STATE OF LOUISIANA	*	**NO. 2018-KA-0715**
VERSUS	*	
		COURT OF APPEAL
ARTHUR TOLEDANO	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 519-546, SECTION "D"
Honorable Dennis J. Waldron, Judge
* * * * * *

JAMES F. MCKAY III
CHIEF JUDGE
* * * * * *

(Court composed of Chief Judge James F. McKay III, Judge Daniel L. Dysart, Judge Regina Bartholomew-Woods)

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CONVICTION AFFIRMED; REMANDED IN PART

JANUARY 23, 2019

STATEMENT OF CASE

On March 18, 2014, Arthur Toledano ("defendant") was charged by bill of information with one count of manslaughter (Count 1) and one count of attempted manslaughter (Count 2). The State amended Count 2 of the bill of information from attempted manslaughter to hit and run driving involving death or serious bodily injury. The charges stemmed from a February 3, 2014 hit and run accident during which the defendant struck siblings, six-year-old Shaud Wilson and nine-year-old Shanaya Wilson, with the vehicle he was driving. Shaud did not survive.

The defendant was arraigned on March 21, 2014, and entered a plea of not guilty. The docket master reflects that the defendant was advised at the time of arraignment that he had a right to trial by judge or jury. A preliminary examination was conducted on November 6, 2014. Judge Marullo informed the defendant in open court once again that he had a right to trial by judge or jury. After consulting with the defendant, defense counsel orally informed Judge Marullo that the defendant wished to waive his right to trial by jury and receive a judge trial; however, no waiver was executed in writing as required by La. C.Cr.P. art. 780(B). Trial was scheduled for January 30, 2015. On January 30, 2015, the

defendant appeared for trial. Judge Marullo granted the defendant's motion for continuance and rescheduled the trial for Monday, February 23, 2015.

On February 20, 2015, the Honorable Dennis Waldron was appointed judge *pro tempore* to replace Judge Marullo. The defendant and his trial counsel, Mr. Panagoulopoulos, appeared for trial the following Monday, February 23, 2015. Defense counsel requested a continuance since he was expecting to present his case to Judge Marullo. Defense counsel stated he wanted additional time to adjust his witness list since the case would now be presented to Judge Waldron. Judge Waldron denied the motion to continue; however, the judge agreed to recess the matter after the State's presentation of its case to allow the defense additional time to prepare. Following opening statements, the State presented its case-in-chief, during which Shayana, her pre-teen brother, mother and uncle, all of whom were present when the accident occured, testified. After the State presented its case, the trial was recessed until Friday, February 27, 2015.

On February 27, 2015, the defense presented its case, and the State presented a rebuttal. Following closing argument, Judge Waldron found the defendant guilty as charged of manslaughter for the killing of Shaud Wilson (Count 1), and guilty of the lesser included offense of hit and run driving without serious death or bodily injury as to Shanaya (Count 2). Sentencing was scheduled for March 4, 2015.

Prior to sentencing, on March 4, 2015, defense counsel filed the defendant's first motion for a new trial arguing that Judge Waldron abused his discretion in denying his motion to continue the trial. Judge Waldron denied the motion for new trial, and stated:

> [S]ince I arrived a week ago Monday on the 23rd of February, I have been met by three situations in three separate cases. One of which as recently as this morning, where persons prior to my coming

> waived trial by Jury. In two, not three, but in two of those three cases the defendant asked specifically to withdraw that plea. I say "plea", but that request - that election - that choice. And, because it did not comport with the somewhat recent amendment, I think the Code provision was last amended in 2013, if memory serves me correct, but in light of the fact that there was not compliance with Article 780 in terms of it being in writing, I found that it was permissible to allow both persons to elect trial by Jury.
>
> Here, the defense did not do that.
>
> And, I am not here to default [sic] the Defense Counsel....
>
> But, there was no request to withdraw the election of the waiver of the jury here, only to continue it to see who would be the Judge and allow the trial then to go with waiver of jury before whoever the Judge is to be in thirty days. And, the reason I denied it is because I don't think the law allows that.

The State and the defendant provided testimony from witnesses at the sentencing hearing. At the conclusion of the testimony provided by the witnesses, the trial court imposed a sentence of twelve years without benefit of parole as to Count 1 and a sentence of six months as to Count 2.

On March 31, 2015, Kevin Boshea enrolled as counsel for the defendant and filed a motion for new trial on the grounds that the verdict was contrary to the law and evidence; a motion to enroll as attorney of record; a motion for appeal; and a motion to reconsider sentence. Judge Waldron's thirty-day term had expired, and the Honorable Calvin Johnson had taken the bench as the new judge *pro tempore*. On April 2, 2015, Mr. Boshea appeared for a status hearing and informed Judge Johnson that he needed to obtain a transcript of the sentencing hearing that would yield grounds for a new trial.

On April 16, 2015, Mr. Boshea filed another motion for new trial seizing upon Judge Waldron's comments during his ruling on the defendant's previous motion for new trial. Mr. Boshea's motion alleged that "had counsel known that

he could have elected a jury trial (as opposed to a bench trial in front of Judge Waldron) he would have done so." In its response, the State argued that no injustice had occurred as a result of the case having been tried before Judge Waldron.

On April 23, 2015, the defense and the State appeared for a hearing on the defendant's most recent motion for new trial. At a bench conference, Mr. Boshea indicated his intent to call previous defense counsel, Mr. Panagoulopoulos, as a witness during the hearing. Before taking the stand, Mr. Panagoulopoulos moved to formally withdraw from representation of the defendant.

Mr. Panagoulopoulos testified that his request for a bench trial was not made in writing. Mr. Boshea presented Mr. Panagoulopoulos with two unpublished writ actions rendered by this Court following the defendant's conviction and sentencing in which this Court found that Judge Waldron had not erred when he allowed the defendant, prior to trial, to withdraw his election of a bench trial that was made orally rather than in writing as required by La. C. Cr. P. art. 780. When asked by present defense counsel whether he would have requested a jury trial had he realized he had an option to do so, Mr. Panagoulopoulos stated he would have requested a jury trial.

On cross-examination, Mr. Panagoulopoulos acknowledged the defendant was aware of his right to trial by both judge and jury prior to the oral waiver. Mr. Panagoulopoulos stated he was unaware a waiver of jury trial had to be done in writing because he had represented other clients during bench trials and had waived his client's right to jury trial orally. When asked whether he would have executed a written waiver of jury trial with the defendant's signature had he known

it was required, Mr. Panagoulopoulos stated that he would have filed the written waiver of the right to trial by jury.

Following the hearing, the trial court granted the defendant's motion for new trial, finding that the defendant's oral waiver of jury trial in this case was not constitutionally made. Judge Johnson did not articulate which subsection of La. C. Cr. P. art. 851(B) required the new trial, but stated:

> [R]egardless of what happened [after the oral waiver], and even regardless of whether there is evidence sufficient to find him guilty as charged, and regardless of whether anything that happened after that, but to deny him his Constitutional Right of choice is absolutely error.

The State noticed its intent to seek supervisory writs and requested a stay, which was granted. Judge Johnson ordered that the State be given until May 22, 2015, to file its writ application. On April 24, 2015, the State filed a motion to vacate the order granting defendant a new trial, arguing that the motion for new trial was untimely under La. C.Cr.P. art. 853. The State's motion to vacate was denied, and the State once again stated its intent to seek writs. On June 24, 2015, this Court granted the State's writ, found the trial court erred in granting defendant's motion for new trial, and vacated the ruling. *State v. Toledano,* 15-0552 (La. App. 4 Cir. 6/24/15) (unpub.). The Louisiana Supreme Court denied the defendant's writ on May 27, 2016. *State v. Toledano*, 15-1433 (La. 5/27/16), 192 So.3d 737 (Mem).

STATEMENT OF FACTS

A statement of facts is not necessary to address the issues raised.

ERRORS PATENT

A review of the record reveals one error patent. The defendant asserts his sentence is legally excessive in assignment of error number five. On March 31,

2015, the defendant filed a motion to reconsider sentence on which the district court has failed to rule. This Court has refused to consider sentencing issues on appeal when there is an outstanding motion to reconsider sentence. See *State v. Biddy*,13-0356, pp. 9-10 (La.App. 4 Cir. 11/20/13), 129 So.3d 768, 775; *State v. Davis*, 00-0275, pp. 10-11 (La.App 4 Cir. 2/14/01), 781 So.2d 633, 640; *State v. Foster*, 02-0256, p. 3 (La.App. 4 Cir 9/11/02), 828 So.2d 72,74). Therefore, we remand this case to the district court for it to rule on the defendant's outstanding motion to reconsider sentence filed on March 31, 2015. The defendant's fifth assignment of error challenging the excessiveness of his sentence is premature and we, therefore do not address the merits of assignment of error here. The district court's failure to rule on the defendant's motion to reconsider sentence does not prevent this Court from review of the defendant's conviction. *Biddy*, p. 10, 129 So.3d 768 at 775.

DISCUSSION

ASSIGNMENT OF ERROR NUMBER 1

In his first assignment of error, the defendant contends the bench trial held in this matter is legally infirm in that there was not a legal waiver of trial by jury. Because of this, the defendant contends the district court erred in denying his motion for a new trial. This matter was addressed and ruled upon by this Court in *State v. Toledano*, 15-0552, pp.6-9 (La. App. 4 Cir. 6/24/15) (unpub.), *writ denied*, 15-1433 (La. 5/27/16), 192 So.3d 737.

In *State v. Robertson*, 13-1403, p. 4 (La. App. 4 Cir. 4/9/14), 136 So.3d 1010, 1012, this Court stated:

> As this Court noted in *State v. Golden*, 11-0735, p. 13 (La. App. 4 Cir. 5/23/12), 95 So.3d 522, 531, *writ denied*, 12-1393 (La.1/11/13), 106 So.3d 545, 12-1417 (La.1/11/13), 106 So.3d 547, citing *State v. Gillet*, 99-2474, p. 5 (La. App. 4 Cir. 5/10/00), 763 So.2d 725, 728:

> Under the law-of-the-case doctrine, an appellate court will not reverse its pretrial determinations unless the defendant presents new evidence tending to show that the decision was patently erroneous and produced an unjust result. Courts of appeal generally refuse to reconsider their own rulings of law on a subsequent appeal in the same case.
>
> Thus, where an appeal consists of the same arguments previously raised in a writ application and a defendant does not present any new evidence bearing on the correctness of the court's prior decisions, this court should decline to reconsider its prior rulings under the law of the case doctrine. See *State v. Duncan*, 11-0563, p. 26 (La.App. 4 Cir. 5/2/12), 91 So.3d 504, 520. *See also Golden*, 11-0735, p. 14, 95 So.3d at 531 ("defendant has [not] established that this court's prior, considered writ decision on the merits was patently erroneous and produced an unjust result.").

In the matter *sub judice*, the defendant does not point to any new evidence which would require a reconsideration of this Court's prior ruling. Therefore we decline to revisit whether the defendant legally waived his right to trial by jury under the law-of-the-case doctrine. Assignment of error one has no merit.

ASSIGNMENT OF ERROR NUMBER 2, 3, AND 4

The defendant asserts the State failed to comply with La. C.Cr.P. art. 719 regarding the expert testimony of Detective Blackman; that the district court erred in allowing Detective Blackman to testify regarding accident reconstruction; and the district court erred in denying the defendant's motion for a new trial.

The defendant asserts the trial court erred in allowing Detective Richard Blackman to testify as an expert in the field of accident reconstruction, including the calculation of the speed of the defendant's vehicle immediately prior to the accident. Detective Blackman testified that he has been employed with the New Orleans Police Department for sixteen years. He has been assigned to the Traffic Division since 2004 and has been assigned to the Fatality Division since 2009.

Detective Blackman stated he has investigated over five hundred fatal car accidents and has been the lead detective in at least seventy fatal car accidents. He obtained a associates degree in Criminal Justice from Delgado Community College. At the time of trial, Detective Blackman was pursuing a bachelor's degree in Criminal Justice at Loyola. Detective Blackman attended training at Northwestern Center for Public Safety and Corrections in Accident Investigation Levels 1 and 2 and Vehicle Dynamics, Total Accident Reconstruction 1 and 2 and was certified at all of these courses. Detective Blackman has qualified as an expert in the field of accident reconstruction, including the calculation of the speed of a vehicle, in several cases. Based on this evidence, the trial court did not abuse its discretion in accepting Detective Blackman as an expert in the field of accident reconstruction, including the calculation of the speed of defendant's vehicle. In *State v. McMillan*, 09-2094 (La. App. 1 Cir. 7/1/10 2010), 43 So.3d 297, *writ denied*, 57 So.3d 309 (La. 2011), the police officer was qualified to testify as an expert in the field of automobile crash investigations in vehicular homicide prosecution even though he had never previously qualified as an expert. The officer had received approximately four weeks of training in crash investigation at a police academy, had an undergraduate degree in aerodynamics and had taken physics courses in high school and college, and had nine years of experience as a State policeman and had investigated hundreds of crashes, including at least sixteen fatalities.

The defendant asserts further that the State failed to provide him with an expert report containing Detective Blackman's *curriculum vitae* and the basis of his speed calculation prior to the accident in violation of La. C.Cr.P. art. 719. Louisiana Code of Criminal Procedure article 719 (A) provides in relevant part:

> A. Upon written motion of the defendant, the court shall order the district attorney to permit or authorize the defendant to inspect and copy, photograph, or otherwise reproduce any results or reports, or copies thereof, of a physical or mental examination, and of scientific tests or experiments, made in connection with or material to the particular case, that are in the possession, custody, control, or knowledge of the district attorney and intended for use at trial. If the witness preparing the report will be called as an expert, the report shall contain the witness's area of expertise, his qualifications, a list of materials upon which his conclusion is based, and his opinion and the reason therefor. If the expert witness has not reduced his results to writing, or if the expert witness's written report does not contain the information required of an expert as provided in this Article, the state must produce for the defendant a written summary containing any information required to be produced pursuant to this Article but absent from a written report, if any, including the name of the expert witness, his qualifications, a list of materials upon which his conclusion is based, and his opinion and the reason therefor.

La. C.Cr.P. art. 729.5(A) sets forth the sanctions available for the failure to comply with discovery:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this Chapter or with an order issued pursuant to this Chapter, the court may order such party to permit the discovery or inspection, grant a continuance, order a mistrial on motion of the defendant, prohibit the party from introducing into evidence the subject matter not disclosed, or enter such other order, other than dismissal, as may be appropriate.

Generally, Louisiana's criminal discovery rules are intended to eliminate unwarranted prejudice arising from surprise testimony and evidence, to permit the defense to respond to the State's case, and to allow a proper assessment of the strength of the State's Case. *State v.Hatfield,* 13-0813, p.38 (La. App.4 Cir. 7/2/14), 155 So.3d 572, 597. The purpose of Louisiana's criminal discovery rules is to eliminate unwarranted prejudice arising from surprise testimony and evidence, and when the defendant is lulled into a misapprehension of the strength of the

State's case through the State's failure to fully disclose, basic unfairness may result. *State v. Lee*, 00-2429, p.19 (La. App. 4 Cir. 1/4/01), 778 So.2d 656, 666.

Upon the State's failure to comply with the discovery rules or with an order issued pursuant to the discovery rules, a court may prohibit the party from introducing into evidence the subject matter not disclosed, order a mistrial on motion of the defendant, or enter such other order, other than dismissal, as may be appropriate. La. C.Cr.P. art. 729.5(A). It is within the trial court's discretion under La. C.Cr.P. art. 729.5(A) to exclude evidence or enter any appropriate order to remedy a party's violation of a discovery right. *Hatfield*, p.40, 155 So.3d at 597 see also *State ex rel T.H.*, 10-0962, p. 3 (La. App. 4 Cir. 11/24/10), 52 So.3d 275, 277 (a trial court has considerable discretion in rulings related to discovery and the dynamics of a trial).

In the matter *sub judice*, the State admitted it did not furnish the defense with an expert report; however, the defense was provided with a copy of Detective Blackman's investigative report in discovery. The report clearly reflects the detective's opinion that the defendant was speeding at the time of the accident:

> On Monday, February 3, 2014 at approximately 7:01 am, the subject, Arthur Toledano B/M, 06/10/1991 was traveling at a high rate of speed in the far right lane on Paris Avenue at Lafreniere Street while at the same time two juvenile victims were attempting to cross Paris Avenue, in the crosswalk, at its intersection with Lafreniere Street.

Detective Blackman similarly testified at the November 6, 2014 motions hearing that the defendant's vehicle was speeding at the time of the accident:

> Q. Did you view that surveillance footage of the crash yourself?
>
> A. Yes, I did.
>
> Q. Okay. And what did you see on the surveillance of the crash?

> A. I saw it was right before I think 7 a.m. I saw kids were crossing Paris Avenue in the crosswalk. Two of them jogged across in the crosswalk and waited on the sidewalk for apparently a bus or something. And the other two kids, the last two kids, were waiting on the neutral ground for traffic to pass, and they had a vehicle stopped in the far left lane on Paris Avenue and allowed the kids to cross in the crosswalk. As they were crossing, you know, I saw a silver vehicle, which was a Honda Crosstour, was speeding on Paris Avenue, and he struck the kids.

The defendant provides no evidence that he has been prejudiced as a result of not being provided a copy of an expert report prior to trial. The defense was provided a copy of Detective Blackman's police report in discovery on May 7, 2014, in which Detective Blackman stated it was his opinion that the defendant had been speeding at the time of the accident, and the detective testified consistent with his report at the motions hearing conducted on November 6, 2014. In addition, the defendant was provided with a copy of the accident video which clearly shows the defendant was speeding. The detective's education, training, work experience, and qualifications to serve as an expert could have easily been discerned by questioning him on this topic at trial, and, in fact, the defense did question the detective extensively at trial about his qualifications to serve as an expert. Furthermore, the trial judge recessed the trial for three days upon the conclusion of the State's case in order to allow the defense additional time to prepare its case. Accordingly, the defense was not prejudiced by the State's failure to provide this information prior to trial.

CONCLUSION

For the above stated reasons the defendant's conviction is affirmed. However, since there is a motion to reconsider sentence which the district court has not ruled upon, the matter is remanded to the district court for a ruling on the

motion to reconsider sentence, reserving the defendant's right to appeal his sentences thereafter.

CONVICTION AFFIRMED; REMANDED IN PART