NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2006-KA-1605**
VERSUS	*	**COURT OF APPEAL**
SCARBYRON P. GAUNICHAUX	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 458-454, SECTION "K"
Honorable Arthur Hunter, Judge

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JUDGE MAX N. TOBIAS, JR.
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(COURT COMPOSED OF JUDGE JAMES F. MCKAY, III, JUDGE MAX N. TOBIAS, JR., AND JUDGE ROLAND L. BELSOME)

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REMANDED.

MARCH 14, 2007

The defendant/appellant, Scarbyron P. Gaunichaux (hereinafter "the defendant" of "Mr. Gaunichaux") was charged on 19 April 2005 with one count of distribution of heroin.[1] He entered a not guilty plea on 22 April 2005, and on 22 July 2005 the district court found probable cause and denied Mr. Gaunichaux's motion to suppress the evidence. Following a bench trial on 10 August 2005, the defendant was found guilty of attempted possession of heroin. On 18 August 2005, the district court denied Mr. Gaunichaux's motion for new trial. After waiving delays, Mr. Gaunichaux was sentenced to serve three years at hard labor, to run concurrently with any other sentence. The state filed a multiple bill of information charging the defendant as a third felony offender. The defense filed a motion to reconsider sentence, motion to quash the multiple bill of information, and motion for appeal. Mr. Gaunichaux's motion for appeal was granted. A multiple bill hearing that was set for 6 October 2005 did not proceed as scheduled, and the record before us does not reflect that the hearing has been reset.

On 11 March 2005, Officers Favaroth and Cotton were driving along St. Claude Avenue in New Orleans when they observed the defendant and his

[1] His codefendant, Raymond Allen, was charged with possession of heroin; he later entered a guilty plea.

codefendant, Raymond Allen, standing on the sidewalk conversing. After conversing, Mr. Allen gave Mr. Gaunichaux an unknown amount of currency, and Mr. Gaunichaux gave Mr. Allen an object. The officers believed that they had witnessed a drug transaction and decided to investigate. Upon seeing the officers exit the vehicle, Mr. Gaunichaux and Mr. Allen entered the yard of 5205 St. Claude Avenue. The officers followed them into the yard and observed Mr. Allen discard a clear plastic object containing foil. After retrieving the object, Officer Favaroth saw that the foil contained a light brown substance that he believed was heroin. Both subjects were then arrested and searched. A metal tube containing a white powder and a black lighter was found on the defendant. Money was retrieved from Mr. Gaunichaux's left hand. Officer Favaroth identified the objects confiscated from the defendant. The crime lab report showing that the brown substance found in the foil was heroin was admitted without objection.

Mr. Allen testified for the defense and stated that he was a drug addict. He asserted that he and Mr. Gaunichaux were friends. He claimed that Mr. Gaunichaux was telling him that he needed to go inside because he was high. Mr. Allen testified that Mr. Gaunichaux did not sell him any drugs. Instead, he stated that he already had the heroin when he saw the defendant.

A review of the record reveals one patent error. The record contains a copy of a motion to reconsider sentence; the minute entry of sentencing and sentencing transcript show that it was filed on the day of sentencing, 18 August 2005. The record does not reflect that the district court has ever acted on the motion for reconsideration of sentence.

As his sole assignment of error, the appellant contends that the district court imposed an excessive sentence. This court has previously held that it is

procedurally incorrect to review a defendant's sentence prior to the district court's ruling on a motion to reconsider sentence. See *State v. Ferrand*, 03-1746 (La. App. 4 Cir. 1/14/04), 866 So. 2d 322; *State v. McQun*, 02-0259 (La. App. 4 Cir. 6/19/02), 828 So. 2d 598; *State v. Allen*, 99-2579 (La. App. 4 Cir. 1/24/01), 781 So. 2d 88. As this court noted in *State v. Temple*, 00-2183 (La. App. 4 Cir. 5/16/01), 789 So. 2d 639, without a final sentence a conviction is not appealable.

Accordingly, because the defendant's sole assignment of error relates to his sentence, to-wit, that it is excessive, this case is remanded to the district court for a ruling on the motion for reconsideration of sentence, reserving Mr. Gaunichaux's right to appeal his conviction and sentence once the district court has ruled upon the motion.

REMANDED.