

STATE OF LOUISIANA

NO. 14-KA-936

VERSUS

FIFTH CIRCUIT

JOHN MICHAEL MARLBROUGH

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 13-6, DIVISION "N"
HONORABLE STEPHEN D. ENRIGHT, JR., JUDGE PRESIDING

JANUARY 28, 2015

COURT OF APPEAL
FIFTH CIRCUIT

FILED JAN 28 2015

STEPHEN J. WINDHORST
JUDGE


CLERK
Cheryl Quirk Landrieu

Panel composed of Judges Fredericka Homberg Wicker,
Marc E. Johnson and Stephen J. Windhorst

HOLLI A. HERRLE-CASTILLO
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APPEAL DISMISSED

SW
ZHW
MSJ

Defendant was convicted of third offense DWI, La. R.S. 14:98A(D), and on May 31, 2013, he was sentenced to one year at hard labor without benefit of parole, probation, or suspension of sentence and imposed a \$2000.00 fine. This Court affirmed defendant's conviction and sentence on appeal. State v. Marlborough, 13-688 (La. App. 5 Cir. 3/12/14), 138 So.2d 65. Prior to the appeal, defendant did not file a motion to reconsider the sentence, nor did he assign excessive sentence as error in the appeal.

Because of an accidental fall in which he sustained serious injuries, defendant had not yet begun serving his sentence at the time this Court rendered its opinion. Shortly after issuance of the appellate decision, the trial court held a hearing in which it found that since defendant had not yet begun serving his sentence, it retained the right to amend that sentence.

On August 4, 2014, defendant filed a "Motion to Reconsider Sentence" pursuant to La. C.Cr.P. art. 881.1 and State v. Dorthey, 623 So.2d 1276 (La. 1993),

seeking a downward deviation of the one year mandatory minimum sentence imposed. On August 7, 2014, the district court denied defendant's motion. Defendant appealed. For the reasons the follow, we dismiss this appeal.

In the current appeal defendant seeks review of the district court's denial of his motion to reconsider sentence, which was filed more than 30 days following the imposition of sentence and after the finality of his first appeal. However, review of this judgment is not properly before this Court on appeal.

A motion to reconsider sentence must be filed within thirty days following the imposition of sentence unless the court, at sentencing, sets a longer time period. La. C.Cr.P. art. 881.1A(1). In felony cases, where a defendant has been sentenced to imprisonment at hard labor, "there is no authorization for the court to amend the sentence after execution of the sentence has begun unless the court grants a *timely filed* motion to reconsider sentence." State v. Gedric, 99-1213 (La. App. 1 Cir. 6/03/99), 741 So.2d 849, 852, writ denied, 99-1830 (La. 11/05/99); 751 So.2d 239. (Emphasis added). In addition, after a motion for appeal has been granted, the trial court lacks jurisdiction to take action in a criminal case, except as provided by law and by La. C.Cr.P. art. 916.

Here, defendant did not file his motion for reconsideration of sentence within the thirty-day period after sentencing. "An 'out-of-time' motion to reconsider sentence is not contemplated by the Code of Criminal Procedure nor allowed by the jurisprudence." Gedric, supra at 852, (citing State v. King, 95-344 (La. App. 3 Cir. 10/4/95), 663 So.2d 307,308 n. 1, writ denied, 95-2664 (La. 3/15/96), 669 So. 2d 433.)¹ La. C.Cr.P. 822, allowing for the correction of an illegal sentence at any

¹ In King, supra, the appellate court dismissed the defendant's second appeal, in which the defendant again raised the issue of excessiveness of sentence based upon the district court's denial his "out of time" motion to reconsider sentence that the district court granted him leave to file, after finding that it was not properly before the court.

time, does not modify jurisprudential or statutory authority to allow the consideration of an untimely motion to reconsider sentence. Id.

As stated previously, defendant seeks review of the district court's denial of his motion to reconsider his sentence filed more than 30 days following the imposition of sentence, as well as after the finality of his first appeal. We are of the opinion that the district court erred in considering the untimely motion for reconsideration of sentence. Accordingly, review of the denial of the motion is not properly before this Court on appeal. We therefore dismiss this appeal.

APPEAL DISMISSED

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON
ROBERT M. MURPHY
STEPHEN J. WINDHORST
HANS J. LILJEBERG

JUDGES



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**NOTICE OF JUDGMENT AND
CERTIFICATE OF DELIVERY**

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **Uniform Rules - Court of Appeal, Rule 2-20** THIS DAY **JANUARY 28, 2015** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

A handwritten signature in cursive script, appearing to read "Cheryl Q. Landrieu", written over a horizontal line.

CHERYL Q. LANDRIEU
CLERK OF COURT

14-KA-936

E-NOTIFIED

TERRY M. BOUDREAUX
HOLLI A. HERRLE-CASTILLO
MATTHEW CAPLAN

MAILED

HON. PAUL D. CONNICK, JR.
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