STATE OF LOUISIANA

COURT OF APPEAL, THIRD CIRCUIT

KA05-876

STATE OF LOUISIANA

VERSUS

EDWARD FUSELIER

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APPEAL FROM THE
FIFTEENTH JUDICIAL DISTRICT COURT,
PARISH OF LAFAYETTE, NO. 92701

HONORABLE JULES DAVID EDWARDS, III, DISTRICT JUDGE

****

ULYSSES GENE THIBODEAUX
CHIEF JUDGE

****

Court composed of Ulysses Gene Thibodeaux, Chief Judge, Glenn B. Gremillion, and J. David Painter, Judges.

APPEAL DISMISSED AND REMANDED WITH INSTRUCTIONS.

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Thibodeaux, Chief Judge.

On July 6, 2005, this court issued a rule to show cause why the appeal in the above-captioned case should not be dismissed due to its untimely perfection. In response, Defendant, Edward Fuselier, filed a brief with this court arguing that this court should consider the trial court's order of appeal as an order granting an out-of-time appeal. In the alternative, Defendant requested this court to remand the matter so that Defendant may amend his motion for appeal for compliance with the law relating to post-conviction relief applications. We hereby order that Defendant's motion for appeal be treated as an application for post-conviction relief and remand the case to the trial court for further proceedings.

After a jury found Defendant guilty of attempted second degree murder, in violation of La.R.S. 14: 27 and La.R.S. 14:30.1, the district court, on August 28, 2003, sentenced Defendant to serve thirty-five years at hard labor. On September 17, 2003, Defendant, contending that thirty-five years was excessive, filed a motion to reconsider his sentence. The trial court denied Defendant's motion on that same date. Defendant filed a motion for appeal on June 14, 2004, which the district court granted.

Under La.Code Crim.P. art. 914, a motion for appeal must be made no later than thirty days after either the rendition of the judgment from which the appeal is taken or the ruling on a motion to reconsider sentence filed pursuant to La.Code Crim.P. art. 881.1. Because Defendant failed to file his motion for appeal within the time provided by La.Code Crim.P. art. 914, his conviction and sentence became final. Once Defendant's conviction and sentence became final, he could no longer obtain an appeal by simply filing a motion for appeal. *State v. Labiche*, 96-433 (La.App. 3 Cir. 7/31/96), 680 So.2d 77. Thus, Defendant must first obtain reinstatement of his

right to appeal by way of a properly filed application for post-conviction relief. *Id.*;

State v. Dixon, 00-516 (La.App. 3 Cir. 6/7/00), 768 So.2d 99; *State v. Counterman*,

475 So.2d 336 (La.1985).

In *Dixon*, this court stated:

> *State v. Counterman*, 475 So.2d 336 (La.1985) sets forth the procedure which should be followed to obtain the right to file an out-of-time appeal. In *Counterman*, the defendant was sentenced on February 10, 1983. No appeal was filed within the time period set forth in Article 914. On April 10, 1984, the defendant filed a motion for an out-of-time appeal. The trial court granted the motion without a hearing and without affording the district attorney an opportunity to respond to the motion. The First Circuit Court of Appeal dismissed the appeal "on the basis that the trial court was without authority or jurisdiction to grant an out-of-time appeal on an *ex parte* motion." *Id.* at 338. The defendant filed a motion for out-of-time appeal with the court of appeal, which was denied. The defendant then filed a motion for out-of-time appeal with the supreme court. The supreme court held that the defendant lost his right to obtain an appeal by simply filing a motion for an appeal after the time delays had run--not because the trial court was divested of jurisdiction but "because the conviction and sentence became final when the defendant failed to appeal timely." *Id.* (footnote omitted). The supreme court held that the proper procedure for obtaining an out-of-time appeal is by filing an application for post conviction relief pursuant to La.Code Crim.P. arts. 924-930.7. [footnote omitted.] In so ruling, the supreme court found several advantages to following this procedure. Primarily, the district attorney would be allowed an opportunity to oppose a request, and the defendant would be afforded an evidentiary hearing to prove his allegations.
>
> An out-of-time appeal is appropriately granted when the trial court has determined it is warranted "after due consideration of such factors as the length of the delay in defendant's attempt to exercise the right and the adverse effect upon the state caused by the delay." *Id.* at 340. The supreme court ultimately concluded that the defendant's motion for an out-of-time appeal filed in the trial court should have been treated as an application for post conviction relief and remanded the case to the trial court for consideration as such. Following *Counterman*, we find that Defendant's January 18, 2000 motion for appeal should have been treated by the trial court as an application for post conviction relief requesting an out-of-time appeal. We note that La.Code Crim.P. art. 930.8 now provides that the time delays for filing an application for post conviction relief are applicable to requests for out-of-time appeals, unless an exception is made. Therefore, Defendant shall be permitted an opportunity to amend his motion to comply with the requirements of

Articles 924-930.8. By doing so, the State will then be given an opportunity to contest the granting of an appeal.

Dixon, 768 So.2d at 101-102.

Defendant's appeal is hereby dismissed and this case is remanded to the trial court for further proceedings. Defendant is to be permitted an opportunity to amend his motion for appeal to comply with the requirements of La.Code Crim.P. arts. 924-930.8, and the State is to be given an opportunity to contest the granting of an out-of-time appeal.

APPEAL DISMISSED AND REMANDED WITH INSTRUCTIONS.