IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

PERCY EDGARDO TORRES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D11-3382

Opinion filed November 6, 2013.

An appeal from the Circuit Court for Duval County.
Russell L. Healey, Judge.

Bruce A. Rosenthal of Bruce A. Rosenthal Law Offices, P. L., Miami, for Appellant.

Pamela Jo Bondi, Attorney General, and Brittany Ann Rhodaback, Assistant Attorney General, Tallahassee, for Appellee.

WOLF, J.

Appellant challenges his conviction for first-degree sexual battery. He raises four issues. We affirm the first and third issues without comment. In the second issue, he argues counsel was ineffective. We find that issue would be more properly raised pursuant to a motion for postconviction relief and, thus, affirm. In the fourth issue, he argues the trial court committed fundamental error by

sentencing him based on constitutionally impermissible factors. We agree that the trial court's comments could reasonably be construed to suggest that the trial court based appellant's sentence, at least in part, on religion. Therefore, we reverse and remand for resentencing before a different judge.

During the sentencing hearing, appellant's father spoke on appellant's behalf and stated, "Your Honor, I am here to tell you who is my son. And I'm telling you the truth because I am a Catholic and I believe in the Bible. As a father that I am, I could tell you that my son is innocent."

Appellant then addressed the court and stated that he was innocent. He asserted that he had been dating the victim, although she was a troubled woman of poor character, and she set him up for the sexual battery charge. Then, the following exchange occurred:

> THE COURT: You were married, weren't you?
>
> [APPELLANT]: Yeah. I was married, but my wife was in my country.
>
> THE COURT: I know that. Just because your wife is in another country doesn't mean you ought to be going out with other women. *You're a good Catholic fellow as I am. That's not the way Catholic people - - that's not the way anybody with morals should do anything*.
>
> [APPELLANT]: We was going out like friends. Like go out.
>
> THE COURT: [Appellant], you're the one that said you had sex with her before this night.
>
> [APPELLANT]: Yeah. Before this night. Yeah. We have sex.
>
> THE COURT: But you're married.

[APPELLANT]: Yeah. I was married.

THE COURT: That wasn't right, was it?

[APPELLANT]: I know. Yes. It is my mistake.

(Emphasis added). At the end of the sentencing hearing, the trial court again commented on appellant's claims that he had a consensual relationship with a woman other than his wife, stating:

> If [the victim] is all what you say she is, you should have been miles and miles and miles away from her. You should never have invited her into your home. You should certainly never have gotten in a vehicle with her and gone bar-hopping. You should not have gone out on dates. You should not have been dancing together and by your own testimony *you should not have had prior sexual encounters with her under any set of circumstances once you are married*. But forget that two, she's the kind of person that will turn on you and set you up and that's what you told me. But yet you continue to have her, you know, be in your life even if it was her that called and said, "Let's go out." *All you had to do was say no. The problem was, though, you didn't.*

(Emphasis added). The trial court then sentenced appellant to the statutory maximum of thirty years in prison.

"Although an appellate court generally may not review a sentence that is within statutory limits, an exception exists when the trial court considers constitutionally impermissible factors in imposing a sentence." Santisteban v. State, 72 So. 3d 187, 197 (Fla. 4th DCA 2011) (citing Nawaz v. State, 28 So. 3d 122, 124 (Fla. 1st DCA 2010)). "Reliance on constitutionally impermissible factors," including religion, "is a violation of a defendant's due process rights." Id. (citations omitted). "'[S]imilar principles apply when a judge impermissibly takes

his own religious characteristics into account in sentencing.'" Id. (quoting United States v. Bakker, 925 F.2d 728, 740 (4th Cir.1991)). A sentence should be vacated where a trial judge's comments "'could reasonably be construed to suggest that the trial judge based [the] sentence, at least in part,'" on a constitutionally impermissible factor. Id. (quoting Nawaz, 28 So. 3d at 125). See also Jackson v. State, 39 So. 3d 427, 428 (Fla. 1st DCA 2010) (finding fundamental error where the trial court's statement "can reasonably be read only as conditioning the sentence, at least in part, upon appellant's claim of innocence").

In Santisteban, a trial judge impermissibly based the length of a sentence on religious principles. 72 So. 3d at 198. The Fourth District reasoned that because it could not say that the sentence would have been the same without reliance on that impermissible ground, the sentence should be vacated. Santisteban distinguished Singleton v. State, 783 So. 2d 970, 979 (Fla. 2001), in which the supreme court found that although biblical references should not be used, an "extraneous" biblical reference in a sentencing order comparing modern times to Sodom and Gomorrah was not reversible error because the order clearly stated the judge did not consider any aggravating factors other than the two set forth in the order.

Here, we find the trial judge's comments can reasonably be construed to suggest that the trial judge based appellant's sentence, at least in part, on religion. We note that appellant never stated he was Catholic. Instead, the trial judge

apparently assumed appellant was Catholic because his father was. The court then specifically condemned appellant for his claim that he had a consensual dating relationship with the victim because it went against the judge's own religious beliefs. The judge stated, "Just because your wife is in another country doesn't mean you ought to be going out with other women. You're a good Catholic fellow as I am. That's not the way Catholic people - - that's not the way anybody with morals should do anything." At the end of the sentencing hearing, the court again condemned appellant for having what he claimed was a consensual relationship with the victim because he was married, stating, "by your own testimony you should not have had prior sexual encounters with her under any set of circumstances once you are married. . . . even if it was her that called and said, 'Let's go out.' All you had to do was say no. The problem was, though, you didn't."

It is unclear how appellant's fidelity to his wife had any bearing on the charge of sexual battery. Further, the trial judge clearly explained that his condemnation of appellant's behavior was based on the court's own religious beliefs, which he assumed he shared with appellant. Thus, the judge's comments were not merely an "extraneous" biblical reference, as in Singleton, 783 So. 2d at 979.

Further, we cannot say that the sentence would have been the same without the court's impermissible consideration of religion. The minimum guidelines sentence was 9 years and 4 months imprisonment. The State did not request a specific number of years, but instead asked the trial court not to downwardly depart. The trial judge then sentenced appellant to the statutory maximum of 30 years imprisonment. Unlike in Singleton, 783 So. 2d at 979, here the judge did not specify on what factors he based the sentence.

No one should be punished, or conversely shown leniency, merely because he or she may be a member of a particular religion. Moreover, as we stated in Nawaz, "for justice to be done, it must also *appear* to be done." 28 So. 3d at 125. Because the court's comments could reasonably be construed as basing the sentence, at least in part, on religion, and because we cannot say that the sentence would have been the same without the court's impermissible consideration of religion, we vacate appellant's sentence and remand for resentencing before a different judge.

REVERSED AND REMANDED.

ROBERTS, J., CONCURS; MAKAR, J., CONCURS WITH OPINION.

Makar, J., concurring with opinion.

When religious references, or appeals to religion, are made by participants in the sentencing phase of a criminal case, it places the trial judge in a difficult position; he can ignore, acknowledge, or nimbly skirt the matter. If he engages the subject, making a religiously–themed or religiously–based comment, it opens the door to criticism that the sentence ultimately imposed was due to an improper factor. Few academic articles[1] discuss the topic, each reflecting differing views on

[1] See, e.g., Mark C. Modak-Truran, Reenchanting the Law: The Religious Dimension of Judicial Decision Making, 53 Cath. U. L. Rev. 709 (2004) (discussing models of religionist/separationist decision-making in the context of judicial deliberations and explanations); Mark B. Greenlee, Faith On the Bench: The Role of Religious Belief in the Criminal Sentencing Decisions of Judges, 26 U. Dayton L. Rev. 1, 41 (2000). This latter article focuses solely on sentencing, but points out that "the closely related subject of arguments to juries about sentencing decisions" is discussed in two articles reflecting opposing views. Greenlee, supra, at 3 n.7 (citing Brian C. Duffy, Barring Foul Blows: An Argument for a Per Se Reversible-Error Rule for Prosecutors' Use of Religious Arguments in the Sentencing Phase of Capital Cases, 50 Vand. L. Rev. 1335 (1997); Elizabeth A. Brooks, Thou Shalt Not Quote the Bible: Determining the Propriety of Attorney Use of Religious Philosophy and Themes in Oral Arguments, 33 Ga. L. Rev. 1113 (1999)).

what is appropriate or what violates constitutional norms.[2] To similar effect are the relatively few court decisions outside of Florida.[3]

The same appears true in Florida. Our supreme court has discussed the subject, but only briefly, creating no bright line rule. In a capital case, it was presented with a trial judge's written sentencing recommendation that made a reference to "Sodom and Gomorrah." Singleton v. State, 783 So. 2d 970, 979 (Fla. 2001). Because the jury had not been exposed to the reference, and because the judge's order said he did not consider any aggravating factors other than those that

[2] Compare Greenlee, supra, note 1 (arguing that religious references, within certain boundaries, should be permissible), with Sanja Zgonjanin, Quoting the Bible: The Use of Religious References in Judicial Decision-Making, 9 N.Y. City L. Rev. 31, 35 (Winter 2005) ("the use of religious references in judicial decision-making should be prohibited.").

[3] See, e.g., Arnett v. Jackson 393 F.3d 681, 688 (6th Cir. 2005) (trial judge's mention of Matthew 18:5-6 did not violate defendant's due process right because "the record does not demonstrate that the judge's personally held religious beliefs formed "the basis of [her] sentencing decision,") (citation omitted); State v. Arnett, 724 N.E.2d 793, 803 (Ohio 2000) (same case) (no violation of defendant's due process right because "sentencing judge cited a religious text merely to acknowledge one of several reasons - - 'one additional source' - -for assigning significant weight to a legitimate statutory sentencing factor."); U.S. v. Bakker, 925 F.2d 728, 740-41 (4th Cir. 1991) (trial judge's statement, that defendant "had no thought whatever about his victims and those of us who do have a religion are ridiculed as being saps from money-grubbing preachers or priests" created "apprehension that the imposition of a lengthy prison term here may have reflected the fact that the court's own sense of religious propriety had somehow been betrayed.").

were permissible, the supreme court held that the reference—if it was error—was harmless. Id. Similarly, it has applied harmless error analysis where prosecutors have made religious references in their closing arguments to juries. See Lawrence v. State, 691 So. 2d 1068, 1074 (Fla. 1997) ("Although we recognize that the prosecutor's biblical reference in this case was not reversible error, we again caution prosecutors, as we did in [Bonifay v. State 680 So. 2d 413 (Fla. 1996)], that arguments invoking religion can easily cross the boundary of proper argument and become prejudicial.").

Thus, it appears that religious references by trial judges in the sentencing context—though potentially risky—are not *per se* impermissible; they become problematic, however, if they are used—or reasonably appear to be used—as the basis for the sentence itself. See, e.g., Nawaz, 28 So. 3d at 125 (citing United States v. Jacobson, 15 F.3d 19, 23 (2d Cir. 1994), for proposition that "reference to national origin during sentencing 'is permissible, so long as it does not become the basis for determining the sentence.'") (citations omitted). The "Constitution, of course, does not require a person to surrender his or her religious beliefs upon the assumption of judicial office," Bakker, 925 F.2d at 741; religious references are made with caution flags aloft.

The Fourth District has weighed in on the topic. In Santisteban the trial judge directly injected religion into his sentencing decision, making it clear his judgment was based on Jewish tradition. As the Fourth District noted, this "religious concept formed the very basis of calculating the sentence, not just a part." 72 So. 3d at 198. Here, it was the defendant's father who first brought up the topic of religious faith, not the trial judge (the record is silent on the defendant's religious views), distinguishing this case slightly from Santisteban. The trial judge did not use religion doctrine as overtly as did the trial judge in Santisteban (nor as overtly as the trial judge used national origin in Nawaz). But it would appear to a reasonable observer that he relied, at least in part, on his disappointment in the defendant's deviation from principles of Catholicism that would have counseled defendant to flee from the immoral conduct he pursued; this appearance matters. Nawaz, 28 So. 3d at 125 ("for justice to be done, it must also appear to be done.").[4] Particularly so given the difference between the minimum sentence of nine years and four months and the thirty years imposed.

Because it is unclear that the defendant's sentence would be the same without consideration of defendant's deviation from religious norms, I concur that

[4] See also Bakker, 925 F.2d at 741 ("Courts, however, cannot sanction sentencing procedures that create the perception of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it.").

resentencing is appropriate. Id. at 125 ("Because it is unclear whether the trial court would have imposed the same sentence absent consideration of appellant's national origin, we must vacate appellant's sentence and remand for resentencing before a different judge."); see also Santisteban, 72 So. 3d at 198 (reversing because court could not "say that the sentence would be the same without reliance on the impermissible ground").