STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 KA 1192

STATE OF LOUISIANA

VERSUS

STANLEY WHITE

DATE OF JUDGMENT: JUL 14 2014

ON APPEAL FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT
NUMBER 8126, DIVISION D, PARISH OF ASCENSION
STATE OF LOUISIANA

HONORABLE JESSIE M. LEBLANC, JUDGE

* * * * * *

Ricky L. Babin
District Attorney
Donaldsonville, Louisiana

Counsel for Appellant
State of Louisiana

Joni M. Buquoi
Lloyd A. Capello, Jr.
Assistant District Attorneys
Gonzales, Louisiana

David A. Weilbaecher, Jr.
Assistant Attorney General
Baton Rouge, Louisiana

J. Rodney Baum
Walter C. Dumas
Steven J. Moore
Baton Rouge, Louisiana

Counsel for Defendant-Appellee
Stanley White

Mark D. Plaisance
Thibodaux, Louisiana

* * * * * *

Higginbotham, J. dissents with reasons.
J. Theriot concurs with reasons

BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

Disposition: REVERSED; ORIGINAL SENTENCE REINSTATED.

KUHN, J.,

The defendant, Stanley White, was originally charged by grand jury indictment with vehicular homicide, a violation of La. R.S. 14:32.1. Pursuant to a plea agreement, on July 10, 1995, the defendant pled guilty to a reduced charge of negligent homicide, a violation of La. R.S. 14:32. (R. 6, 13). On December 11, 1995, he was sentenced to twenty-four months at hard labor. He filed a motion to reconsider sentence and requested a stay of execution of sentence. The district court granted the request for stay of execution. On February 12, 1996, the district court denied the motion to reconsider sentence and ordered that the defendant surrender himself to begin serving the sentence previously imposed. (R. 8-10, 78). On February 14, 1996, the district court granted the defendant's motion for bond pending appeal. (R. 81-82).

On appeal, in an unpublished decision, this Court affirmed the defendant's conviction and sentence. See ***State v. White***, 96-1005 (La. App. 1st Cir. 2/14/97), 690 So.2d 1123 (*per curiam*). Notice of judgment was mailed to the district court judge, the clerk of the district court, all appeal counsel of record, and the district attorney's office. (R. 88, 90).

No further action took place until July 19, 2011, when the State filed a motion for execution of sentence. It appears from a show cause order signed by the district court that the parties were ordered to appear on September 26, 2011, for a hearing on the matter. However, the record does not contain a minute entry or transcript from that day. (R. 91-92).

The State thereafter filed a motion to revoke appeal bond and motion to execute sentence on April 10, 2013. (R. 93). The matter was heard on May 3, 2013, and a motion to quash sentence that had been filed by the defendant was also heard that day. The district court denied the defendant's motion to quash. Nevertheless, the district court *sua sponte* modified the defendant's original

sentence by ordering that the remainder of his two-year sentence be suspended and that he be placed on supervised probation for two years, with credit for time served. The State objected to the modified sentence and requested a stay of execution of sentence pending appeal, which the district court granted. (R. 11).

The State now appeals, arguing that the district court lacked authority to modify the defendant's original, legal sentence. (State's Br. 5). For the following reasons, we reverse the judgment of the district court and reinstate the defendant's original sentence.

FACTS

Because the defendant entered a guilty plea, the facts were not fully developed. The record establishes that on July 31, 1994, the defendant was the driver of a vehicle involved in a collision that resulted in the death of ten-week-old Brittany Deville. In its written reasons for judgment, the district court stated that although the defendant was not legally intoxicated under the DWI statute in effect at the time of the offense, he had a blood-alcohol level of .09 grams percent. (R. 13, 120, 150). See La. R.S. 14:98 (prior to its amendment by 2001 La. Acts, No. 781, § 1).

DISCUSSION

In its sole assignment of error, the State argues that the district court had no authority to modify the defendant's original sentence. Specifically, the State contends that the action of the district court runs counter to the body of law associated with La. C.Cr.P. art. 881 and violates the separation of powers enumerated in the Louisiana Constitution. (State's Br. 5-6).

Because the defendant's original sentence was valid and legal, it could be modified only in accordance with the rules for altering a legal sentence. In this respect, Article 881 provides, in pertinent part:

> A. Although the sentence imposed is legal in every respect, the court may amend or change the sentence, within the legal limits of its discretion, *prior to the beginning of execution of the sentence.*
>
> B. (1) After commencement of execution of sentence, *in felony cases in which the defendant has been sentenced to imprisonment without hard labor* and in misdemeanor cases, the sentencing judge may reduce the sentence or may amend the sentence to place the defendant on supervised probation. [Emphasis added.]

While Article 881(A) & (B) authorize a district court to modify a defendant's legal sentence under certain circumstances, these sections are not applicable to the facts of the present case. Article 881(A) authorizes a district court to amend a sentence only *before* execution of that sentence has begun. Upon denying the defendant's motion to reconsider sentence on February 12, 1996, the district court ordered the defendant to surrender himself to the Department of Corrections to begin serving his two-year sentence. (R. 124). Thus, as the State argues, the district court lacked the authority to modify the defendant's original sentence because he had already begun to serve a legal sentence at hard labor. (State's Br. 5-6). Nor did Article 881(B) authorize the district court to amend the defendant's original sentence because this section applies only when a sentence *without hard labor* is imposed in a felony case and in misdemeanor cases, whereas the defendant herein was sentenced to hard labor for his felony conviction.

Additionally, the record does not reveal that the defendant applied for rehearing or took a writ to the Louisiana Supreme Court from the judgment of this Court affirming his conviction and sentence. A judgment rendered by an appellate court becomes final when the delay for applying for a rehearing has expired and no application therefore has been made. La. C.Cr.P. art. 922(B). After appeal attempts are exhausted, the district court lacks jurisdiction to take any action in a criminal proceeding other than the actions specified in La. C.Cr.P. art. 916 or "as otherwise provided by law" (such as to handle an application for a writ of habeas corpus or an application for post-conviction relief). See ***State v. Gedric***, 99-1213

(La. App. 1st Cir. 6/3/99), 741 So.2d 849, 852 (*per curiam*), writ denied, 99-1830 (La. 11/5/99), 751 So.2d 239. Article 916 provides that:

> The jurisdiction of the trial court is divested and that of the appellate court attaches upon the entering of the order of appeal. Thereafter, the trial court has no jurisdiction to take any action except as otherwise provided by law and to:
>
> (1) Extend the return day of the appeal, the time for filing assignments of error, or the time for filing per curiam comments in accordance with Articles 844 and 919.
>
> (2) Correct an error or deficiency in the record.
>
> (3) Correct an illegal sentence or take other appropriate action pursuant to a properly made or filed motion to reconsider sentence.
>
> (4) Take all action concerning bail permitted by Title VIII.
>
> (5) Furnish per curiam comments.
>
> (6) Render an interlocutory order or a definitive judgment concerning a ministerial matter not in controversy on appeal.
>
> (7) Impose the penalty provided by Article 844.
>
> (8) Sentence the defendant pursuant to a conviction under the Habitual Offender Law as set forth in R.S. 15:529.1.

None of the actions specified in Article 916 confer jurisdiction or authority upon a district court to modify a legal sentence after an appeal is taken. See ***Gedric***, 741 So.2d at 852. The defendant argues, however, that ***State v. Roberts***, 568 So.2d 1017 (La. 1990) (*per curiam*), provided authority for the district court to modify his sentence. Yet, we note that the procedural posture of ***Roberts*** is distinguishable from the instant case. In ***Roberts***, the relators filed petitions for writs of habeas corpus after the State executed their nine-year sentences over six years after the sentences had been affirmed on appeal. The district court denied the petitions for habeas relief, but the Louisiana Supreme Court fashioned a remedy and ordered that the relators be released on parole. ***Roberts***, 568 So.2d at 1018-19. Unlike the instant case, the district court in ***Roberts*** had jurisdiction to review the petitions for habeas relief under Article 916. See ***Gedric***, 741 So.2d at 852.

Moreover, rather than giving the defendant in the present case unearned incarceration credit and placing him on parole, the district court suspended his entire sentence. We do not find ***Roberts*** useful in this case.

CONCLUSION

For the foregoing reasons, particularly the fact that execution of sentence began before the district court modified the defendant's sentence, as well as the divesture of the district court's jurisdiction following the defendant's appeal (except for specified actions), we conclude that the district court lacked jurisdiction and authority and was without a procedural mechanism to modify the defendant's original, legal sentence. See La. C.Cr.P. arts. 881 and 916. Accordingly, the judgment of the district court modifying the defendant's sentence is reversed and set aside and the original sentence is reinstated.

REVERSED; ORIGINAL SENTENCE REINSTATED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 KA 1192

STATE OF LOUISIANA

VERSUS

STANLEY WHITE

THERIOT, J., concurring and assigning reasons.

This case presents a unique set of circumstances. Both parties raise legitimate arguments in support of their respective positions. However, before we can have a discussion of the separation of powers and the principles of fundamental fairness dictated by the due process clause of the Fourteenth Amendment of the United States Constitution, we must first resolve the issue of the trial court's authority to amend Mr. White's sentence.

I agree that the trial court exceeded its authority and the matter should be remanded. Considerable discussion centered on La. C.Cr.P. art. 881 and when execution of the sentence commences. The majority relies on La. R.S. 15:566.2 to determine the commencement of Mr. White's sentence. However, La. R.S. 15:566.2 does not apply when a prisoner "has been released on bail or perfected a suspensive appeal". See La. R.S. 15:566.2. Mr. White was released on bail; therefore, in my opinion, La. R.S. 15:566.2 does not apply to the present case.

I find that Mr. White's sentence commenced on February 16, 1996. That is the date the trial court remanded Mr. White to the physical custody of the sheriff. The Louisiana Supreme Court has held that the word "execution," as it relates to criminal sentences, is defined as "the process of performing a judgment or sentence of a court". *State v. Brown,* 451 So.2d 1074, 1078 (La. 1984). In this case, the

process of performing the sentence commenced when Mr. White was remanded to the custody of the sheriff. At that point, pursuant to La. C.Cr.P. art 881, the trial court was prohibited from amending the sentence.

I also agree that the facts of this case differ from the facts of the *Roberts* case.[1] Therefore, *Roberts* is not controlling in this matter. However, I do reserve judgment as to whether the reasoning of *Roberts* should apply to this case.

Pursuant to LA. C.Cr.P. art 881.4(A), it is appropriate to remand this matter to the trial court for further proceedings. Although the trial court's jurisdiction has been divested, the State has filed a motion with the trial court, thereby subjecting the State to the jurisdiction of the trial court as it pertains to the motion to revoke appeal bond and a motion to execute sentence pending. Like any other motion filed before a trial court, the trial court may grant the motion or the trial court may deny the motion. I would advise the trial court to hold a contradictory hearing to allow both parties to argue their well-founded positions. Furthermore, the trial court should provide written reasons to substantiate its denial or granting of the motions. Once a decision is rendered on the State's motions, this court would be in the proper position to discuss the constitutional questions being raised by the parties.

[1] 568 So.2d 1017 (La. 1990).

STATE OF LOUISIANA

VERSUS

STANLEY WHITE

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 KA 1192

BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

HIGGINBOTHAM, J., DISSENTS AND ASSIGNS REASONS.

HIGGINBOTHAM, J.

First, I acknowledge that the loss of baby Brittany is a terrible tragedy that no parent should have to endure, and I in no way want to diminish that tragedy.

As espoused by the Louisiana Supreme Court in **State v. Kline**, 475 So.2d 1093 (1985) (per curiam), and **State v. Roberts**, 568 So.2d 1017 (La. 1990) (per curiam), re-incarceration at this time of Mr. Stanley White would be inconsistent with fundamental principles of liberty and justice. Therefore, I respectfully disagree with the decision of the majority to remand the matter, and I would affirm the judgment of the trial court.

The **Roberts**[1] court found that execution from the beginning of relators' sentences more than seven years after they were initially imposed and more than six years after the sentences were affirmed on appeal was inconsistent with fundamental principles of liberty and justice. The court held that due process and fundamental fairness required that it fashion an appropriate relief. Under the particular circumstances of the case, the court concluded that the defendants should be released on parole considering the nature of the offenses, the sentences imposed, the lapse of time without

[1] Although the procedural posture of the **Roberts** case is different from this case, the fundamental principles of liberty and justice adopted by the Louisiana Supreme Court remain the same.

execution of the sentences, their exemplary conduct, and the absence of any fault or wrongdoing on their part. **Roberts**, 568 So.2d at 1019.

In **Kline**, the defendant was released from custody on his sentence of one and one-half years at hard labor for attempted possession of a firearm. The court stated that there was no evidence in the record that the defendant had any part in securing his release from the parish jail on order of the district court judge within fifteen days of the date he surrendered himself after his conviction and sentence were affirmed on appeal. The sheriff and district attorney's office were aware of the situation and took no action while the defendant reestablished himself in the community, obtained work, and avoided any further problems with the authorities. The court reasoned that under those circumstances, re-incarceration of the defendant to serve the balance of his term would be inconsistent with the fundamental principles of liberty and justice. **Kline**, 475 So.2d at 1093.

In the instant case, the tragic accident occurred nearly twenty years ago when Mr. White was 19 years old. After his trial and appeal, Mr. White had no notice to report to the sheriff's office on a particular date and no arrest warrant was ever sought by the State. Mr. White did not violate any conditions of his bond. Moreover, there has been no explanation for the State's delay in executing the sentence. Further, since his conviction, Mr. White obtained a bachelor's degree, a realtor's license, full-time employment, has had no arrests and took no steps to prevent the lawful execution of his sentence.

Under the unusual circumstances of this case, considering the rationale of **Kline** and **Roberts**, due process and fundamental fairness require that the court fashion an appropriate relief. The record reveals that Mr. White has been a model citizen for twenty years, has established himself

in the community, and has avoided further problems with the authorities, thereby demonstrating his capacity to rehabilitate himself in a non-custodial setting. In this case, due process and fundamental fairness support the judgment of the district court. I find that the district court **fashioned an appropriate relief** in modifying Mr. White's sentence to give him credit for time served, suspending his previously imposed two-year sentence, and placing him on supervised probation for two years. Therefore, I would affirm the judgment of the trial court.