

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * NO. 2012-KA-1768
VERSUS *
COURTNEY D.WHITE AND * COURT OF APPEAL
JOHN CUNNINGHAM * FOURTH CIRCUIT
* STATE OF LOUISIANA
* * * * *

CONSOLIDATED WITH: **CONSOLIDATED WITH:**
STATE OF LOUISIANA NO. 2013-KA-0106
VERSUS
JOHN CUNNINGHAM

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 496-306 C/W 499-077 SECTION "B"
Honorable Lynda Van Davis, Judge and
Honorable Jerome M. Winsberg, Judge Pro-Tempore

* * * * *

Judge Max N. Tobias, Jr.

* * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Max N. Tobias, Jr.,
Judge Rosemary Ledet)

Christopher A. Aberle
LOUISIANA APPELLATE PROJECT
P.O. Box 8583
Mandeville, LA 70470-8583

COUNSEL FOR DEFENDANT/APPELLANT, COURTNEY D. WHITE

Sherry Watters
LOUISIANA APPELLATE PROJECT
P.O. BOX 58769
New Orleans, LA 70158--8769

COUNSEL FOR DEFENDANT/APPELLEE, JOHN CUNNINGHAM

AFFIRMED; MOTIONS GRANTED.

Courtney White appeals his guilty plea and sentence for manslaughter in case number 496-306 on the docket of the Criminal District Court, and our docket number 2012-KA-1768, and John Cunningham appeals his guilty pleas and sentences for manslaughter in the same case and in case number 499-077 on the docket of the Criminal District Court, and our docket number 2013-KA-0106, requesting only a review of the record for errors patent. In addition, Mr. Cunningham has filed a pro se brief raising one assignment of error. Finding no patent errors and no merit to Mr. Cunningham's *pro se* assignment of error, we affirm both Mr. White's and Mr. Cunningham's guilty pleas and sentences.

Case Number 496-306

On 22 April 2010, the grand jury returned an indictment charging Courtney White and John Cunningham with the second degree murder of Jerome Mutin. Both defendants entered pleas of not guilty at their 13 May 2010 arraignment. On 14 January 2011, the trial court denied both defendants' motions to suppress the evidence and identification. The court denied the defendants' motion for severance for trial, and this court denied Mr. White's writ application from that ruling. *State v. White*, 12-0843, unpub. (La. App. 4 Cir. 6/6/12). Trial for both

defendants began on 5 June 2012; however, and on the fourth day of trial (June 8) pursuant to plea agreements, both defendants entered pleas of guilty to manslaughter. The defendants both waived all delays, and the court sentenced Mr. White to serve forty years at hard labor and Mr. Cunningham to serve thirty years at hard labor, Mr. Cunningham's sentence was to be served consecutively with his sentence in case number 499-077 on the Criminal District Court's docket. Mr. White filed a motion to reconsider his sentence on 11 June 2012, but we find no indication that the court ruled on the motion in the record. Both Mr. White and Mr. Cunningham moved for an appeal on 9 July 2012.

Case Number 499-077

On 5 August 5, 2010, the grand jury indicted Mr. Cunningham with one count each of conspiracy to commit first degree murder and the first degree murder of David Neiswonger.¹ Mr. Cunningham pleaded not guilty to these charges at his 12 August 2010 arraignment. On 26 April 2011, the court denied Mr. Cunningham's motion to suppress evidence. This court denied Mr. Cunningham's writ application seeking review of that ruling. *State v. Cunningham*, 11-0886, unpub. (La. App. 4 Cir. 8/4/11). The Supreme Court granted Mr. Cunningham's writ application and remanded the matter to this court for reconsideration. *State v. Cunningham*, 11-1924 (La. 1/13/12), 77 So.3d 954. On remand, this court again denied Mr. Cunningham's writ. *State v. Cunningham*, 11-0886 (La. App. 4 Cir. 3/21/12), 88 So.3d 1196. The Supreme Court denied writs. *State v. Cunningham*, 12-0870 (La. 6/1/12), 90 So.3d 442.

¹ The bill also charged Arthur Grandpre, Gerald Williams, and Phillip Dominick in each of these counts. They have not yet gone to trial and are not parties to this appeal.

On 30 September 2011, the court suppressed evidence that was to be used in connection with the conspiracy charge because the state failed to produce it by a certain date. This court reversed this ruling. *State v. Cunningham*, 11-1402, unpub. (La. App. 4 Cir. 11/14/11). On 15 December 2011, the trial court granted the state's motion to allow victim impact testimony at the penalty phase from a victim in an unrelated case. This court granted Mr. Cunningham's writ from this ruling. *State v. Cunningham*, 12-0141, unpub. (La. App. 4 Cir. 4/19/12).²

On 8 June 2012, Mr. Cunningham pleaded guilty to manslaughter and waived all delays. The court sentenced him to serve forty years at hard labor, the sentence to be served consecutively to his sentence in case number 496-306 on the Criminal District Court's docket. The state *nolle prosequied* the conspiracy charge as to him. On 9 July 2012, he moved for an appeal.

After counsel for Mr. Cunningham filed one brief as to both cases, this court consolidated these appeals for review.

The relevant facts of the murder that was charged in case number 496-306 arose on 23 December 2009. Late on that evening, the victim Jerome "Profit" Mutin was at the home of Glen Holly in the 2300 block of D'Abadie Street in New Orleans. Mr. Mutin was a drug dealer, and he had spoken on the phone with someone who was going to meet him at the residence to buy drugs from him. Someone knocked at the door, and Mr. Mutin answered the door, with Mr. Holly standing behind him. Mr. Holly testified that Courtney White, whom he knew, was standing on the steps right outside the door, while John Cunningham, whom

² This court also denied a codefendant's writ from the denial of his motion to sever, *State v. Williams*, 12-0441, unpub. (La. App. 4 Cir. 5/8/12), and the Supreme Court denied writs from this court's ruling, *State v. Williams*, 12-1302 (La. 9/28/12), 98 So.3d 842.

he also knew, was standing at the foot of the steps. As Mr. Mutin was trying to look around Mr. White, Mr. White shot him in the head and then fled. Mr. Cunningham smiled at Mr. Holly and then fled. Mr. Holly slammed the door shut. Mr. Holly later identified both Messrs. White and Cunningham from photographic lineups. About one week after Mr. Mutin's murder, Mr. Holly was shot and injured and another man at his residence, David Neiswonger, was shot and killed at his residence. Mr. Neiswonger's murder formed the basis of the charge against Mr. Cunningham in case number 499-007.

Counsel for Mr. White in our case number 2012-KA-1768 and counsel for Mr. Cunningham in both cases have requested only a review of the record for errors patent.

Both counsel complied with the procedures outlined by *Anders v. California*, 386 U.S. 738 (1967), as interpreted by this court in *State v. Benjamin*, 573 So.2d 528 (La. App. 4th Cir. 1990). Counsel filed briefs 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 thorough reviews of the records. Counsel moved to withdraw because they believe, after a conscientious review of the record, that no non-frivolous issue for appeal exists. Counsel reviewed the record and found no trial court ruling that arguably supports the appeal. Copies of their counsel's briefs were forwarded to Mr. White and Mr. Cunningham, and this court informed them that they had the right to file briefs in their own behalf. Mr. Cunningham has filed a brief in our case number 2012-KA-1768 assigning one issue.

As per *State v. Benjamin*, this court performed an independent, thorough review of the pleadings, minute entries, and the bills of indictment in the appeal

records. In case number 2012-KA-1768, Mr. White and Mr. Cunningham were each properly charged by bill of indictment with one count of second degree murder, a violation of La. R.S. 14:30.1. The bill of indictment was signed by the foreman of the grand jury. Likewise, in case number 2013-KA-0106, Mr. Cunningham was charged by bill of indictment with one count each of conspiracy to commit first degree murder and first degree murder, and the foreman of the grand jury signed the indictment. Both appellants were present and represented by counsel in both cases at arraignment, during their pleas, and at sentencing. Mr. White's plea of guilty to manslaughter in case number 2012-KA-1768 and Mr. Cunningham's pleas of guilty to manslaughter in both cases are legal in all respects, as are their sentences.

The only patent error pertains to case 2012-KA-1768, with respect to Mr. White's sentence. Although Mr. White filed a motion to reconsider his sentence, there is no indication that the court ruled on it. Normally, the failure of a trial court to rule on a motion to reconsider sentence requires that the case be remanded for a ruling and that appellate review of a defendant's sentence be deferred. *See State v. Peters*, 10-0326 (La. App. 4 Cir. 2/16/11), 60 So.3d 672, *writ denied*, 11-0494 (La. 9/30/11), 71 So.3d 279; *State v. Hailey*, 02-1738 (La. App. 4 Cir. 9/17/03), 863 So.2d 564. However, Mr. White pleaded guilty pursuant to a plea agreement wherein he would receive the forty-year sentence that the court imposed. As provided in La. C.Cr.P. art. 881.2 A(2), he cannot "appeal or seek review of a sentence imposed in conformity with a plea agreement which was set forth in the record at the time of the plea." His motion to reconsider sentence alleges only that the sentence that he received was excessive. Because Mr. White cannot raise this

claim as per article 881.2 A, we find no need to remand this case for a ruling on the motion to reconsider. It is thus moot.

Our review reveals no other patent errors.

By his sole assignment of error, Mr. Cunningham contends that his guilty plea in case number 2012-KA-1768 is invalid because the prosecutor failed to amend the bill of indictment to manslaughter before he pleaded guilty to the lesser charge. He correctly points out that after he and Mr. White pleaded guilty to manslaughter, the prosecutor realized that he did not amend the indictment to reflect that charge, and he amended the bill at that time.

Nonetheless, the failure to amend the bill prior to the plea to the lesser charge does not invalidate the plea. In *State v. Bailey*, 08-93 (La. App. 3 Cir. 5/28/08), 984 So.2d 267, the court found that the failure to amend the bill was harmless error, if error at all. Indeed, in *State v. Jackson*, 04-2863 (La. 11/29/05), 916 So.2d 1015, the Court found that the failure of the state to amend the bill of information to an offense *that was not responsive to the offense charged in the bill* was harmless error where the record showed that the defendant knowingly pled guilty to the offense. *See also State v. Narcisse*, 01-49 (La. App. 5 Cir. 6/27/01), 791 So.2d 149.

Here, we find no doubt that Mr. Cunningham knew that he was pleading guilty to manslaughter in exchange for a thirty-year sentence, rather than risk being found guilty of second degree murder and receiving a life sentence. Thus, the failure of the prosecutor to amend the bill until after Mr. Cunningham pleaded guilty to the lesser offense is harmless error. His assignment of error has no merit.

Our independent review reveals no non-frivolous issue and no trial court ruling that arguably supports either of the appeals. Therefore, we affirm Courtney

White's conviction and sentence in case number 2012-KA-1768 and John Cunningham's convictions and sentences in both case numbers 2012-KA-1768 and 2013-KA-0106. We also grant the motions to withdraw as counsel filed by counsel for both appellants.

AFFIRMED; MOTIONS GRANTED.