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SUPREME COURT OF LOUISIANA

No. 2010-KK-1231

STATE OF LOUISIANA

VERSUS

VEDO GUILLORY

On Writ of Certiorari to the Court of Appeal, Third Circuit, Parish of Calcasieu

WEIMER, J., concurring in part and dissenting in part.

I agree that La. C.Cr.P. art. 858 allows for appellate review for error of law of a grant of a motion for new trial pursuant to La. C.Cr.P. art. 851(5). See **State v. Willson**, 215 La. 507, 41 So.2d 69, 70 (1949), which held that former La. C.Cr.P. art. 509(5),¹ on which current La. C.Cr.P. art 851(5) is based, did not vest discretionary powers in an appellate court to order a new trial in the absence of legal error. Consequently, to the extent that cases including **State v. Toomer**, 395 So.2d 1320, 1328 (La. 1981), **State v. Matthews**, 354 So.2d 552, 562 (La. 1978), **State v. Williams**, 343 So.2d 1026, 1037 (La. 1977), and **State v. D’Ingianni**, 217 La. 945, 47 So.2d 731, 733 (1950), can be read to mean that a trial judge’s ruling pursuant to La. C.Cr. P. art. 581(5) is not subject to appellate review, they are in error.

¹ Former La. C.Cr.P. art. 509(5) (1928) provided:

Whenever, though as a matter of legal right the accused may not be entitled to a new trial, yet the judge is of the opinion that the ends of justice would be served by the granting of a new trial.

Currently, La. C.Cr.P. art. 581(5) provides:

The court is of the opinion that the ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right.

However, there is no statutory obligation which requires a trial judge to supply reasons for the grant of a new trial pursuant to La. C.Cr.P. art 851(5). In this matter, the majority indicates “where the trial court exercises its discretion and fails to identify the concerns it had with the trial, we find the decision to grant a new trial was an error of law because there is nothing to support the exercise of the trial court’s discretion.” **State v. Guillory**, No. 2010-1231, slip op. at p. 7.

I acknowledge that the majority is correct that an articulation of the reasons which prompted the trial court to grant the new trial would better facilitate appellate review. However, I would not reverse this matter without first affording the trial court an opportunity to supply this court with a per curiam outlining the reasons why the motion for new trial was granted pursuant to La. C.Cr.P. art. 851(5). The defendant should not be deprived of a favorable ruling at the trial court level because the trial judge failed to articulate reasons when no such obligation was imposed on the trial judge prior to this ruling.