

STATE OF LOUISIANA
v.
KEVIN O'BRIEN ALLEN

No. 2022-KP-00508

Supreme Court of Louisiana

November 1, 2022

Kevin O'Brien Allen - Applicant Defendant;
Applying For Supervisory Writ, Parish of
Bossier, 26th Judicial District Court Number(s)
199,853, Court of Appeal, Second Circuit,
Number(s) 54,569-KW;

Writ application granted. See per curiam.

SJC

JLW

JTG

JBM

PDG Hughes, J., concurs and assigns
reasons.

Crain, J., dissents and assigns reasons.

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PER CURIAM

Writ granted. In 2014, Kevin O'Brien Allen was convicted of two counts of distribution of marijuana in violation of La. R.S. 40:966. For these crimes, Mr. Allen faced a sentencing exposure of not less than five, nor more than 30 years imprisonment at hard labor on each count. La. R.S. 40:966(B)(3). The trial court imposed two ten-year concurrent sentences. Eighteen months later, Mr. Allen was adjudicated a five-time habitual offender^[1] and given the then-mandatory sentence of life imprisonment pursuant to La. R.S. 15:529.1.^[2]

Counsel for Mr. Allen filed a motion to reconsider the sentence. In the motion, sentencing counsel misstated Mr. Allen's

habitual offender sentencing range as 20 years to life, asserted the life sentence was excessive in violation of Article I, Section 20 of the Louisiana Constitution, and asked the court to reconsider the sentence. The trial court denied the motion finding the sentence was required by statute.

Mr. Allen subsequently filed an application for post-conviction relief in which he argued that he was denied effective assistance of counsel in relation to his habitual offender sentencing. In *State v. Harris*, 18-1012, p. 1 (La. 7/9/20), 340 So.3d 845, 847,

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we held that an "ineffective assistance of counsel at sentencing claim is cognizable on collateral review." Under the standard for ineffective assistance of counsel provided in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), a reviewing court must vacate a sentence if the defendant establishes (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's deficient performance prejudiced defendant to the extent that the outcome of the proceeding is rendered unreliable. We have explained that

[a]n objectively reasonable standard of performance requires that counsel be aware of the sentencing options in the case and ensure that all reasonably available mitigating information and legal arguments are presented to the court. Since Louisiana law prohibits excessive sentences, and requires that individual circumstances be considered, counsel acts unprofessionally when he fails to conduct a reasonable investigation into factors which may warrant a downward departure from the mandatory minimum.

Harris, 18-1012, p. 19, 340 So.3d at 858.

A sentence may be excessive under Article I, Section 20 of the Louisiana Constitution, even if it falls within the statutory range established by the Legislature. *State v. Johnson*, 97-1906, p. 6 (La. 3/4/98), 709 So.2d 672, 676; *State v. Sepulvado*, 367 So.2d 762, 767 (La. 1979). In *State v. Dorthey*, 623 So.2d 1276, 1280-81 (La. 1993), we held that this extends to the minimum sentences mandated by the Habitual Offender Law and that the trial court must reduce a sentence to one not unconstitutionally excessive if the trial court finds that the sentence mandated by the Habitual Offender Law "makes no measurable contribution to acceptable goals of punishment" or is nothing more than "the purposeful imposition of pain and suffering" and "is grossly out of proportion to the severity of the crime."

Here, in the motion to reconsider the sentence, defense counsel failed to apprise the trial court of its duty of depart from the mandatory life sentence under *Dorthey* on the grounds it was excessive. Counsel also failed to present any

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mitigating evidence. In particular, counsel failed to emphasize that none of Mr. Allen's predicate offenses were violent or sexual in nature. The initial sentence-on the lower end of the sentencing range-was based on the information contained in a presentence investigation report that described not only Mr. Allen's prior convictions and arrests but also mitigating information. In the motion to reconsider the habitual offender sentence, which was filed 18 months after the initial sentencing, counsel failed to remind the trial court of these individual circumstances including that Mr. Allen had obtained his GED, was an employed father two young children, and that he desired treatment for his dependency on marijuana.

We find that sentencing counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. As a result of her deficient performance, the trial court imposed a mandatory life sentence that was excessive as applied to Mr.

Allen. Accordingly, Mr. Allen's right to effective assistance of counsel as required by the Sixth Amendment to the Constitution of the United States and Article I, Section 13 of the Louisiana Constitution was violated and his sentence must be vacated.

Accordingly, we reverse the ruling of the trial court, which denied the application for post-conviction relief. We vacate Mr. Allen's life sentence and remand to the trial court, which is instructed to re-sentence Mr. Allen to a term imprisonment that is not unconstitutionally excessive. In resentencing, the trial court must state for the record its considerations and factual basis. *See* La.C.Cr.P. art. 894.1(C). We note that while ameliorative sentencing changes may not apply retroactively, they may guide the court when imposing the new sentence. *See generally State v. Clark*, 391 So.2d 1174 (La. 1980).

REVERSED AND REMANDED

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Hughes, J., concurring

I concur in the result. While counsel may have "failed to apprise" the court of its duty, the duty is the court's.

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CRAIN, J., dissents and assigns reasons.

I would deny the writ application. In *State ex rel. Melinie v. State*, 93-1380 (La. 1/12/96), 665 So.2d 1172, this court expressly barred post-conviction review of sentencing claims. In doing so, the court recognized the sole bases for obtaining post-conviction relief are found in Louisiana Code of Criminal Procedure article 930.3. In *State v. Harris*, 18-1012 (La. 7/9/20), 340 So.3d 845, the majority, citing to unique circumstances, made an exception to *Melinie*. It allowed the defendant to assert upon collateral review his claim that his appellate counsel was ineffective for failing to challenge his sentence on appeal. I disagreed, finding *Melinie* properly restricted post-conviction relief to only those

grounds enunciated in Article 930.3. Then, in *State v. Robinson*, 19-1330 (La. 11/24/20), 304 So.3d 846, the majority widened its exception, allowing collateral review of an excessive sentence claim simply by couching it in terms of a "motion to correct an illegal sentence." Again, I disagreed. The claim had already been fully litigated on direct appeal and denied, placing it outside the scope of review under Article 930.3.

Here, once more, the majority is jurisprudentially expanding Article 930.3 without any legislative authority to do so. A statute meant to impose procedural limits has effectively been rendered limitless. It now appears any sentence can be reviewed at any time.

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Beyond ignoring the clear boundaries imposed by the legislature, the majority's opinion potentially strips the trial court of its constitutional role to impose legal sentences. By remanding to the trial court for "re-sentenc[ing] . . . to a term of imprisonment that is not unconstitutionally excessive[,]" the majority suggests the original sentence is unconstitutional, even if, upon remand, the complained-of conduct by appellate counsel is rectified. That is, even if the trial court on remand is made aware of the considerations of *State v. Dorthey*, 623 So.2d 1276, 1280-81 (La. 1993), considers all mitigating evidence in the presentence investigation report, and otherwise

contemplates all circumstances favorable to the defendant, the majority implies a downward departure is still required in order to comply with this court's remand instructions, even though the trial court may find the original sentence is warranted. To the extent the majority opinion deprives a trial court of its role to independently assess all relevant factors on remand and issue whatever legal sentence those factors may warrant-even the original sentence, I disagree. The practice of ignoring statutorily imposed procedural time bars is only made worse by divesting the constitutionally imposed sentencing authority of the trial judge.

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Notes:

^[1] Mr. Allen's predicate offenses were: 1) possession with intent to distribute marijuana; 2) second-offense possession of marijuana; 3) second-offense possession of marijuana; and 4) possession of a Schedule II controlled dangerous substance.

^[2] In 2017, the Louisiana Legislature passed ameliorative amendments to the Habitual Offender Law, such that, if he were convicted today, Mr. Allen would not be subject to a mandatory minimum life sentence, but rather a minimum 20-year sentence. La. R.S. 15:529.1(A)(4)(b).
