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STATE OF LOUISIANA
v.
CHARLES RAY THOMPSON

No. 2022-KH-01391

Supreme Court of Louisiana

May 2, 2023

IN RE: Charles Thompson, Jr. - Applicant Defendant; Applying For Supervisory Writ, Parish of St. Tammany, 22nd Judicial District Court Number(s) 559,308, Court of Appeal, First Circuit, Number(s) 2022 KW 0556;

Writ application granted. See per curiam.

JDH

JTG

PDG

Weimer, C.J., dissents and assigns reasons.

Crichton, J., concurs and assigns reasons.

Crain, J., dissents and assigns reasons.

McCallum, J., dissents.

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ON SUPERVISORY WRIT TO THE 22ND JUDICIAL DISTRICT COURT, PARISH OF ST. TAMMANY

PER CURIAM

Motion granted; Writ granted. In 2015, Charles Ray Thompson was convicted of two counts of distribution of cocaine, a violation of La. R.S. 40:967(A)(1) (counts 2 and 3); possession with intent to distribute cocaine, a violation of La. R.S. 40:967(A)(1) (count 4); possession of Alprazolam, a violation of La. R.S. 40:969(C) (count 5); and possession of a firearm by a person convicted of a felony, a violation of La. R.S. 14:95.1 (count 6). For these crimes, Mr. Thompson faced a sentencing exposure up to 115 years.[1] The trial court sentenced Mr. Thompson on count 2, to 20 years imprisonment at hard labor; on count 3, to 20 years imprisonment at hard labor; on count 4, to 15 years imprisonment at hard labor; on count 5, to 5 years imprisonment at hard labor; and on count 6, to 15 years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The court ordered that the sentences run concurrently with each other for a total of 20 years. Thereafter, the State filed a habitual offender bill of information listing five predicate offenses.[2]

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After a hearing, the district court vacated the previously imposed sentence on count 2 and sentenced Mr. Thompson as a third-felony habitual offender to a term of life imprisonment without the benefit of parole, probation, or suspension of sentence.

Counsel for Mr. Thompson did not file a motion to reconsider the sentence. For that reason, on direct appeal, the appellate court found that Mr. Thompson's assignment of error challenging his sentence as excessive was procedurally barred from being reviewed. *State v. Thompson,* 2015-1983, pp. 6-7 (La.App. 1 Cir. 9/16/16), 202 So.3d 998, 1002.

Mr. Thompson 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, 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.

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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, defense counsel failed to file a motion to reconsider the mandatory life sentence. Counsel did not apprise the trial court of its discretion to depart from the mandatory life sentence under *Dorthey* on the grounds it was excessive. Counsel also failed to present any mitigating evidence. In particular, counsel failed to emphasize that none of Mr. Thompson's predicate offenses were enumerated crimes of violence under La. R.S. 14:2(B)(57) or sexual in nature. In addition, the initial sentence imposed-20 years-was far below the maximum available penalty for the most recent convictions. The life sentence was likewise shielded from review on appeal as a result of counsel's failure to motion for its reconsideration.

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

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Accordingly, we reverse the ruling of the trial court, which denied the application for post-conviction relief. We vacate Mr. Thompson's life sentence and remand to the trial court, which is instructed to re-sentence Mr. Thompson to a term of imprisonment that is not unconstitutionally excessive. We note that while ameliorative sentencing changes may not apply retroactively, they may likewise guide the court when imposing the new sentence. *See generally, State v. Clark*, 391 So.2d 1174 (La. 1980). 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 also grant the State's motion to file an appendix in excess of 25 pages.

REVERSED AND REMANDED

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CRAIN, J., dissents and assigns reasons.

To prove ineffective assistance of counsel,

both deficient performance by counsel *and* resulting prejudice must be established. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Here, even assuming counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, it did not prejudice defendant.

The majority concludes that prejudice was proven because an excessive sentence resulted. A mandatory minimum sentence can only be reduced as constitutionally excessive if the court finds the sentence "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." *State v. Dorthey,* 623 So.2d 1276 (La. 1993). This requires that defendant show he is "exceptional," "a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case." *State v. Johnson,* 97-1906, (La. 3/4/98), 709 So.2d 672, 676.

The subject sentence is not excessive so as to justify a downward departure from the mandatory minimum sentence for a third felony offender. Defendant was

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convicted of distributing cocaine and possessing a gun-an enumerated crime of violence. S*ee* La. R.S. 14:2(B)(57). There is evidence he was a member of the drug trade in his area. Defendant only asserts his crimes were the result of his drug addiction. He offers no other mitigating information to warrant a downward departure from the mandatory life sentence. He has not proven he is exceptional. In fact, as a confessed drug addict, he has proven himself too common. A reduced sentence under *Dorthey* is reserved for rare cases where the punishment clearly does not fit the crime. By not enforcing this high standard, the majority turns the exception into the rule.

Defendant proved no prejudice. Thus, he failed to show he received ineffective assistance of counsel. I dissent.

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WEIMER, C.J., dissenting.

I respectfully dissent because I find that defendant has failed to meet his burden of proving, pursuant to La. C.Cr.P. art. 930.2, that he was prejudiced by his counsel's performance.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court provided the following standard for determining whether a conviction must be reversed because of ineffective assistance of counsel:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687 (emphasis added). This is a two-pronged showing, and to obtain relief, both deficient performance and prejudice must be established. Failure to prove either element is fatal to an ineffective assistance of counsel claim.

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Pretermitting the majority's conclusion that deficient performance on the part of counsel was demonstrated, I find that defendant failed to offer sufficient proof to establish that he suffered prejudice as a result of any alleged errors on the part of his counsel. The sentence defendant received was mandatory life without parole as a third felony offender where the third felony and the two prior felonies were violations of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for ten years or more. La. R.S. 15:529.1(A)(3)(b)(2014). The trial court was required to depart downward from that sentence only if defendant showed that the sentence was excessive as applied to him. *State v. Dorthey*, 623 So.2d 1276, 1281 (La. 1993); *State v. Johnson*, 97-1906 (La. 3/4/98), 709 So.2d 672, 677. As explained in *Johnson*, to rebut the presumption that the mandatory minimum sentence is constitutional, the defendant was required to clearly and convincingly show that he "is exceptional, which in this context means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case." *Johnson*, 97-1906, 709 So.2d at 676 (quoting *State v. Young*, 94-1636, pp. 5-6 (La.App. 4 Cir. 10/26/95), 663 So.2d 525, 528 (Plotkin, J., concurring)).

Here, defendant alleges that if his counsel had investigated and presented the evidence in a motion to reconsider sentence, his family members would have testified that he has had a life-long struggle with drugs. In my view, such testimony is simply not sufficient to demonstrate that defendant is the "exceptional" defendant who is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense and the circumstances of the case, especially given the specific facts of this case (and each of these cases must

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be evaluated under their own unique facts). Indeed the most "exceptional" fact about defendant that appears in the record is the length and breadth of his criminal record. Before committing the instant offense, defendant had been convicted of illegal discharge of a firearm (pleaded down from attempted first-degree murder) and had been arrested for aggravated battery against his girlfriend, a charge which was ultimately dismissed when his girlfriend refused to cooperate with the prosecution. Defendant has also pled guilty to the offense of simple assault and resisting an officer. He has convictions of both petty drug offenses (marijuana) and serious drug offenses (cocaine-distribution, possession). Although offered rehabilitative services, he was uncooperative and ultimately "failed out" of drug court.

While defendant's prior convictions are primarily non-violent drug offenses, it cannot be overlooked that defendant's current conviction is for distribution of cocaine and for possession of a firearm by a convicted felon. Apparently, his dangerousness has escalated: he is a drug dealer who had a weapon while peddling potential death and addiction. Through his conduct, defendant has demonstrated that he simply cannot follow the laws enacted to protect society from those who deal drugs. The fact of his own addiction, standing alone, does not demonstrate that defendant is the "exceptional" defendant whose life sentence was excessive under the particular facts presented and whose circumstances would have required the trial court to impose a less harsh sentence. Unless he has found and demonstrated redemption in prison, which is better evaluated in pardon or parole proceedings, a court should not act to extricate defendant from the predicament he created for himself.

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Therefore, I find that defendant failed to prove prejudice as a result of counsel's alleged deficient performance and, as a result, that he failed to meet his burden of proving ineffective assistance of counsel under *Strickland.*

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Crichton, J., concurs and assigns reasons:

While I agree that defendant was denied effective assistance of counsel at sentencing and, therefore, is entitled to a new sentencing hearing, I write separately to emphasize the importance of the right at issue here.

A defendant is entitled to the effective assistance of counsel during *both* the guilt and sentencing phases of his criminal prosecution. This principle is firmly embedded in both the state and federal constitutions. *See* U.S. Const. amend. VI; La. Const. Ann. Art. I, § 13 ("At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment.") The United States Supreme Court has articulated the important role counsel plays during sentencing: "'[T]he necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent.'" *McConnell v. Rhay*, 393 U.S. 2, 89 S.Ct. 32, 21 L.Ed.2d 2 (1968) (quoting *Mempa v. Rhay*, 389 U.S. 128, 135, 88 S.Ct. 254, 257, 19 L.Ed.2d 336 (1967)). This Court, too, has long held that "counsel is essential for the preservation of the defendant's rights" during sentencing. *State v. Austin*, 255 La. 108, 114, 229 So.2d 717, 719 (1969).

Here, defendant was adjudicated a habitual offender and sentenced to life imprisonment without parole. Defendant's lawyer rendered textbook ineffective

assistance by failing to object to the sentence, failing to file a motion to reconsider the sentence, and failing to inform the sentencing court of its authority to deviate below the mandatory minimum sentence when, as here, such a sentence is arguably constitutionally excessive. As a result of counsel's failures, defendant has been subjected to an arguably excessive sentence that was unreviewable on appeal. *See State v. Thompson*, 15-1983, p. 6 (La.App. 1 Cir. 9/16/16), 202 So.3d 998, 1002 ("The defendant [] is procedurally barred from having [his claim of excessive sentence] reviewed, since he failed to file a new motion to reconsider sentence after the district court resentenced him as a habitual offender.").

As recently explained, the right to assistance of counsel would be gutted if a defendant, "whose errors by counsel result in a constitutionally excessive sentence (and one that is shielded from full review on appeal), [was left] without a remedy." *State v. Harris*, 18-1012, p. 20 (La. 7/9/20), 340 So.3d 845, 860-61 (Crichton, J., concurring). As I have recognized in previous cases, a mandatory life sentence such as the one imposed here may be grossly disproportionate to a defendant's nonviolent criminal history. *See e.g. State v. Kennon,* 19-0998 (La. 9/1/20), 340 So.3d 881 (Crichton, J., additionally concurring); *State v. Ellison*, 18-0053, p. 6 (La. 10/29/18), 255 So.3d 568, 572 (writ denied) (Crichton, J., would grant); *State v. Guidry,* 16-1412 (La. 3/15/17), 221 So.3d 815, 831 (Crichton, J., additionally concurring); *State v. Hickman*, 17-0142, p. 1 (La. 9/29/17), 227 So.3d 246, 247 (writ denied) (Crichton, J., additionally concurring); *State v. Hagans*, 16-0103, p. 1 (La. 10/17/16), 202 So.3d 475 (writ denied) (Crichton, J., additionally concurring); *State v. Ladd*, 14-1611, p. 1 (La. 3/27/15), 164 So.3d 184 (Crichton, J., additionally concurring); *cf. State v. Martin*, 19-1087, p. 2 (La. 10/1/19), 280 So.3d 128, 128-29 (writ denied) (Crichton, J., concurring) ("the repeated crimes of extreme violence warrant the district attorney's use of the multiple offender bill and the judge's imposition of a substantial hard labor sentence.").

If defendant were not permitted to raise a claim of ineffective assistance of counsel at sentencing, he would be "entirely without a remedy for this violation of his Sixth Amendment right to effective representation." *Harris*, 18-1012, p. 20, 340 So.3d at 860 (Crichton, J., concurring). It is my view that when a defendant is denied his or her right to effective representation during sentencing, "we must adhere to the basic constitutional protections of post-conviction relief to proscribe an excessive sentencing that follows." *State v. Lowry*,

22-0941, p. 1 (La. 11/1/22), 349 So.3d 13 (writ denied) (Crichton, J., would grant). Accordingly, I agree with the decision of the Court to grant defendant's writ application and remand for re-sentencing to an appropriate term of imprisonment.

Notes:

[1] Mr. Thompson was convicted of three counts under La. R.S. 40:967, which in 2014 provided a maximum sentence of 30 years, for a total of 90 years. He was also convicted under La. R.S. 40:969(C), which, in 2014, provided a maximum sentence of five years, and under La. R.S. 14:95.1, which provided a maximum sentence of 20 years. If each of these sentences were run consecutively, it would amount to a punishment of 115 years imprisonment.

[2] The predicate offenses listed on the habitual offender bill of information included: (1) January 28, 2012 conviction for possession of marijuana (second offense), a violation of La. R.S. 14:966(D)(2); (2) January 28, 2012 conviction for possession of marijuana (second offense), a violation of La. R.S. 14:966(D)(2); (3) May 6, 2009 conviction for distribution of a Schedule II CDS, a violation of La. R.S. 40:967(A)(1); (4) March 27, 2000 conviction for illegal discharge of a weapon, a violation of La. R.S. 14:94; and (5) May 1, 2015 conviction for possession of a Schedule II CDS (cocaine in an amount of twenty-eight grams or more, but less than two hundred grams), a violation of La. R.S. 40:967(F)(1)(a).