11/28/01 “See News Release93 for any concurrences and/or dissents.”

SUPREME COURT OF LOUISIANA

No. 00-K-1725

STATE OF LOUISIANA

versus

SIDNEY WILLIAMS

CALOGERO, Chief Justice, dissents.

I respectfully dissent. The legislature may not authorize an appellate court to modify a defendant’s sentence to his detriment under the auspices of either La. Rev. Stat. 15:301.1 or La. Code Crim. Proc. art. 882 when the defendant alone takes the appeal and the state neither lodges an objection at the time of sentencing in the district court nor thereafter seeks appellate review to correct the error. Contrary to the majority’s reasoning, such an action creates a chilling effect on a defendant’s exercise of his constitutional right to appeal in Louisiana and, in my view, offends La. Const. art. I, § 19, which guarantees Louisiana citizens a right to judicial review.

The majority’s reliance on federal cases pre-dating our decision in State v. Jackson, 452 So. 2d 682 (La. 1984), is misguided, because there is no federal constitutional right to appeal corresponding to our state constitutional right to judicial review. Thus, even though a defendant may not be entitled to an illegally lenient sentence should one be imposed, we recognized in Jackson that allowing the appellate court *sua sponte* to correct sentencing errors favorable to the defendant when only the defendant has sought review “either is or appears to be retaliatory in nature” and, therefore, “may have a ‘chilling effect’ on the exercise of the [defendant’s] right to appeal.” Id. at 683. Subsequently, in State v. Fraser, 484 So. 2d 122 (La. 1986), we reiterated our support for the constitutional underpinnings of Jackson when we

rebuffed the perceived attempt, via the amendment of La. Code Crim. Proc. art. 882, to allow an appellate court to correct an illegally lenient sentence on review absent any contemporaneous objection by the state in the district court or any request for appellate review by the state. We were rightly concerned with the appearance of an impartial judiciary and believed that requiring the prosecutor to honor his duty to protect the state's interest furthered that objective. See Fraser, 484 So. 2d at 125.

Today, however, the majority capitulates in another legislative attack on Jackson, and, consequently, a collateral assault on Louisiana's constitutional right to judicial review, via a tortured reading of La. Rev. Stat. 15:301.1 in an attempt to breathe new life into La. Code Crim. Proc. art. 882. This court, as the majority also recognizes ante at p. 13, has held that "criminal statutes are to be strictly construed and, in the absence of an express legislative intent, any doubt or ambiguity should be resolved in favor of lenity and not so as to multiply the penalty imposed." State v. Freeman, 411 So. 2d 1068, 1072 (La. 1982). Notwithstanding that general rule of statutory construction, the majority resolves all of the "unwitting[]" ambiguities, redundancies, and conflicts with other statutes that it recognizes in La. Rev. Stat. 15:301.1 against the defendant and in favor of the state, which has not, to this day, bestirred itself even to object to the sentence imposed, much less initiate correction thereof. See Ante, p. 12. Thus, despite finding that the instant case does not fall within the purview of La. Rev. Stat. 15:301.1, ante, p. 11 n. 6 and p. 16 n. 11, the majority interprets ambiguities and conflicts therein to expand the reach of La. Code Crim. Proc. art. 882 to allow an appellate court on review sought solely by the defendant to order remand and correction of an illegal sentence, when the state has neither objected to the error in the district court nor sought appellate review to correct the error. To add insult to injury, the majority leaves for another day the constitutional

propriety of exempting the state, but not the defendant, from the statutory prerequisites for preserving for appellate review a claim relating to punishment, i.e., a contemporaneous objection, La. Code Crim. Proc. art. 841, or a motion to reconsider sentence, La. Code Crim. Proc. art. 881.1. Ante, p. 11 n. 7.

In sum, I believe the court of appeal lacked the authority to vacate the defendant's sentence and remand the case to the district court when the state did not object, appeal, or seek writs in this court. Such an action, in my view, was unconstitutional; therefore, the sentence cannot be modified in that fashion.

The majority further errs in its analysis of La. Rev. Stat. 15:301.1. Even if La. Rev. Stat. 15:301.1 changed the result in Jackson and Fraser, I would subject the authority of an appellate court to order correction of illegally lenient sentences under Subsection (B) to the same 180-day time limit of Subsection (D) that the legislature has imposed on a district court for correcting sentencing errors under Subsection (B) favorable to the defendant either on its own initiative or at the request of the state. The majority's decision today effectively reads Subsection (D) out of the statute in those cases in which the defendant has taken an appeal and over six months have elapsed before the appellate court issues its opinion. The point is illustrated by this case. Although 180 days had already elapsed when the Third Circuit rendered its decision, and the district court could not have corrected its own errors on its own initiative, the majority, as did the court of appeal, sweeps aside the provisions of Subsection (D) and permits the district court to act solely because the *defendant* took an appeal. The district court could have corrected *sua sponte* its sentencing errors under Subsection (B) at any time within 180 days of imposing sentence, and was not precluded from doing so by the pending appeal. See La. Code Crim. Proc. art. 916(3) (despite entering order of appeal, district court retains jurisdiction to correct an illegal sentence

or take other appropriate action pursuant to a properly made or filed motion to reconsider sentence). Yet the district court failed to exercise its authority within the 180-day time limit of Subsection (D); consequently, I would hold that, once the 180-day time period has elapsed, the appellate court lacks the authority to revive the lower court's power to correct its own sentencing errors under Subsection (B).

Additionally, I disagree with the majority's finding that a district court can amend a sentence to make it comply with the self-enacting provision of La. Rev. Stat. 15:301.1(A). Because Subsection (A) is self-enacting, it would apply by operation of law. If a statute provides that an entire sentence must be without benefit of probation, parole, or suspension of sentence, and the sentencing court fails to comply with that provision, Subsection (A) provides that the entire sentence is nonetheless deemed to be without benefit of probation, parole or suspension of sentence. The sentencing court does not become involved, because the statute is self-enacting. Similarly, when the penalty provision states that only a portion of a sentence is to be without benefit of probation, parole, or suspension of sentence, and the sentencing court has discretion as to what portion is to be served without benefit of probation, parole, or suspension of sentence, if the court fails to impose a proper sentence, Subsection (A) operates to correct the error automatically. Because the statute is self-enacting, the sentencing court no longer has discretion, and the portion of the sentence that is without benefit of probation, parole, or suspension of sentence should be the minimum allowed under the statute.

Here, the sentencing court's error, i.e., its failure to indicate what portion of the defendant's sentence was to be served without benefit of probation, parole, or suspension of sentence, would have been automatically corrected by the self-enacting provision of La. Rev. Stat. 15:301.1(A). La. Rev. Stat. 14:98(D) provides that, upon

a third DWI conviction, at least six months of the sentence will be without benefit of probation, parole, or suspension of sentence. Because the sentencing court failed to indicate what portion of the sentence would be without benefit of probation, parole or suspension sentence, the self-enacting provision of La. Rev. Stat. 15:301.1(A) should deem the portion to be served "without benefit or probation, parole, or suspension of sentence" to be the minimum six months specified in La. Rev. Stat. 14:98(D).

As to the trial court's failure to impose fines and its selection of unauthorized home incarceration in the sentence, these errors fall under La. Rev. Stat. 15:301.1(B), which is not self-enacting. These errors can be corrected only by the district court on its own motion or by the state either in the district court or on appeal. The correction, however, is subject to the 180-day time limit, which has long since passed in this case. Hence, correction of these errors is time barred.

For the foregoing reasons, I respectfully dissent.