

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 KW 1714

STATE OF LOUISIANA

VERSUS

NICOLE ERVIN



Judgment rendered **JUN 21 2018**

Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, State of Louisiana
Trial Court No. 06-09-0252
Honorable Richard M. Moore, Judge

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ATTORNEY FOR
DEFENDANT-APPELLANT
NICOLE ERVIN

BEFORE: GUIDRY, PETTIGREW, AND CRAIN, JJ.

Crain, J. concurs and assigns reasons

PETTIGREW, J.

The defendant, Nicole Ervin, was charged by bill of information with simple burglary of an inhabited dwelling, a violation of La. R.S. 14:62.2, and initially pled not guilty. On May 10, 2010, pursuant to a plea agreement, the defendant withdrew her not guilty plea and pled guilty to simple burglary, a violation of La. R.S. 14:62.¹ On that same date, in conformity with the plea agreement, the trial court sentenced the defendant to twelve years of imprisonment at hard labor with credit for time served, suspended the remainder of the sentence, and imposed five years of supervised, active probation with conditions. On April, 18, 2012, the defendant stipulated to violating probation, her probation was revoked, and the May 10, 2010 sentence was made executory. On May 15, 2017, the defendant filed a pro se "motion to run sentences concurrent" in an attempt to have the May 10, 2010 sentence run concurrently with two additional sentences imposed in two other cases. On September 12, 2017, the motion was denied. On September 20, 2017, the defendant filed a notice of appeal of the trial court's denial of the motion, and the trial court granted the instant appeal and appointed the Louisiana Appellate Project to represent the defendant. Stating that there are no nonfrivolous issues upon which to support the appeal, the defense counsel filed a brief raising no assignments of error and requesting a patent error review pursuant to La. Code Crim. P. art. 920(2). The defense counsel also filed a motion to withdraw as counsel of record. For the following reasons, we hereby convert the appeal to a writ, deny the writ, and affirm the denial of the motion to run sentences concurrent. We further grant defense counsel's motion to withdraw.

¹ Though the State indicated at the time of the plea that the bill of information was amended, an amended bill of information is not in the record on appeal, and simple burglary is not a responsive offense to the charge of simple burglary of an inhabited dwelling. See La. Code Crim. P. art. 814(A)(42.1). Nonetheless, the trial court was not without jurisdiction to accept the defendant's knowing and voluntary guilty plea simply because the plea was not responsive to the offense charged in the bill of information, even assuming the district attorney did not amend the bill to conform to the plea. See La. Code Crim. P. art. 487(B); see also **State v. Jackson**, 2004-2863, pp. 13-14 (La. 11/29/05), 916 So.2d 1015, 1022-23.

PROCEDURAL POSTURE

Herein, the defendant filed a pro se motion seeking to run her sentences concurrently, pursuant to La. Code Crim. P. art. 822. We note that the denial of a motion to amend a sentence is not an appealable judgment. See La. Code Crim. P. arts. 912, 930.6; **State v. Lee**, 2011-1128 (La. App. 5th Cir. 7/31/12), 99 So.3d 721, 723; **State v. Boudreaux**, 2011-1345 (La. App. 4th Cir. 7/25/12), 98 So.3d 881, 884, writ denied, 2012-1907 (La. 11/9/12), 100 So.3d 841; **State v. Hutchinson**, 99-0034 (La. App. 4th Cir. 5/17/00), 764 So.2d 1139, 1140-41; **State v. Benoit**, 446 So.2d 921, 922 (La. App. 1st Cir. 1984), writ denied, 448 So.2d 113 (La. 1984). Further, in accordance with Article 822, “each motion to amend or modify a sentence imposed shall be filed, considered, and decided in compliance with Code of Criminal Procedure Articles 881 and 881.1.” A trial court has no authority to amend or modify a hard labor, felony sentence after the defendant has begun serving the sentence unless the court grants a timely filed motion to reconsider sentence. See La. Code Crim. P. arts. 881(A) & 881.1(A)(1); see also **State v. Gedric**, 99-1213 (La. App. 1st Cir. 6/3/99), 741 So.2d 849, 851-52 (per curiam), writ denied, 99-1830 (La. 11/5/99), 751 So.2d 239. In this case the defendant has not suggested, nor is there any basis for finding, the motion the defendant filed was a timely filed motion to reconsider sentence. Therefore, the appeal delays for defendant’s conviction and sentence imposed in 2010 have long since expired under Article 881.1(A)(1). See also La. Code Crim. P. art. 914. The defendant’s conviction and sentence became final when the defendant failed to appeal timely, and the conviction and sentence are no longer subject to review under the ordinary appellate process.²

² After appeal delays have expired, the defendant’s remedy is to obtain the reinstatement of her right to appeal by filing an application for postconviction relief requesting an out-of-time appeal pursuant to **State v. Counterman**, 475 So.2d 336, 338 (La. 1985), within the time delays provided by La. Code Crim. P. art. 930.8. However, a motion for postconviction relief to reinstate appeal rights is not a substitute for a timely motion to reconsider sentence and does not satisfy the requirements of La. Code Crim. P. art. 881.1. **State v. Thames**, 2015-1298 (La. App. 1st Cir. 9/19/16), 2016 WL 5118581 (unpublished), writ denied, 2016-1911 (La. 9/6/17), 224 So.3d 981; see also **State v. Gerald**, 2013-1478 (La. App. 1st Cir. 5/2/14), 145 So.3d 436, 438, writ denied, 2015-1370 (La. 2/13/15), 157 So.3d 585. Thus, the defendant’s failure to timely file a motion to reconsider sentence waived any rights to review the sentence on appeal. See **State v. Carter**, 2000-0200 (La. App. 4th Cir. 10/18/00), 772 So.2d 213, 218. Moreover, the defendant’s motion to modify her sentence in this case was filed outside the two-year time period prescribed for postconviction relief. La. Code Crim. P. art. 930.8(A); see also **State v. Sterling**, 2011-436 (La. App. 3rd Cir. 7/20/11),

Thus, as the denial of a motion to amend or modify a sentence is not an appealable judgment and the defendant's appeal rights have expired, the appellant's proper remedy for raising any error relating to the ruling on the motion is by application for supervisory writs. La. Code Crim. P. art. 912.1(C)³; see also **City of New Orleans v. Ballansaw**, 475 So.2d 768 (La. 1985) (per curiam). A writ would be properly before this court since Uniform Rules of Louisiana Courts of Appeal, Rule 4-3 gives a party thirty days from the date of a ruling at issue in which to give notice of intent and request a return date to file a writ. We find that the defendant could have filed a timely writ, which this court could have considered by exercising its supervisory jurisdiction under La. Const. art. V, § 10; therefore, we shall accord this matter writ status on our own motion. See **Boudreaux**, 98 So.3d at 884; **Benoit**, 446 So.2d at 922; **State v. Branch**, 96-1626 (La. App. 3rd Cir. 5/21/97), 696 So.2d 81, 83.

DENIAL OF THE MOTION TO RUN SENTENCES CONCURRENT

Defense counsel has filed a brief containing no assignments of error and a motion to withdraw. Accordingly, the defendant has abandoned issues for review, if any, concerning the denial of the motion to run the May 10, 2010 sentence concurrently with other sentences. See Uniform Rules of Louisiana Courts of Appeal, Rule 2-12.4(B)(4). Moreover, a defendant cannot appeal a sentence imposed in conformity with a plea agreement set forth in the record at the time of the plea. La. Code Crim. P. art. 881.2(A)(2); **State v. Wiggins**, 13-0649, p. 4 (La. App. 1st Cir. 1/31/14), 139 So.3d 1, 4; see also **State v. Young**, 96-0195, p. 7 (La. 10/15/96), 680 So.2d 1171, 1175. Finally, as discussed above, the trial court was without authority to amend or modify the defendant's sentence in this case.⁴ Thus, we now turn to the **Anders** brief filed by

(Continued)

2011 WL 2848743 (unpublished), writ granted in part on other grounds, 2011-1837 (La. 3/9/12), 84 So.3d 557. The defendant does not allege that any exception to the time limit applies.

³ La. Code Crim. P. art. 912.1(C) provides, in pertinent part, that in all other cases not otherwise provided by law, the defendant has the right of judicial review by application to the court of appeal for writ of review.

⁴ While an illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review pursuant to La. Code Crim. P. art. 882, in this case there is no allegation that the sentence imposed on the defendant was illegal.

counsel. See **State v. Tickle**, 2014-1155 (La. App. 4th Cir. 4/15/15), 2015 WL 1775521 (unpublished); **State v. Lyons**, 2013-180, (La. App. 5th Cir. 10/9/13), 128 So.3d 407, 411.

ANDERS BRIEF

Statement of Facts

The defendant pled guilty in this case, thus the facts were not developed. At the **Boykin**⁵ hearing, the State presented the following factual basis for the plea. On or about May 27, 2008, police officers were investigating a break-in at a residence in East Baton Rouge Parish and received an anonymous tip indicating that the defendant had broken into the apartment of the victim, Eliezer Hernandez-Vargas. The tipster indicated that the defendant gained entry by breaking a window. The officers dusted the point of entry for fingerprints. After a comparison of the fingerprints lifted from pieces of glass from the window and the defendant's fingerprints, it was determined that the fingerprints matched. The defendant admitted to entering the apartment, explaining that she had an addiction to pain medication and that one of the ways she was able to maintain a supply of the medication was by breaking into residences and stealing items. A cell phone and other items were taken out of the residence during the offense. The defendant did not have permission, consent, or authority to enter the residence or to take the property.

Law and Analysis

The defense counsel filed a brief containing no assignments of error and a motion to withdraw. In the brief and motion to withdraw, referring to the procedures outlined in **State v. Jyles**, 96-2669 (La. 12/12/97), 704 So.2d 241 (per curiam), counsel indicated that after a conscientious and thorough review of the record, she could find no nonfrivolous issues to raise on appeal.

The procedure in **Anders v. California**, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), used in Louisiana, was discussed in **State v. Benjamin**, 573 So.2d 528, 529-31 (La. App. 4th Cir. 1990), sanctioned by the Louisiana Supreme Court in **State v.**

⁵ **Boykin v. Alabama**, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969).

Mouton, 95-0981, pp. 1-2 (La. 4/28/95), 653 So.2d 1176, 1177 (per curiam), and expanded by the Louisiana Supreme Court in **Jyles**, 96-2669 at p. 3, 704 So.2d at 242. According to **Anders**, 386 U.S. at 744, 87 S.Ct. at 1400, "if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw." To comply with **Jyles**, appellate counsel must review not only the procedural history of the case and the evidence presented at trial, but must also provide "a detailed and reviewable assessment for both the defendant and the appellate court of whether the appeal is worth pursuing in the first place." **Jyles**, 96-2669 at p. 3, 704 So.2d at 242 (quoting **Mouton**, 95-0981 at p. 2, 653 So.2d at 1177).

When conducting a review for compliance with **Anders**, an appellate court must conduct an independent review of the record to determine whether the appeal is wholly frivolous. **State v. Dyke**, 17-1303, p. 3 (La. App. 1st Cir. 2/27/18), ___ So.3d ___, ___ (2018 WL 1060732). Under both state and federal jurisprudence, an unqualified plea of guilty waives all nonjurisdictional defects and precludes their review by either appeal or postconviction relief. **State v. Crosby**, 338 So.2d 584, 588 (La. 1976). We note that in this case no pretrial rulings were preserved for appeal under **Crosby**.

Herein, the trial court thoroughly explained the defendant's rights prior to accepting the guilty plea. The plea agreement (including the sentence to be imposed and the State's dismissal of a simple burglary charge in a separate case) was set forth in the record. The defendant was questioned as to her date of birth, education, and her understanding of the proceedings. The defendant indicated that she was not under the influence of drugs or alcohol, or coerced into pleading guilty. The trial court informed the defendant of her **Boykin** rights (right to trial by jury, right against compulsory self-incrimination, and right of confrontation), her right to an appeal, and that by pleading guilty she would be waiving her rights. She indicated that she understood and wished to waive her rights. The defendant was informed of the statutory elements and sentencing range for the offense, and the consequences of pleading guilty. She denied having any questions and confirmed her desire to waive her rights and plead guilty. The trial court imposed the sentence in accordance with the plea agreement. The defendant was also

informed that she had the right to file a motion for reconsideration of the sentence within thirty days, and to appeal the sentence if believed to be unconstitutional. Finally, the trial court informed the defendant of the two-year time limitation to file for postconviction relief.

In the **Anders** brief, the defense attorney asks for a review for patent error under La. Code Crim. P. art. 920(2), as routinely performed by this court on appeal. The defense counsel reviewed the procedural history of the case. She noted that the defendant was made aware of the sentence at the time of the plea, and that the sentence would not be regarded as unconstitutional. The defense counsel concludes in her brief that there are no nonfrivolous issues to raise on appeal. Further, the defense counsel certifies that the defendant was served with a copy of the **Anders** brief and the motion to withdraw as counsel of record. The defense counsel's motion to withdraw notes the defendant has been notified of the right to file a pro se brief, and the defendant has not filed a pro se brief in this case. Thus, we find that the defense counsel has adequately complied with the requirements necessary to file an **Anders** brief.

The defendant in this case pled guilty. This court has conducted an independent review of the entire record in this matter. We recognize that our review of the guilty plea colloquy is subject to the restraints of **State v. Collins**, 14-1461 (La. 2/27/15), 159 So.3d 1040 (per curiam) and **State v. Guzman**, 99-1528, 99-1753, pp. 6-7 (La. 5/16/00), 769 So.2d 1158, 1162. We have found no reversible errors under La. Code Crim. P. art. 920(2). Furthermore, we find no nonfrivolous issues or trial court rulings that arguably support this application for review. Accordingly, the writ application is denied. Defense counsel's motion to withdraw, which has been held in abeyance pending the disposition of this matter, is hereby granted.

WRIT DENIED; DENIAL OF "MOTION TO RUN SENTENCES CONCURRENT" AFFIRMED; MOTION TO WITHDRAW GRANTED.

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 **CRAIN, J., concurring.**

The defendant sought review of the trial court's ruling denying her motion to run sentences concurrently. For the reasons set forth by the majority, that ruling is not subject to appellate review and the appeal granted by the trial court was improper. I agree with converting the defendant's appeal of the trial court's denial of her motion to run sentences concurrently to an application for supervisory writ. I also agree with denying the writ because the trial court lacked authority to amend the sentence. *See* La. Code Crim. Pro. arts. 881A and 881.1A(1); *State v. Gedric*, 99-1213 (La. App. 1 Cir. 6/3/99), 741 So. 2d 849, 851-52 (*per curiam*), writ denied, 99-1830 (La. 11/5/99), 751 So. 2d 239. I concur because I disagree with reviewing the record to determine if the improvidently granted appeal was frivolous simply because appellate counsel, which should not have been appointed, filed an *Anders* brief and motion to withdraw. The majority errs in conducting appellate review of the underlying conviction and sentence after recognizing appellate review thereof is precluded. I would vacate the order appointing counsel to represent the defendant on appeal and dismiss counsel's motion to withdraw as moot.