

Judgment rendered October 23, 2003.

No. 37,580-KA
No. 37,581-KA
(Consolidated Cases)

ON REHEARING

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

STATE OF LOUISIANA

Appellee

Versus

GLENN E. HOWARD

Appellant

* * * * *

Per Curiam on Rehearing

Originally Appealed from the
Fifth Judicial District Court for the
Parish of Franklin, Louisiana
Trial Court Nos. 2002-80F & 2002-81F

Honorable Glen W. Strong, Judge

* * * * *

DERRICK D. CARSON

Counsel for
Appellant

WILLIAM R. COENEN, JR.
District Attorney

Counsel for
Appellee

JOHNNY R. BOOTHE
Assistant District Attorney

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Before BROWN, STEWART, GASKINS,
DREW and MOORE, JJ.

PER CURIAM

LIMITED REHEARING GRANTED.

The defendant was originally sentenced to 10 years at hard labor for attempted manufacture of methamphetamine and 10 years at hard labor for possession of methamphetamine with intent to distribute. The sentences were to run concurrently, but were suspended and the defendant was placed on supervised probation for five years.

The prosecution filed a motion to reconsider, claiming the sentence for attempted manufacture of methamphetamine was illegally lenient. The state argued that under La. R.S. 40:967 and 40:979, a portion of the sentence for attempted manufacture of methamphetamine must be served without benefit of parole, probation, or suspension of sentence. The state also contended that a mandatory minimum sentence applied.

The trial court agreed and granted the state's motion. The defendant was resentenced to serve five years at hard labor without benefits for attempted manufacture of methamphetamine. He was also sentenced to serve five years at hard labor for possession of methamphetamine with intent to distribute, with the sentences to run concurrently.

The defendant did not file a motion to reconsider his sentences in the trial court. On appeal the defendant argued that the sentences were excessive.

The defendant sought rehearing. This court invited the state and the defendant to address the issue of a mandatory sentence for attempted manufacture of methamphetamine.

La. R.S. 40:967 provides that the penalty for manufacture of methamphetamine is a sentence of imprisonment at hard labor for not less than 10 years nor more than 30 years, at least 10 years of which shall be served without benefit of parole, probation, or suspension of sentence. In addition, a defendant may be sentenced to pay a fine of not more than five hundred thousand dollars. Regarding the penalty for an attempt, La. R.S. 14:27 is the general attempt statute and states in pertinent part:

D. Whoever attempts to commit any crime shall be punished as follows:

(3) In all other cases he shall be fined or imprisoned or both, **in the same manner as for the offense attempted; such fine or imprisonment shall not exceed one-half of the largest fine, or one-half of the longest term of imprisonment** prescribed for the offense so attempted, or both. [Emphasis supplied.]

However, La. 40:979 provides a more specific statute on attempts to commit drug offenses. That statute provides:

A. Except as otherwise provided herein, any person who attempts or conspires to commit any offense denounced and/or made unlawful by the provisions of this Part shall, upon conviction, be fined or imprisoned **in the same manner as for the offense planned or attempted**, but such fine or imprisonment **shall not exceed one-half of the longest term of imprisonment** prescribed for the offense, the commission of

which was the object of the attempt or conspiracy.¹ [Emphasis supplied.]

The state may choose which of these statutes to use in prosecuting a defendant. *State v. O'Blanc*, 346 So. 2d 686 (La. 1977); *State v. Thomas*, 95-2348 (La. App. 1st Cir. 12/20/96), 686 So. 2d 145, *writ denied*, 97-0192 (La. 3/14/97), 690 So. 2d 36. In the present case, when the state amended its bill of information, the defendant was charged under La. R.S. 40:979.

Some disagreement existed as to whether mandatory minimum sentences are required under the wording of these statutes. In *State v. Callahan*, 95-1331 (La. 3/29/96), 671 So. 2d 903, the Louisiana Supreme Court found that La. R.S. 14:27 provides only a **maximum** sentence for a conviction for an attempt to commit a crime. In that case, the defendant was convicted of attempted possession of marijuana with intent to distribute. The court found that there was no express statutory minimum sentence for an attempt under that provision and the principles of leniency required that the statute be strictly construed.²

¹This statute was amended by Acts 2001, No. 404 §4, effective June 15, 2001, six months before this offense. It changed the wording of paragraph A to make it very similar to the wording of La. R.S. 14:27. Prior to the amendment, that paragraph read as follows:

Except as otherwise provided herein, any person who attempts or conspires to commit any offense denounced and or made unlawful by the provisions of this Part shall, upon conviction, be fined or imprisoned **in the same manner as for the offense planned or attempted, but such fine or imprisonment shall not exceed one-half of the punishment** prescribed for the offense, the commission of which was the object of the attempt or conspiracy. [Emphasis supplied.]

²Justice Marcus dissented, saying that the phrase “in the same manner” refers to the minimum sentence requirement, and the second sentence refers

State v. Thomas, supra, considered the differences in La. R.S. 14:27 and 40:979, as written before the amendment. In that case, the defendant was convicted of attempted possession with intent to distribute cocaine in a drug free zone. That court concluded that although the supreme court in *Callahan* ruled that there was only a maximum sentence under La. R.S. 14:27, the different language in La. R.S. 40:979 required a mandatory minimum sentence.

In *State v. Odle*, 2002-0226 (La. App. 3d Cir. 11/13/02), 834 So. 2d 483, *writ denied*, 2003-0625 (La. 6/20/03), 847 So. 2d 1219, the defendant was convicted of attempted possession of 400 or more grams of cocaine. Because the court could not determine if La. R.S. 14:27 or La. R.S. 40:979 applied, the matter was remanded. However, the court stated that if La. R.S. 40:979 applied, as written before the 2001 amendment, there is a mandatory minimum sentence. The court also expressed agreement with the dissent in *State v. Callahan, supra*. See also *State v. Chatman*, 599 So. 2d 335 (La. App. 1st Cir. 1992); *State v. Williams*, 588 So. 2d 1239 (La. App. 1st Cir. 1991), *writ denied*, 592 So. 2d 1333 (La. 1992); *State v. Laprime*, 521 So. 2d 538 (La. App. 4th Cir. 1988), *writ denied*, 542 So. 2d 517 (La. 1988).

In the present case, at the time the court heard the motion to reconsider the sentence, the amendment to La. R.S. 40:979 was in effect. We do not know if the trial court considered the amendment to the provision in finding that the sentence, as originally imposed, was illegally lenient. Because the language in La. R.S. 14:27 and 40:979 is now virtually identical,

to the maximum sentence.

it would appear that the reasoning of *State v. Callahan, supra*, would apply and there is no longer a mandatory minimum sentence for an attempt. The current sentencing range for attempted manufacturing of methamphetamine is 0-15 years at hard labor, to be served with or without benefit of parole, probation, or suspension of sentence.

While the original and the subsequent sentences imposed for attempted manufacture of methamphetamine fall within the sentence parameters, the trial court's ruling that the first sentence was illegally lenient is in error. Since the judge based his sentence for the second charge, possession of methamphetamine with intent to distribute, on the sentence imposed on the attempted manufacture of methamphetamine, justice demands that the sentences be vacated. We remand for further proceedings. We deny the rehearing application regarding our ruling on the motion to suppress.

SENTENCES VACATED; REMANDED.

STEWART, J., concurs

I agree that the trial court's ruling that the first sentence was illegally lenient is in error. However, instead of remand, I would reinstate the original probated sentence.