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POST CONVICTION PROCEDURE

Cheney C. Joseph, Jr.*

PRESENTENCE INVESTIGATION

Louisiana law leaves the question of obtaining a presentence report solely within the discretion of the trial court.¹ The writer knows of no case in which an appellate court has found an abuse of discretion from the trial court's failure to request a presentence investigation. Nevertheless, in *State v. Lockwood*,² in an opinion by Chief Justice Dixon, the Louisiana Supreme Court established the principle that a presentence report, if ordered by a trial judge, must be "a fair and accurate report." In *Lockwood*, the defendant pled guilty of two counts of aggravated crime against nature with pre-teenage boys. At the first sentencing proceeding the trial court refused to afford defense counsel an opportunity to refute or explain "materially false or invalid information" in the report, and sentenced the defendant to serve two years imprisonment at hard labor. The Supreme Court remanded the case with instructions to permit the defendant to examine the allegedly erroneous information. At the hearing on remand, the defendant asked for a "supplemental presentence investigation." This was denied and the court reimposed the two year sentence.

On the second appeal in *Lockwood* the supreme court held that a defendant is not merely entitled to "refute" or "explain" allegedly false information in the report but rather is entitled to have false information eliminated from the presentence data upon which the sentencing court will rely.³ It was not sufficient for the judge merely to allow the defendant to attempt to disprove the assertions in the report. In fashioning a remedy, the court remanded the case with instructions that an entirely new presentence investigation be conducted (and a new report prepared) and that the defendant be sentenced by a different judge who was not "exposed to the existing inaccurate and prejudicial report."

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1. La. Code Crim. P. art. 875 (A)(1). Compare Fed. R. Crim. P. 32(c)(1).

2. 439 So. 2d 394 (La. 1983).

3. The opinion reveals that the probation officer did an unacceptable job, relying on the notes of interviews by another officer who initiated the investigation and law enforcement reports. The officer failed to interview the defendant, the victims, or the victims' parents. Furthermore, the State did not endeavor to substantiate any of the contested material.

The writer applauds the court's approach as very sound from both practical and theoretical standpoints. The purpose of the presentence report is to provide from an impartial source (the probation officer) information for the trial court to use in sentencing. In view of the supposed "neutrality" of the investigator, there is good reason to believe that the sentencing judge will rely heavily on the factual assertions and factual conclusions in the report.

The Louisiana Supreme Court had earlier made a great stride in the series of cases in which the court recognized a defendant's right (although qualified) to be made aware of and to rebut contested factual assertions.⁴ However, the importance of *Lockwood* is the court's recognition that, in cases of "significantly and substantially inaccurate" reports, the prejudice may be impossible to erase without requiring a new presentence report and remand for sentencing before a different judge.

Although the opinion appears to be predicated on constitutional grounds, the court does not explicitly outline the basis for its decision. Whether or not the "due process" clauses of the United States or the Louisiana constitutions require such a result, the Louisiana Supreme Court may properly exercise its supervisory jurisdiction to insure that trial judges make sentencing decisions based on accurate data.⁵ The court's direction to the lower courts and probation officials in *Lockwood* will undoubtedly help to further that goal.

RESTITUTION AS A CONDITION OF PROBATION

The subjects of "victim's rights" and "victim's compensation" have certainly become important topics for criminal justice policy makers. Restitution to the victim is an appropriate, and specifically enumerated condition of probation in Louisiana. Article 895(A)(7) of the Louisiana Code of Criminal Procedure authorizes the sentencing judge to require a defendant to pay "reparation or restitution to the aggrieved party for damage or loss caused by his offense." Article 895.1 was amended by Acts 1984, No. 940 to require the sentencing judge to order restitution as a condition of probation for "actual pecuniary loss" if the offense involved "monetary loss or medical expense" to the victim or his family. To what extent does the discretionary provision of article 895(A)(7) permit the judge to order restitution to victims of a defendant's criminal acts for non-pecuniary "damage" such as mental anguish, apprehension, and annoyance caused by the offense?

In *State v. Alleman*,⁶ the defendant entered guilty pleas to three of five counts of an indictment charging him with making obscene phone

4. See *State v. Trahan*, 367 So. 2d 752 (La. 1978); *State v. Bosworth*, 360 So. 2d 173 (La. 1978); *State v. Underwood*, 353 So. 2d 1013 (La. 1977).

5. See La. Const. art. V § 5(A).

6. 439 So. 2d 418 (La. 1983).

calls. As a condition of probation, the judge ordered the defendant to pay \$500 in restitution to each of the victims named in the original five count indictment. On appeal the Louisiana Supreme Court set aside the five-hundred-dollar payments to the two victims in the counts to which the defendant did not plead. However, the court rejected the defendant's contention that the restitution for damages envisioned by article 895 was limited to actual "physical" or "tangible" losses and therefore did not apply to the "mental anguish, apprehension and annoyance suffered by defendant's victims."⁷

The writer shares the concerns expressed by the dissenting members of the court who disagreed, as Justice Watson so aptly phrased the issue, with "the concept of awarding civil damages in a criminal proceeding."⁸ There must be limits, which the court was obviously not required to outline, to the "awarding of civil damages" under the rubric of restitution. The problem with *Alleman* is that the majority did not hint that such limits exist. In fact, the court cited civil cases for the proposition that courts award pecuniary indemnification in tort cases for mental suffering, when it appears to be "real and serious."⁹

The rules of procedure and evidence which govern the assessment of such damages in civil cases have been refined through the years and presumably are designed to achieve an accurate result as to amount in a traditional adversary context. Unfortunately, no such similar mechanism exists in the context of Louisiana's present sentencing procedure.

With deference to the conscientious efforts of the trial court, and to the supreme court, the writer notes that nowhere in the opinion is

7. *Id.* at 419.

8. *Id.* at 420 (Watson, J., dissenting in part).

9. *Id.* at 419. Citing *Meador v. Toyota of Jefferson, Inc.*, 332 So. 2d 433 (La. 1976), and doctrinal writing, the court said:

[D]efendant argues that a sentencing judge may not impose the condition of restitution except for a tangible or physical loss, as opposed to the mental anguish, apprehension, and annoyance suffered by defendant's victims. But the sentencing judge is authorized unqualifiedly by statute to require "reparation or restitution to the aggrieved party for damage or loss caused by his offense," and this is an explicit component of his general authority to impose any specific condition reasonably related to defendant's rehabilitation. La. C. Cr. P. art. 895(A)(7). There is nothing in this language or in our law which would indicate a legislative intent to limit reparation or restitution to bodily injury or property damage. In the case of torts, for example, the jurisprudence has no difficulty in awarding a pecuniary indemnification for mental suffering, when it appears to be real and serious. *Meador v. Toyota of Jefferson Inc.*, 332 So. 2d 433 (La. 1976); Comment, *Damages Ex Contractu*, 48 Tul. L. Rev. 1160, 1170 (1974); 2 M. Planiol, *Traite Elementaire de Droit Civil*, no. 252 at 152 (11th ed. 1959). Moreover, there is no reason to believe that restitution for such harms is any less reasonably related to rehabilitation than reparation for bodily injury or damage to property.

439 So. 2d at 419-20.

there any hint of the method used by the trial judge to arrive at the five hundred dollar figure. Was this simply an "educated guess" at the dollar figure which ought to be awarded or was this figure arrived at by examining similar awards in civil suits? Did experts (psychologists, counselors, etc.) testify at a sentencing hearing or even voice their views to a probation officer conducting a presentence report? There is no information regarding the method used by the trial judge or any suggestion as to approved methods of arriving at such "damage awards" in future cases.

The writer is also concerned that the majority's approach may have the effect of approving an award of "punitive damages" to a victim of crime without carefully considering all of the ramifications of such a decision. As noted earlier, no clear guidelines were given regarding the method of fixing such damages for "anguish, apprehension, and annoyance" suffered by the victim of a crime. Almost all victims of crime suffer some "mental distress" from being exposed to the criminal misbehavior of others.

Surely criminal offenders deserve the punishment which is inflicted upon them by society. The basic question here is a very fundamental one. What form should that punishment take? The legislature has approved the imposition of various sanctions, such as imprisonment, other limitations on freedom in the form of conditions of probation, fines payable to the state, and even death (in most aggravated homicide cases). The legislature has not approved what is in effect the payment of a "fine" to the victim.

Perhaps such sentences more aptly reflect an enlightened theory of punishment in which the criminal offender is forced to realize that his misbehavior has directly harmed another human being. The point is simply that the supreme court should carefully consider and promulgate guidelines for trial courts. In *Allemand*, the court only approved of "restitution" for "mental anguish" and "annoyance" caused by receiving obscene phone calls. Nevertheless, the obvious difficulty of discovering what dollar amount represents "restitution" as opposed to "punitive damages" or a fine payable to the victim will no doubt become apparent in future cases.

APPELLATE REVIEW OF SENTENCE

Remand for Resentencing Before a Different Judge

In a footnote in *State v. Telsee*,¹⁰ Justice Lemmon suggested, while dissenting in the reversal of the sentence, that the appellate court should consider remanding for resentencing before another judge rather than sending the case back to the same judge after that judge had already

10. 425 So. 2d 1251, 1261 n.1 (La. 1983).

thrice sentenced the same defendant. In the first appeal in *Telsee*,¹¹ the court remanded for a sentence hearing. A subsequent appeal occasioned a remand for compliance with Louisiana Code of Criminal Procedure article 894.1.¹² After a hearing, the same sentence was reimposed. In the third appeal the issue was simply whether the sentence imposed was excessive in light of the nature of the offense and the characteristics of the defendant. No improper factors were considered and the sentencing guideline statute was followed. The court ordered the sentence reduced and set a maximum term which could be imposed but not exceeded on sentence.¹³

In such a case, the trial judge has already made a diligent effort to impose a fair sentence. If the court of appeal disagrees with his or her assessment, then it may be unfair to require the judge to impose a sentence with which the judge cannot agree. Therefore, the appellate court should consider reimposing sentence or referring the case to another judge, rather than simply giving the trial court limits within which to sentence.

In *State v. Soco*,¹⁴ the Louisiana Supreme Court reversed a ninety-nine year sentence imposed on a first offender for a typical on-the-street armed robbery. Although the defendant had pushed the victim around during the robbery and perjured himself during the trial, the maximum sentence was certainly not appropriate. However, rather than remanding with upper and lower limits on the length of sentence as has been done in some cases, the court simply sent the case back to a different judge.

Adopting such a procedure is an effective use of the supervisory powers of an appellate court in a case in which the record plainly denotes a basic difference of opinion between the trial judge and the appellate panel regarding the severity of the sentence which ought to be imposed.

Review for Excessiveness After Revocation of Probation

Defendants who agree to plead guilty in return for a suspended sentence may not be concerned with the term of imprisonment they will be required to serve if probation is revoked. For that matter, the appellate court may not be prepared at the initial imposition of the suspended sentence of imprisonment to determine whether it will be "excessive" if probation is subsequently revoked.

In *State v. Gordon*,¹⁵ the defendant pled guilty to two counts of distributing cocaine to police undercover officers and to one count of

11. 388 So. 2d 747 (La. 1980).

12. 404 So. 2d 921 (La. 1981).

13. 425 So. 2d 1251 (La. 1983).

14. 441 So. 2d 719 (La. 1983).

15. 444 So. 2d 1188 (La. 1984).

conspiracy to distribute cocaine. The dollar amounts involved in the two sales were \$7,200 and \$2,400. Defendant's co-conspirator, a man named Shade, was sentenced to five years at hard labor. However, the twenty-nine year old defendant had a good educational background and had previously been employed as a respiratory therapist at a hospital. He had no prior criminal convictions and led a "law abiding" life prior to his involvement with cocaine. He had lost his job as a result of missing work and sold cocaine to provide a source of income to continue his drug abuse.

When the plea agreement was reached, the defendant was aware that he would receive a twenty year sentence which was to be suspended with supervised probation for five years conditioned on the defendant's serving a year in jail and successfully completing a drug treatment program. Within less than a month of his completion of the drug program, "THC" (the active ingredient of marijuana) was discovered in the defendant's urine. He was discharged from the program and a probation revocation hearing was held. After the revocation hearing, the trial judge revoked the defendant's probation and ordered him to serve the twenty year sentence. The defendant was given credit for the one year already served in jail as a condition of probation.

Defendant appealed his sentence as excessive. The supreme court distinguished earlier cases¹⁶ in which the court had refused to consider an excessiveness claim because the defendant's sentence was part of a plea bargain to which the defendant had agreed. The court reasoned that the length of the suspended sentence was an "insignificant" and "non-negotiated term of the plea bargain" because "an opportunity for rehabilitation was being offered as a way to avoid imprisonment."¹⁷ The court agreed that the twenty year sentence was excessive for a first offender and remanded for resentencing. With deference, the writer cannot agree with the court's logic. Although the result may not be unfair, it would appear that the defendant did agree at the time of his plea to accept the twenty-year sentence should he willfully fail to comply with the terms of his probation. Use of marijuana while in the drug rehabilitation program is clearly a violation of those terms. However, the supreme court was obviously concerned with the twenty year sentence for a first offender, even one who was given a fair opportunity to avoid serving the sentence by complying with the terms of his probation. The message of *Gordon* is that a defendant can raise an "excessiveness" claim after the revocation of probation even though the length of the term of imprisonment (which was initially suspended) was part of a plea agreement.¹⁸

16. See *State v. Curry*, 400 So. 2d 614 (La. 1981).

17. 444 So. 2d at 1191.

18. On remand, defendant was sentenced to serve twelve years imprisonment at hard labor. *State v. Gordon*, No 111, 723, minutes of sec. 3 (1st La. Jud. Dist. Ct. Aug. 14, 1984). That sentence is presently on appeal.

Amendment of Illegal Sentences by Courts of Appeal

When the courts of appeal began to review criminal appeals, they were confronted with the dilemma of what action to take if the court "noticed" on its own, without the issue being raised by either party, that the sentence of the trial court was illegal. A sentence which does not conform to the maximum or minimum terms set forth in the statute is clearly error "discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence."¹⁹ Thus, under the Code of Criminal Procedure the appellate court can consider the matter although it is not raised by either party. In a case in which such a review for "patent error," or "error patent on the face of the record," discloses a sentence which, although not noticed and objected to by the defendant, exceeds the statutory limits, then the court of appeal must remand to the trial court to correct the illegal sentence.

However, with the advent of a large number of mandatory sentences being enacted, inevitably cases arose in which the trial court, without objection by the state, sentenced the defendants to illegally lenient terms not within the statutory limits on the trial court's discretion.

There are several possible explanations for such illegally lenient sentences. One explanation is that the judge was simply unaware that the mandatory sentence provision existed. Another related explanation is that the judge erred in construing such mandatory provisions. A further explanation might be that the judge chose, possibly at the prompting of the parties in connection with a "plea bargain," to ignore the mandatory sentencing provisions.²⁰ Yet another explanation might be that the judge declined to impose a mandatory sentence feature such as the "without benefit of parole" provision limiting parole eligibility because he or she did not consider it to be a limit on the trial court's discretion, but rather one on the parole board's discretion to grant parole. A final possibility might be a trial judge's wish to discourage appeals because the "patent error" would be discovered and, if the conviction was not reversed and the mandatory feature was invoked by the court of appeal, the defendant would be in a worse position after the appeal than he was beforehand.

There are several possible approaches which appellate courts could take when confronted with such "patent error" favorable to the defendant. One approach would be to ignore the error if not raised by the state in the trial court. Another would be to remand to the trial court with instructions to reimpose sentence in conformity with the statutory mandate. Still another would be to correct the error on appeal by raising the term of imprisonment to the minimum, or adding the limitation "without benefit of parole," or requiring that the defendant

19. La. Code Crim. P. art. 920.

20. See *State v. Coleman*, 451 So. 2d 185, 189 n.2 (La. App. 1st Cir. 1984).

serve the sentence which was illegally suspended, or by imposing a fine as well as imprisonment if both are required by the statute.

The defect of this last alternative is obvious. The court of appeal is, in effect, exercising the sentencing discretion which the trial court was supposed to exercise. If the trial court was unaware of or chose to ignore the mandatory provisions and is ordered to comply, the length of the sentence or the amount of the fine might vary. For example, if the defendant is convicted of armed robbery and the sentence is imposed without the limitation on parole eligibility ("without benefit of parole"), simply adding that restriction on appeal, rather than remanding to the trial court to resentence, drastically alters the sentence without giving the sentencing judge the option to reduce the length of the term in view of the defendant's lack of parole eligibility. Thus, the option of remanding is a better choice than simply endeavoring to "correct" the sentence. The "correction" may impose a more severe sentence than the trial court either intended to impose or was required to impose.

The courts of appeal in Louisiana were divided as to the proper approach,²¹ and the stage was obviously set for the supreme court to render a definitive decision. An earlier writ application had been granted in *State v. Napoli*,²² setting aside the court of appeal's decision and reinstating the original sentence of the trial court. In briefly explaining the *per curiam* order in *Napoli*, the supreme court said:

When the defendant alone seeks review of a conviction and sentence, the court of appeal should review only those issues raised by the defendant and any patent errors favorable to defendant. The court of appeal erred in this case by reviewing a sentencing error unfavorable to defendant, thereby providing a chilling effect on defendant's exercise of his right to appeal.²³

However, the first circuit court of appeal in *State v. Jackson*,²⁴ in a scholarly and thought-provoking opinion by Judge Shortess, declined to follow the writ grant in *Napoli* because the supreme court in *State v. Telsee*²⁵ had itself noted on appeal that the defendant's sentence was "illegally lenient" in that the trial court's sentence in a forcible rape case failed to specify that the first two years of the forty (reduced to

21. See, e.g., *State v. Gatlin*, 445 So. 2d 47 (La. App. 4th Cir. 1984); *State v. Jones*, 445 So. 2d 26 (La. App. 4th Cir. 1984); *State v. Wright*, 446 So. 2d 479 (La. App. 4th Cir. 1984); *State v. Ogletree*, 446 So. 2d 415 (La. App. 4th Cir. 1984); *State v. Tate*, 444 So. 2d 753 (La. App. 4th Cir. 1984); *State v. Lee*, 445 So. 2d 54 (La. App. 4th Cir. 1984); *State v. Thomas*, 439 So. 2d 629 (La. App. 1st Cir. 1983), rev'd on other grounds, 452 So. 2d 1177 (La. 1984); *State v. Jimmerson*, 432 So. 2d 1093 (La. App. 3d Cir. 1983).

22. 437 So. 2d 868 (La. 1983).

23. *Id.* at 868 (citation omitted).

24. 439 So. 2d 622 (La. App. 1st Cir. 1983), rev'd, 452 So. 2d 682 (La. 1984).

25. 425 So. 2d 1251 (La. 1983).

twenty-five) year sentence be served without benefit of parole. Judge Shortess pointed out in *Jackson* that courts of appeal had in effect received mixed signals from the supreme court on this issue and opted to follow the "fully considered opinion" in *Telsee* because *Napoli* was "only a writ action."

The response to *Jackson* by the supreme court was very clear. The supreme court granted writs and unanimously reversed, holding that the courts of appeal should "ignore the error, unless the prosecution, having properly raised the issue in the trial court, has sought appellate review."²⁶ The decision is clearly based on the Louisiana constitutional right of a defendant to seek review of a conviction.²⁷ The court expressed the view that permitting "[s]uch modifications . . . may produce a 'chilling effect' on the exercise of the right to appeal."²⁸

The basis for the supreme court's decision in *Jackson* will clearly be of great significance. By Act 587 of 1984, article 882 of the Code of Criminal Procedure was amended expressly to provide that an "illegal sentence may be corrected . . . by an appellate court on review." The amendment was sponsored by the Louisiana District Attorney's Association and was proposed prior to the supreme court's decision in *Jackson*. Nevertheless, since *Jackson* was not based on statutory construction, but rather on the Louisiana constitutional right to seek review, the statute should have no effect.

The writer recognizes the obvious possibility that trial courts under *Jackson* in effect have a "free rein" to ignore mandatory sentencing provisions as long as the district attorney fails to raise a proper objection.²⁹ This, of course, raises the possibility that the prosecution and defense counsel can agree, if the trial court will approve, to a sentence of less than the mandatory minimum as part of a "plea bargain."

Such ignoring of the legislature's mandatory terms does not offend the writer and appears arguably to fall within the spirit of the Louisiana prosecutor's broad prerogative to decide whether to invoke the provisions

26. *State v. Jackson*, 452 So. 2d 682, 684 (La. 1984).

27. La. Const. art. I, § 19; *id.* art. V, § 10.

28. 452 So. 2d at 683 (citations omitted).

29. In *State v. Coleman*, 451 So. 2d 185, 189 n.2 (La. App. 1st Cir. 1984), Judge Crain, author of *Coleman* and a member of the court of appeal panel in *Jackson*, said:

If the appellate courts are restricted from correcting or ordering corrected a sentence illegal in favor of a defendant, and the parole board is required to honor an illegal sentence, serious problems are going to be presented even with the ability of the trial court to correct the sentence. It would become impossible for an illegal sentence to be corrected in the event it is acquiesced in by the State. Thus, a defendant charged with armed robbery could be sentenced, and the sentence suspended, or be given with parole and probation and absent a State motion to correct the sentence, it would stand. Consequently, mandatory sentencing requirements could be ignored if the State desired. Given the desire in so many instances to obtain a guilty plea, this result is not at all improbable.

of a particular legislative sanction.³⁰ If these "mandatory sentences" are seen as penalties which society can insist upon the trial court's imposing, then the prosecutor's decision not to insist on their invocation is analogous to his decision in the charging process not to use the legislative enactment which has the mandatory penalty. Put simply, if the prosecutor has the constitutional authority not to charge the crime which carries the mandatory penalty, arguably he should not have to insist on invoking those mandatory penalties even though he has chosen to prosecute for the offense. The counter argument is that his charging decision automatically invokes the mandatory penalty and that the only constitutional prerogative is to refuse to charge that particular offense. Nevertheless, it is the duty of the prosecutor (not the court of appeals) to decide whether to invoke the state's right to have a severe mandatory sentence imposed. *Jackson* fits well into the Louisiana scheme of prosecutorial discretion.

Amendment of Excessive Sentences

Most often appellate courts merely remand to the trial court if a sentence is found to be excessive. Sometimes, as in *State v. Sepulvado*,³¹ the original case recognizing the Louisiana constitutional duty to review for excessiveness, the appellate court will outline the limits of an acceptable sentence. In some cases, such as *State v. Telsee*,³² the supreme court simply has amended and reduced a sentence at the appellate level after once unsuccessfully remanding for compliance with Code of Criminal Procedure article 894.1 with a gentle suggestion to the trial court that the sentence imposed may be excessive.

As noted earlier in this article, the writer agrees with the approach taken by Chief Justice Dixon in *Soco* of simply remanding for resentencing before another judge if the appellate court and the trial court have totally divergent views of the severity of a particular case. However, some courts of appeal have followed the lead of *Telsee* and, after giving the trial court a chance to reduce the sentence, amend the sentence to conform to the appellate court's view of an appropriate disposition.

For example, in *State v. Martz*,³³ the trial court initially sentenced the defendant to five years imprisonment at hard labor for selling marijuana to an undercover officer. On the defendant's first appeal, the appellate court remanded for compliance with Code of Criminal Procedure article 894.1, suggesting that the trial judge failed to "accord proper weight" to the guidelines.³⁴ After a resentencing hearing the judge

30. La. Const. art. V, § 26(B).

31. 367 So. 2d 762 (La. 1979).

32. 425 So. 2d 1251 (La. 1983).

33. 454 So. 2d 278 (La. App. 4th Cir. 1984).

34. *State v. Martz*, 436 So. 2d 712, 714 (La. App. 4th Cir. 1983).

imposed the same five year sentence with extensive oral reasons for his sentence. The trial judge placed great emphasis on the seriousness of distribution and on the defendant's assaulting the arresting officer. On the defendant's second appeal, the court of appeal noted its earlier reference to defendant's good employment record and lack of any prior criminal history. It also noted that the defendant's "rural background and inexperience" prevented him from contemplating that his conduct, which involved the sale of only two matchboxes of marijuana, would "cause or threaten serious harm."³⁵ Accordingly, the appellate court reduced the sentence from five years to two years imprisonment at hard labor.

In another case, *State v. Johnson*,³⁶ the sixty-three-year-old defendant was sentenced to five years at hard labor for negligent homicide of a two year old child resulting from a vehicular wreck in which the defendant was drunk and driving 45 mph in a 20 mph school zone. The court of appeal found that the sentence was excessive and amended the five year sentence only by deleting the requirement that it be served at hard labor.

These cases are only isolated examples. However, they highlight the willingness of some appellate panels, in effect, to substitute their judgment for that of a trial judge. Obviously, any appellate finding that a trial court's sentence was excessive must involve an appellate court judgment that the trial court's judgment was too severe. However, the question is not simply: "would the appellate judge have imposed a similarly harsh sentence?" The margin of discretion accorded to the trial court, in effect the margin of "tolerable error," is really the issue. No doubt, appellate judges must have difficulty in gauging the degree of deference which they must accord to a trial judge who has imposed what they perceive to be an unduly harsh sentence.

MANDATORY FIREARM SENTENCING STATUTE

Applications

In 1981, the legislature adopted a very strict limitation on the trial court's sentencing discretion in felony cases in which a firearm was used. Article 893.1 of the Code of Criminal Procedure requires the judge to impose the maximum sentence if that sentence is less than five years and to impose a minimum five year sentence if the maximum exceeds five years.³⁷ Further, parole eligibility and suspension of sentence are denied.

35. 454 So. 2d at 281 (quoting from an earlier appeal in the same case).

36. 444 So. 2d 750 (La. App. 4th Cir. 1984).

37. The provisions of Code of Criminal Procedure article 893.1 do not apply in cases

The mandatory provisions of the article only apply if the court makes a "finding" that a firearm was used in the commission of the felony. However, courts of appeal have not required a separate adversary hearing or any further pleading by the prosecution. Further, some cases suggest that the court on its own motion must determine whether a firearm was used and must impose the mandatory sentence accordingly.³⁸

This writer expressed his concern with the concept of imposing such limits on the trial court's sentencing discretion and with the technical deficiencies in the statute in an earlier volume of this review.³⁹ There was then relatively little jurisprudence on the new statute. This is understandable both because the process of appeals requires time and because some trial judges apparently have not been complying with the statute's mandate. However, during the last term a number of appellate decisions addressing a number of issues have been handed down.

In *State v. Moore*,⁴⁰ the police were called to attend to a domestic dispute. The result was a violent encounter between the defendant and police during which shots were fired. Fortunately, no one was injured. The defendant eventually entered a guilty plea to one count of attempted first degree murder. During his *Boykin* examination, he acknowledged that he fired at the officers and was informed before sentence that the mandatory provisions of article 893.1 would apply. Without holding any further hearings on the "use of a firearm," the trial court imposed an eight year sentence of imprisonment at hard labor without benefit of parole.

The court of appeal rejected the defendant's contention that he was entitled to an adversary hearing to determine whether a firearm was used. The court of appeal noted that the defendant had acknowledged the use of a firearm during the *Boykin* examination and referred to the "extensive sources of information" upon which a sentencing court traditionally may draw.

With deference, the writer feels that the court of appeal should not have equated the "finding" required by Code of Criminal Procedure article 893.1 with other information used by trial courts in sentencing for the simple reason that the term "finding" normally connotes a judicial determination of fact following an adversary hearing. Furthermore, such a "finding" is of critical significance because it calls forth the dramatically severe effects of the statute. On that basis alone, the court of appeal should have required the trial court to afford the

of offenses with penalty provisions which deny probation eligibility. See, e.g., La. R.S. 14:64 (1974).

38. See *infra* notes 40-47 and accompanying text.

39. Joseph, *Developments in the Law 1980-1981—Postconviction Procedure*, 42 La. L. Rev. 701 (1981).

40. 442 So. 2d 726 (La. App. 1st Cir. 1983).

defendant an adversary hearing on the issues. That is not to say that the trial judge improperly considered the defendant's *Boykin* admission or that a trial judge commits error in considering the trial record (if there is a trial). Nevertheless, the interest in having a reliable fact-finding procedure leading to a trial court's finding of "use of a firearm" is great in these cases and judges should allow defendants an adversary proceeding before deciding that they are bound by the mandatory, discretion-limiting provisions of article 893.1. However, the writer concedes that the fault lies with the legislature for not providing more detailed guidance regarding the procedure to be followed in making the crucial "finding." The matter addresses itself to an amendment of the statute.

In *Moore*, the court of appeal also rejected the defendant's contention that he was entitled to be charged formally under article 893.1 before being sentenced under that statute. Relying on the supreme court's rejection in *State v. Roussel*⁴¹ of a similar argument in connection with a similar sentencing provision in Louisiana Revised Statutes 14:95.2, the court of appeal held that "[u]sing a firearm . . . is not a separate crime and there is no necessity for a separate charge."⁴²

The writer certainly agrees that the analogy to article 95.2 of the Criminal Code is appropriate and that the sentencing provision does not define a separate offense. Nevertheless, the legislature should have required a presentence motion by the prosecutor, or even by the court itself, which would serve to give notice to the defendant of the intent to invoke the statute. The elements of the crime frequently do not require proof of the use of a firearm. In such cases, the motion would serve as the only formal allegation that a firearm was involved. Even in the absence of an explicit legislative requirement, the courts still have the inherent authority to adopt such a procedure under article 3 of the Code of Criminal Procedure. Requiring such notice would certainly enhance the fairness of sentencing and would, in that sense, conform to the "spirit" of the code.

In *State v. McKnight*,⁴³ the defendant was convicted of manslaughter for the shooting death of his estranged wife. In sentencing the defendant, the trial judge determined that a firearm was used and imposed a penalty of eighteen years imprisonment at hard labor without benefit of parole. The length of the sentence was within the twenty-one year statutory limit and was not unusual for manslaughter cases. However, the application of the firearm sentencing statute significantly increased the severity of the imprisonment by denying parole eligibility—a restriction

41. 424 So. 2d 226 (La. 1982).

42. 442 So. 2d at 728.

43. 446 So. 2d 915 (La. App. 1st Cir. 1984).

not imposed in the penalty provision for manslaughter. With the firearm statute, a more serious sanction applies to manslaughter committed by shooting the victim as opposed to stabbing or other violent, and possibly more heinous, means of unlawful killing.

The court of appeal rejected the defendant's argument that the statute's restriction on parole eligibility only applied to five years of the eighteen year sentence. Although the minimum sentence is five years, whatever sentence the trial court imposes must be served without benefit of parole. The language of the statute clearly mandates such a result.

The court of appeal's construction of the statute simply indicates another of the statute's dramatically severe results. All sentences for felonies committed with firearms must be served without benefit of parole. The trial judge is not given the option to determine whether the portion of the sentence in excess of the five year minimum should be without benefit of parole.

In *State v. Jackson*,⁴⁴ the defendant was convicted of manslaughter and the trial court invoked the mandatory sentence provisions of both Code of Criminal Procedure article 893.1 and Revised Statutes 14:95.2. The defendant was sentenced to fifteen years imprisonment without benefit of parole under article 893.1 and then was sentenced to an additional two years without benefit of parole under Revised Statutes 14:95.2. The court of appeal rejected a defense theory that the subsequent enactment of the Code of Criminal Procedure article impliedly repealed Revised Statutes 14:95.2.

What is more significant is the court's conclusion that the legislature intended to permit (and to require) the sentencing court to apply the two statutes in tandem. As the court of appeal pointed out, article 893.1 applies to all felonies committed with a firearm but does not add to the statutory maximum sentence. Article 893.1 serves simply to limit discretion by imposing a minimum term of imprisonment and by denying probation or parole. On the other hand Revised Statutes 14:95.2 provides for an additional term of imprisonment and only applies to convictions for certain enumerated crimes. Because both statutes are phrased in mandatory terms, not only may the trial court use both, but the logical implication of *Jackson* is that the legislature mandates the use of both statutes.

In *State v. Victorian*,⁴⁵ the court of appeal, on rehearing, held that the mandatory sentencing provisions of Code of Criminal Procedure article 893.1 apply to the felony of illegal use of weapons defined in Revised Statutes 14:94.

Judge Knoll expressed the view on original hearing, and in dissent on rehearing, that the legislature established a specific penalty for the

44. 454 So. 2d 211 (La. App. 1st Cir. 1984).

45. 448 So. 2d 1304 (La. App. 3d Cir.), cert. denied, 452 So. 2d 167 (La. 1984).

illegal use of a firearm in enacting Revised Statutes 14:94 and provided for enhanced penalties only in the event of subsequent convictions. Judge Knoll reasoned as follows:

Article 893.1 is an enhanced penalty to be applied to *general* statutes that do not require the element of a weapon or firearm, e.g., manslaughter, negligent homicide, murder, and etc. But in specific statutes e.g., illegal use of a weapon, any "aggravated" offenses when a firearm is used, armed robbery, and etc., Article 893.1 is not to be applied because absent an express legislative intent, it is assumed that the legislature, in fixing penalties for specific offenses committed with a firearm, intended the penalty to take this into account.⁴⁶

Judge Yelverton, writing in dissent on original hearing, and for the court on rehearing, pointed to the anomaly of a legislative scheme mandating severe maximum penalties for felonies not requiring the use of firearms or other weapons, but frequently involving such instruments, and not imposing a similar mandate for crimes which specifically require the involvement of such dangerous weapons. Judge Yelverton was convinced that the "[l]egislature's manifest attitude regarding the use of firearms in the commission of felonies"⁴⁷ was to impose the severe sanctions outlined in article 893.1.

The writer believes that Judge Yelverton correctly assessed the legislative intent. Article 893.1 is a sweeping limitation on traditional prerogatives of trial judges and is obviously designed to require more severe sentences than are otherwise required if a firearm is used.

Amendment of Sentences By Trial Courts

As noted in the previous section, the supreme court in *Jackson* clearly prohibited appellate courts from correcting illegally lenient sentences on their own motion. About one month prior to the supreme court's decision in *Jackson*, in *State v. Coleman*⁴⁸ the same panel of the first circuit court of appeal that initially decided *Jackson* was confronted with an attempted manslaughter case in which the state moved to have the trial court invoke the mandatory sentencing provisions of both Code of Criminal Procedure article 893.1 and Louisiana Revised Statutes 14:95.2 after the conviction and initial sentence had already been affirmed on appeal.

The trial court's original five-year sentence of imprisonment at hard labor did not specify that the sentence must be served without benefit of parole. The state also asked that an "additional" two year sentence,

46. Id. at 1307.

47. Id. at 1309.

48. 451 So. 2d 185 (La. App. 1st Cir. 1984).

without benefit of parole be imposed under Revised Statutes 14:95.2 because attempted manslaughter while using a firearm is one of the crimes enumerated in that statute. In its motion, the prosecution pointed out that the evidence in the trial record clearly established that the offense was committed with a firearm. The trial judge agreed and ruled that he was compelled to resentence the defendant to five years imprisonment at hard labor without benefit of parole and was required to add two years without benefit of parole. The court of appeal agreed with the trial court's conclusions that the initial sentence was illegal and that both Code of Criminal Procedure article 893.1 and Revised Statutes 14:95.2 must be invoked if both statutes fit the circumstances, i.e., the offense is a felony enumerated in the Revised Statutes and was committed with a firearm. The court of appeal rejected defendant's contention that the mandatory "double enhancement" resulting from the use of both statutes was neither intended nor acceptable under the statutory scheme.

Coleman is a very important case and, if not reversed by the supreme court on writs, clearly demonstrates the unreasonably harsh effect of the two mandatory firearm sentence statutes.⁴⁹ *Coleman* holds that the state may invoke the mandatory sanctions after the defendant has already begun to serve his sentence. Furthermore, *Coleman* clearly says that the trial court must amend if the record supports a finding that a firearm was used. To do otherwise, the opinion clearly implies, would be to impose an illegal sentence. Finally, and most obviously the harshest result, the trial court must impose a "five plus two" sentence without parole to satisfy both mandatory statutes. The court of appeal found a legislative intent not simply to permit but to require the application of both statutes.⁵⁰

A partial solution to the problem is to treat the requirement of a "finding" by the trial court as requiring an adversary hearing provoked by the court on its own motion or on motion of the prosecutor before sentencing. If a formal adversary finding was not made prior to the imposition of the initial sentence, then the original sentence was not illegal, and hence, could not subsequently be amended.

49. Writs have been granted and at the time of this writing the matter is pending.

50. See *State v. Hogan*, 454 So. 2d 1235 (La. App. 2d Cir. 1984). See also *State v. Williams*, 454 So. 2d 1287 (La. App. 2d Cir. 1984), in which the court of appeal discusses the unfairness of a sentence under Code of Criminal Procedure article 893.1 when applied to an entirely accidental (but criminally negligent) killing with a firearm.