

Judgment rendered August 9, 2017.
Application for rehearing may be filed
within the delay allowed by Art. 992,
La. C. Cr. P.

No. 51,458-KA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

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STATE OF LOUISIANA

Appellee

versus

GEORGE EDWARD HIGGINS

Appellant

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Appealed from the
Fifth Judicial District Court for the
Parish of Richland, Louisiana
Trial Court No. 2013237

Honorable Ann Bolton McIntyre, Judge

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LOUISIANA APPELLATE PROJECT
By: Carey J. Ellis, III

Counsel for Appellant

GEORGE EDWARD HIGGINS

Pro Se

JOHN MCINTOSH LANCASTER
District Attorney

Counsel for Appellee

KENNETH DOUGLAS WHEELER
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Assistant District Attorneys

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Before BROWN, MOORE, and STONE, JJ.

STONE, J.

The defendant, George Edward Higgins, pled guilty to forcible rape and sexual battery, and agreed to 40 years at hard labor for forcible rape and 50 years at hard labor for sexual battery, to be served concurrently. Higgins requested and was granted this appeal; however, appellate counsel filed a motion to withdraw, together with a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), alleging there are no nonfrivolous issues upon which to base an appeal. For the following reasons, the motion to withdraw is granted, Higgins' convictions are affirmed, and his sentences are vacated and remanded for resentencing.

FACTS AND PROCEDURAL HISTORY

George Edward Higgins ("Higgins") was indicted by a grand jury for aggravated rape, aggravated incest, and aggravated battery, based on egregious sexual conduct with his juvenile daughter from 2007 to 2013. At the arraignment, Higgins pled not guilty and not guilty by reason of insanity, to all charges. Counsel for Higgins requested the trial court appoint a sanity commission and make a determination about Higgins' competency. The trial court signed an order appointing two physicians to examine Higgins and render reports concerning his mental condition at the time of the alleged offenses, his capacity to understand the proceedings against him, and his ability to assist in his defense.

Higgins pled guilty to the lesser charges of attempted aggravated rape and sexual battery. The trial court accepted Higgins' guilty pleas and sentenced him to 50 years at hard labor, without the benefit of parole, probation, or suspension of sentence, for the attempted aggravated rape conviction and 50 years at hard labor, 25 years of which would be served

without probation, parole, or suspension of sentence, for the sexual battery conviction. However, the trial court failed to conduct a sanity hearing and this Court was forced to vacate Higgins' convictions and sentences and remand the matter.

On remand, a sanity hearing was conducted and based on the reports of the appointed physicians, the trial court found Higgins was competent at the time of the alleged crimes, and competent to stand trial. The state subsequently charged Higgins by an amended bill of information with forcible rape in violation of La. R.S. 14:42.1, and sexual battery, in violation of La. R.S. 14:43.1. In exchange for his guilty pleas, Higgins agreed to serve 40 years at hard labor for the forcible rape conviction and 50 years at hard labor for the sexual battery conviction, with the sentences to run concurrently.

Higgins requested and was granted this appeal. His appellate counsel has filed an *Anders* brief, seeking to withdraw, on grounds that he could find no nonfrivolous issues to raise on appeal. *See Anders v. California, supra, State v. Jyles*, 96-2669 (La. 12/12/97), 704 So. 2d 241; *State v. Mouton*, 95-0981 (La. 04/28/95), 653 So. 2d 1176; and *State v. Benjamin*, 573 So. 2d 528 (La. App. 4 Cir. 1990).

DISCUSSION

We note appellate counsel's brief contains no assignments of error and conforms to the procedures set forth in *Anders* and *Jyles, supra*. The brief outlines the facts and procedural history of the case and the action of the trial court. The brief also contains "a detailed and reviewable assessment for both the defendant and the appellate court of whether the appeal is worth pursuing in the first place." *Jyles, supra*. Appellate counsel further verifies

in his certificates of service that he has mailed copies of the motion to withdraw and appellate brief to Higgins, in accordance with *Anders, Jyles, Mouton*, and *Benjamin, supra*.

In accordance with the applicable jurisprudence, appellate counsel also notified Higgins of his right to file a pro se brief and sought to withdraw from the case. This court issued an order holding the motion to withdraw in abeyance and rescinding the pro se briefing deadline. Higgins was granted an additional 30 days to file a pro se brief and an additional 10 days to view the appellate record. To date, no pro se brief or any other brief has been received on Higgins' behalf.

After a thorough examination of the appellate record, we agree with appellate counsel that there are no nonfrivolous issues to be raised on appeal. Higgins was properly charged by an amended bill of information. Higgins was present in court and represented by counsel at all important stages of the proceedings. His guilty pleas complied with the law and he freely and voluntarily entered into a valid plea agreement. The trial court advised Higgins of the nature of the charges against him, the consequences of his guilty pleas, and the sentencing ranges he would have been exposed to had he not entered into the plea agreement. Higgins was properly advised of his rights and agreed to the imposed concurrent sentences of 40 years and 50 years, at hard labor. Accordingly, appellate counsel's motion to withdraw is granted.

ERROR PATENT

Our error patent review of the record revealed the trial court failed to impose proper restriction of sentence benefits as to each conviction. A defendant convicted of forcible rape shall be imprisoned for not less than 5

years nor more than 40 years at hard labor. At least 2 years of the sentence must be served without the benefit of probation, parole, or suspension of sentence. La. R.S. 14:42.1(B). Likewise, a defendant convicted of sexual battery under La. R.S. 14:43.1, when the defendant acted without the consent of the victim, or when the victim had not yet attained 15 years of age and was at least 3 years younger than the defendant, shall be imprisoned at hard labor for no less than 25 years nor more than 99 years. At least 25 years of the sentence imposed shall be served without the benefit of probation, parole, or suspension of sentence. La. R.S. 14:43.1(C)(2).

Upon sentencing Higgins, the trial court failed to address the restriction of benefits for each sentence, and this failure renders Higgins' sentences illegally lenient. Since the trial court maintains some discretion as to the length of the benefit restrictions, this error cannot be cured on appeal. Accordingly, the sentences are vacated and the case is remanded for resentencing in compliance with La. R.S. 14:42.1 and La. R.S. 14:43.1(C)(2). *State v. Downs*, 50,345 (La. App. 2 Cir. 01/13/16), 186 So. 3d 207; *State v. Carter*, 43,304 (La. App. 2 Cir. 06/18/08), 987 So. 2d 364, writ denied, 08-2752 (La. 09/25/09), 18 So. 3d 86.

CONCLUSION

For the foregoing reasons, the motion to withdraw is granted and Higgins' convictions are confirmed. Higgins' sentences are vacated, and the matter is remanded for resentencing.

**MOTION TO WITHDRAW GRANTED; CONVICTIONS
AFFIRMED; SENTENCES VACATED AND REMANDED WITH
INSTRUCTIONS.**