

Fifth Circuit Court of Appeal
State of Louisiana

No. 26-KA-358

STATE OF LOUISIANA

versus

ELGENE J. GARY, JR.

ON APPEAL THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 22-801, DIVISION "K"
HONORABLE ELLEN SHIRER KOVACH, JUDGE PRESIDING

September 09, 2026

JUDE G. GRAVOIS
JUDGE

Panel composed of Judges Susan M. Chehardy,
Jude G. Gravois, and Marc E. Johnson

APPEAL DISMISSED WITHOUT PREJUDICE; REMANDED

JGG
SMC
MEJ

TRUE COPY



MORGAN NAQUIN
DEPUTY CLERK

COUNSEL FOR DEFENDANT/APPELLANT,
ELGENE J. GARY

Remy V. Starns
Douglas D. Brown

COUNSEL FOR PLAINTIFF/APPELLEE,
STATE OF LOUISIANA

Thomas J. Butler
Darren A. Allemand

GRAVOIS, J.

On August 31, 2026, appointed appellate counsel filed a Motion to Dismiss Appeal. For the following reasons, we grant the Motion to Dismiss Appeal, dismiss this appeal without prejudice, and remand the matter to the trial court for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

Appellant, Elgene J. Gary, Sr., was convicted of three counts of sexual battery, violations of La. R.S. 14:43.1. Sentences were imposed on June 16, 2025. A motion to reconsider sentence was denied on July 23, 2025. The convictions and sentences became final on or about August 22, 2025 (30 days post-ruling per La. C.Cr.P. art. 914(B)). On May 20, 2026, trial counsel filed an *ex parte* “Motion for Appeal & Designation of Record” requesting that “appeal rights be reinstated.” The trial court granted the motion and the appeal was lodged in this Court on August 6, 2026.

On August 31, 2026, appointed appellate counsel filed a Motion to Dismiss Appeal, noting that the motion for appeal was untimely under La. C.Cr.P. art. 914. In his motion, appellant seeks:

- dismissal of his appeal without prejudice, and remand with the instructions that the May 20, 2026 motion be treated as an application for post-conviction relief seeking an out-of-time appeal, filed and timely as of May 20, 2026 under La. C.Cr.P. art. 930.8;
- that the defendant be allowed to amend the application to comply with La. C.Cr.P. arts. 924 through 930.8;
- that the State be afforded the opportunity to respond, and the lower court shall conduct a hearing contemplated by *State v. Counterman*, 475 So.2d 336 (La. 1985);
- that the lower court appoint counsel for the proceedings on remand; and
- that the proceedings on remand be expedited, given the defendant’s age and the jurisdictional period.

ANALYSIS

Time limitations for criminal appeals are designated by La. C.Cr.P. art. 914, which provides in pertinent part:

B. The motion for an appeal must be made no later than:

- (1) Thirty days after the rendition of the judgment or ruling from which the appeal is taken.
- (2) Thirty days from the ruling on a motion to reconsider sentence filed pursuant to Article 881.1, should such a motion be filed.

In *State v. Counterman*, 475 So.2d 336 (La. 1985), the Louisiana Supreme Court held that a defendant loses the right to obtain an appeal by simply filing a motion for appeal after failing to move for an appeal within the time provided in Article 914. *Id.* at 338. The *Counterman* court explained that after the time for appealing has elapsed, the conviction and sentence are no longer subject to review under the ordinary appellate process, unless the defendant obtains the reinstatement of his right to appeal. *Id.* at 338. The proper procedural vehicle for a defendant to seek the exercise of his right to appeal after the time for appeal has expired is an application for post-conviction relief pursuant to La. C.Cr.P. arts. 924–930.7. *Id.* at 339. The Supreme Court explained as follows:

[T]he trial court may grant post conviction relief reinstating defendant’s constitutional right to appeal after the time for appealing has elapsed, after due consideration of such factors as the length of the delay in defendant’s attempt to exercise the right and the adverse effect upon the state caused by the delay, in cases such as those in which the defendant was not substantially notified at sentencing of his right to appeal or those in which the defense attorney was at fault in failing to file or perfect a timely appeal.

Id. at 340.

In the present case, defense counsel made no oral or written motions, either at the trial or at sentencing, that could be construed as a motion for an appeal. The May 20, 2026 “Motion for Appeal & Designation of Record” was *not* an application for post-conviction

relief, because it alleged no grounds for the loss of the appeal, and gave the State no opportunity to oppose the motion.

Because there is nothing in the record to show that defendant obtained reinstatement of his appeal rights, we dismiss the appeal and remand the matter to allow the defendant the opportunity to seek reinstatement of his right to appeal by filing an application for post-conviction relief requesting the same. *See State v. Williams*, 98-819 (La. App. 5 Cir. 1/26/99), 727 So.2d 678, 678–79; *State v. Orgeron*, 97-1054 (La. App. 5 Cir 3/11/98), 708 So.2d 1242; *State v. Ockmand*, 95-413 (La. App. 5. Cir. 11/28/95), 665 So.2d 588.

CONCLUSION AND DECREE

For the foregoing reasons, this appeal is dismissed without prejudice, and the matter is remanded to the trial court for further proceedings.

APPEAL DISMISSED WITHOUT PREJUDICE; REMANDED

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED
IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY
SEPTEMBER 9, 2026 TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES
NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CURTIS B. PURSELL
CLERK OF COURT

26-KA-358

E-NOTIFIED

24TH JUDICIAL DISTRICT COURT (CLERK)
HONORABLE ELLEN SHIRER KOVACH (DISTRICT JUDGE)
DOUGLAS D. BROWN (APPELLANT) REMY V. STARNES (APPELLANT)
DARREN A. ALLEMAND (APPELLEE)

MAILED