

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2000-KA-1523**
VERSUS * **COURT OF APPEAL**
ISAAC CARR * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 370-675, SECTION "G"
HONORABLE JULIAN A. PARKER, JUDGE
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JUDGE MAX N. TOBIAS, JR.
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(Court composed of Judge Steven R. Plotkin, Judge Miriam G. Waltzer and Judge Max N. Tobias, Jr.)

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SENTENCE VACATED; REMANDED

This appeal concerns a resentencing only.

Isaac Carr (“Carr”) was convicted of possession of cocaine in violation of La. R.S. 40:967(C) on 17 April 1996. After a habitual offender hearing on 23 May 1996, he was found to be a fourth felony offender and was sentenced to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence. He appealed. This Court affirmed his conviction and habitual offender adjudication, but vacated his sentence and remanded the case for resentencing. The basis for the remand was the trial court’s erroneous statement that the life term was statutorily mandated when the court actually had the discretion to sentence the defendant to a term of between twenty years and life. State v. Carr, 96-2388 (La. App. 4 Cir. 9/10/97), 699 So. 2d 1105, writ denied, 97-2633 (La. 2/6/98), 709 So. 2d 732.

At the resentencing hearing on 25 September 1998, the trial court heard arguments from the defense and the State. The trial court adopted the reasons of the State and resentenced the defendant to life imprisonment

without benefits. Carr was granted an out-of-time appeal on 10 August 1999.

The facts of the case are not at issue here.

The defendant now argues that at the resentencing hearing, the trial court erred in not complying with La. C.Cr.P. 894.1 and in imposing an excessive sentence.

At the sentencing hearing after the remand, Carr's attorney pointed out that the defendant had already served five and one-half years with a good record, that the minimum sentence under the La. R.S. 15:529.1A(3)(a) in May of 1994 (when the offense occurred) was twenty years, and that under State v. Dorthey, 623 So. 2d 1276 (La. 1993), the judge could actually sentence him to less than twenty years. The prosecutor responded that if this defendant had been sentenced under current law, the trial court would have no discretion but to impose a life sentence. The prosecutor also argued that the judge should follow the intent of the legislature and impose the maximum sentence in the "spirit" of the current law and that it was within the court's discretion to give the life term.

The trial court adopted the prosecutor's argument as a "statement of law" and imposed the life sentence on the defendant.

The trial court gave no reasons for the life sentence except that the

spirit of the harsher current version of the statute was being observed. Thus, in effect Carr was sentenced to an enhancement not in effect when he committed the instant offense. Effectively, Carr was resentenced under the spirit of La. R.S. 15:529.1A(1)(c)(ii), which reads as follows:

If the fourth or subsequent felony or either of the prior felonies is a felony defined as a crime of violence under R.S. 14:2(13) or as a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for more than five years or any other crime punishable by imprisonment for more than twelve years, the person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence.

Under this version of the statute, a life sentence would be mandatory, as Carr's underlying offense, first degree robbery, is among the crimes of violence listed in R.S. 14:2(13). However, the version of R.S. 15:529.1A (3) in effect at the time of the offense provided for the following penalty for a fourth offender:

(a) The person shall be sentenced to imprisonment ... for a determinate term not less than the longest prescribed for a first conviction but in no event less than twenty years and not more than his natural life; or

(b) If the fourth felony or subsequent felony and two prior felonies involved a violation of R.S. 14:34, R.S. 14:62.1, R.S. 14:62.2, R.S. 14:62.3, R.S. 14:65, R.S. 14:110(B), or of any crime punishable by imprisonment for more than twelve years, the person shall be imprisoned for the

remainder of his natural life, without benefit of parole, probation, or suspension of sentence.

None of the provisions under section (b) apply to Carr. Thus, he was sentenced to the maximum term under section (a) without a factual basis having been articulated by the court as required under La. C.Cr.P. art. 894.1.

The mere statement of following the spirit of current law and merely adopting by reference the oral arguments made by the prosecutor is inadequate.

In State v. Burns, 97-1553 (La. App. 4 Cir. 11/10/98), 723 So. 2d 1013, writ denied, 98-3054 (La. 4/1/99), 741 So. 2d 1282, which concerns the excessiveness of a mandatory life sentence for a narcotics offense, this Court stated:

A sentence may be reviewed for constitutional excessiveness even though it is within statutory guidelines. State v. Cann, 471 So. 2d 701, 703 (La. 1985). In reviewing a sentence for excessiveness, the appellate court must first determine whether the trial court complied with La. C.Cr.P. art. 894.1 when it imposed the sentence and then determine whether the sentence is too severe given the circumstances of the case and the defendant's background. State v. Lobato, 603 So. 2d 739, 751 (La. 1992). If the sentence needlessly imposes pain and suffering and is grossly out of proportion to the gravity of the offense so as to shock our sense of justice, then it may be determined to be unconstitutionally excessive as violative of La. Const. art. 1, Sec. 20 (1974). Id. However, a sentence imposed will not be set aside absent a showing of manifest abuse of

the trial court's wide discretion to sentence within statutory limits. Id. The articulation of the factual basis for a sentence is the goal of LSA C.Cr.P. art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary even when there has not been full compliance with LSA C.Cr.P. art. 894.1. Id.

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The purpose behind La. C.Cr.P. art. 894.1 is to provide an explanation for a particularized sentence when the trial court is given discretion to choose a sentence tailored to the offender's circumstances from within a legislatively provided sentencing range.

Id. at pp. 6-7, 723 So.2d at 1018.

The trial court in the case at bar, having discretion to choose between a twenty-year sentence and a life term, chose the most severe penalty without any effort to particularize the sentence to this defendant as required by La. C.Cr.P. 894.1.

In State v. Clements, 433 So. 2d 143, 144 (La. 1983), the Louisiana Supreme Court considered a similar case and remanded it for resentencing because the “barren record” did not support a life sentence for a fourth offender. In Clements, the defendant had three prior burglary convictions and a drug offense. In the instant case, the defendant’s record consists of two drug offenses, a first-degree robbery conviction, and an unauthorized use of a credit card offense. However, the record in the instant case is barren

of reasons for the most severe of sentences.

We distinguished this case from State v. Lindsey, 99-3256 (La. 10/17/00), 770 So.2d 339 and State v. Webster, 98-0807 (La App. 4 Cir. 12/20/00), ____ So.2d ____, 2000 WL 1875830, because, inter alia, the trial judge reviewed for the record facts relating to the defendant's life of crime.

We are unable to conclude that the life sentence is not excessive here. Accordingly, for reasons stated above, the defendant's sentence is vacated and the case is remanded for resentencing in compliance with this opinion.

SENTENCE VACATED; REMANDED