsel complied with the procedures outlined by *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967), as interpreted by this Court in *State v. Benjamin*, 573 So.2d 528 (La. App. 4th Cir. 1990). Counsel filed a brief complying with *State v. Jyles*, 96-2669 (La. 12/12/97), 704 So.2d 241. Counsel's detailed review of the procedural history of the case and the facts of the case indicate a thorough review of the record. Counsel moved to withdraw

because he believes, after a conscientious review of the record, that there is no non-frivolous issue for appeal. Counsel reviewed available transcripts and found no trial court ruling, which arguably supports the appeal. A copy of the brief was forwarded to defendant, and this Court informed him that he had the right to file a brief in his own behalf. He has not done so.

As per *State v. Benjamin*, this Court performed an independent, thorough review of the pleadings, minute entries, bill of information, and transcripts in the appeal record. Defendant was properly charged by bill of information with a violation of La. R.S. 14:27(62), and the bill was signed by an assistant district attorney. Defendant was present and represented by counsel at arraignment, motion hearings, jury selection, trial, and sentencing. A review of the trial transcript reveals that the State proved the offense beyond a reasonable doubt.

Our review of the record revealed that the trial court ruled on the defendant's pro se motion for new trial after he was re-sentenced at the multiple bill hearing.

La. C.Cr.P. art. 853 provides in part:

A motion for a new trial must be filed and disposed of before sentence.

La. C.Cr.P. art. 873 provides:

If a defendant is convicted of a felony, at least three days shall elapse between conviction and

sentence. If a motion for a new trial, or in arrest of judgment, is filed, sentence shall not be imposed until at least twenty-four hours after the motion is overruled. If the defendant expressly waives a delay provided for in this article or pleads guilty, sentence may be imposed immediately.

This court in *State v. Allen*, 00-0013, p.6 (La. App. 4 Cir. 1/10/01), 777 So.2d 1252, 1256, addressing the sentencing of a defendant prior to the ruling on the defendant's motions, found:

A review of the record reveals that the trial court ruled on the defendant's motions for new trial and post verdict judgment of acquittal after sentencing the defendant. Defendant's sentences must be vacated and the case remanded for resentencing because the sentences were imposed before the motions were disposed of in violation of La. C.Cr.P. arts. 821, 853 and 873. (Citations omitted).

Mr. Fred was found guilty as charged on March 2, 2004. He filed a pro se motion for a new trial, along with a motion for a post verdict judgment of acquittal on or about March 12th. The motion for post verdict judgment of acquittal was denied on March 19th. He was sentenced to four years in the DOC on March 25th, and when that sentence was set aside, he was sentenced as a multiple offender to eight years on April 27th. On June 24th this court ordered the trial court to rule on the defendant's pro se motion for new trial. The motion was denied on July 16th.

Based on this court's findings in *Allen*, we vacate the defendant's sentence and remand the case for re-sentencing.

We also note, as Mr. Fred's counsel points out in his *Anders* brief, that the record does not reflect that the trial court advised Mr. Fred of the two-year period in which to file for post conviction relief under La. C.Cr.P. art. 930.8. However, as his counsel further points out, this error "has no bearing on the sentence and is not grounds to reverse the sentence or remand the case for re-sentencing." *State v. Leary*, 627 So. 2d 777 (La. App. 2d Cir. 1993). Moreover, La.C. Cr.P. art. 930.8 contains merely precatory language; this article does not bestow an enforceable right upon an individual defendant. *State ex rel. Glover v. State*, 93-2330, 94-2101, 94-2197, p. 21 (La. 9/5/95), 660 So.2d 1189, 1201, *abrogated in part on other grounds*, *State ex rel. Olivieri v. State*, 2000-0172, 2000-1767 (La. 2/21/2001), 779 So.2d 735. In the interest of judicial economy, we note for Mr. Ford that La. C.Cr.P. art. 930.8 generally requires that applications for post-conviction relief be filed within two years of the finality of a conviction. We further note that this two-year period does not commence to run until the conviction is final; hence, it has not yet commenced to run.

Defendant's conviction is affirmed. His sentence is vacated and the case is remanded for resentencing.

Appellate counsel's motion to withdraw is granted.

**MOTION TO WITHDRAW AS COUNSEL GRANTED;
CONVICTION AFFIRMED; SENTENCE VACATED AND THE
MATTER IS REMANDED FOR RESENTENCING**