

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 KA 0761

STATE OF LOUISIANA

VERSUS

MARK A. BURGE

DATE OF JUDGMENT: **DEC 21 2012**



ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 53767, DIVISION B, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE AUGUST J. HAND, JUDGE

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BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

Disposition: FIVE-YEAR SENTENCE VACATED; REMANDED WITH INSTRUCTIONS.

KUHN, J.

Appellant, the State of Louisiana, appeals the trial court's denial of its motion to reconsider the five-year sentence imposed on the defendant-appellee, Mark A. Burge, pursuant to the defendant's motion to correct illegal sentence. For the following reasons, we vacate the five-year sentence and remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

On July 28, 1976, when the defendant was seventeen years old, he kidnapped and raped a woman. He was charged with and convicted of aggravated kidnapping and aggravated rape, violations of La. R.S. 14:44 and La. R.S. 14:42, respectively. For each conviction, the defendant was sentenced to life imprisonment without benefit of parole, probation, or suspension of sentence. The sentences were ordered to run consecutively. The defendant's sentence for aggravated rape was subsequently vacated on appeal and the matter was remanded for resentencing. See *State v. Burge*, 362 So.2d 1371, 1378 (La. 1978). He was resentenced on remand to fifty-years imprisonment without benefit of parole, probation, or suspension of sentence for the lesser included offense of attempted aggravated rape, to be served consecutively to the life sentence. Through multiple appeals and writs, the defendant challenged, *pro se*, his aggravated kidnapping sentence, arguing that his life sentence without parole eligibility was illegal. See *Burge v. Butler*, 867 F.2d 247 (5th Cir. 1989).

In April 2011, the defendant filed a counseled motion to correct illegal sentence, wherein he argued that under *Graham v. Florida*, ___ U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), his life sentence without benefit of parole for his

aggravated kidnapping conviction was illegal. At a hearing on August 16, 2011, the trial court heard argument on the issue and took the matter under advisement. At a sentencing hearing on September 12, 2011, the trial court, pursuant to *Graham*, vacated the defendant's life sentence for aggravated kidnapping and resentenced him to five-years imprisonment at hard labor for the responsive offense of simple kidnapping, with the five-year sentence to run consecutively to the previously imposed fifty-year sentence. The State objected to the sentence and filed a motion to reconsider sentence, which the trial court denied. The State now appeals.

ASSIGNMENT OF ERROR

In its sole assignment of error, the State argues the trial court erred in granting the motion to correct illegal sentence. Specifically, the State contends it was improper for the trial court to vacate the defendant's life sentence without parole for his aggravated kidnapping conviction and to resentence him to five-years imprisonment for simple kidnapping.

In *Graham*, 130 S.Ct. at 2034, the Supreme Court held that the United States Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. La. R.S. 15:574.4(B) provides, in pertinent part, that “no prisoner serving a life sentence shall be eligible for parole consideration until his life sentence has been commuted to a fixed term of years.” La. R.S. 15:574.4(A)(2) provides, in pertinent part:

[A] person committed to the Department of Public Safety and Corrections for a term or terms of imprisonment with or without benefit of parole for thirty years or more shall be eligible for parole consideration upon serving at least twenty years of the term or terms of imprisonment in actual custody and upon reaching the age of forty-five.

In *State v. Shaffer*, 11-1756 (La. 11/23/11), 77 So.3d 939, 942 (*per curiam*), our supreme court found that **Graham** required the relators, and all other persons similarly situated, to have a meaningful opportunity to secure release as a regular part of the rehabilitative process. Accordingly, the *Shaffer* Court, 77 So.3d at 942, held:

[T]he Eighth Amendment precludes the state from interposing the Governor's ad hoc exercise of executive clemency as a gateway to accessing procedures the state has established for ameliorating long terms of imprisonment as part of the rehabilitative process to which inmates serving life terms for non-homicide crimes committed when they were under the age of 18 years would otherwise have access, once they reach the age of 45 years and have served 20 years of their sentences in actual custody. The state thus may not enforce the commutation provisos in La. R.S. 15:574.4(A)(2) and 15:574.4(B) against relators and all other similarly situated persons, and the former provisions offer objective criteria set by the legislature that may bring Louisiana into compliance with the **Graham** decision. (Footnotes omitted).

The defendant argues in brief that *Shaffer* did not create an exclusive remedy under **Graham** and, further, that our supreme court therein did not overrule longstanding precedent that permits sentences such as the five-year sentence he received. We do not agree. The *Shaffer* Court, along with its two companion cases, specifically tailored its decision to comply with **Graham**. See *State v. Dyer*, 11-1758 (La. 11/23/11), 77 So.3d 928 (*per curiam*); *State v. Leason*, 11-1757 (La. 11/23/11), 77 So.3d 933 (*per curiam*). Further, the *Shaffer* Court addressed the older jurisprudence on this issue and expressly declined to follow it. Just as the defendant argues in the instant matter, the *Shaffer* Court noted that relators argued “that the appropriate remedy is to resentence them according to the penalties provided for the next lesser and included responsive

verdict of attempted aggravated rape.” *Shaffer*, 77 So.3d at 941. In rejecting the suggestion that the proper remedy is resentencing under a lesser and included offense, the *Shaffer* Court, 77 So.3d at 941-42, stated:

We agree with relators that Louisiana must comply with the **Graham** decision but reject their proposed solution. In **Graham**, the Supreme Court held that “for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole.” **Graham**, 560 U.S. at —, 130 S.Ct. at 2030. The Court specifically observed: “A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants ... some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” **Id.** The Court noted that a life sentence without parole “deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.” **Id.**, 560 U.S. at —, 130 S.Ct. at 2027 (citing **Solem v. Helm**, 463 U.S. 277, 300–301, 103 S.Ct. 3001, 3015, 77 L.Ed.2d 637 (1983) (striking down a life sentence without parole for a habitual offender convicted of issuing a “no account” check, Court notes the difference between the availability of parole as a “regular part of the rehabilitative process” and commutation of sentence as “an ad hoc exercise of executive clemency”)).

Thus, under *Shaffer* and *Graham*, the appropriate remedy for a minor sentenced to life imprisonment without parole for a non-homicide crime is to let the life sentence stand, but to delete the restriction on parole eligibility. We note as well that our supreme court directed the Department of Corrections to revise *Shaffer*’s prison master according to the criteria in La. R.S. 15:574.4(A)(2) to reflect an eligibility date for consideration by the Board of Parole. Thus, in accordance with *Shaffer*, the Department of Corrections is directed to revise the defendant’s prison master according to the criteria in La. R.S. 15:574.4(A)(2) to

reflect an eligibility date for consideration by the Board of Parole.¹ See Shaffer, 77 So.3d at 942-43.

Accordingly, the five-year sentence imposed by the trial court upon defendant is vacated. The case is remanded to the trial court for resentencing in accordance with this decision and with instructions for addressing the defendant's prison master regarding his sentence for aggravated kidnapping.

FIVE-YEAR SENTENCE VACATED; REMANDED FOR RESENTENCING WITH INSTRUCTIONS.

¹ In 2012, the Legislature enacted La. R.S. 15:574.4(D) by 2012 La. Acts No. 466, which sets forth parole criteria for juvenile non-homicide offenders who have been sentenced to life imprisonment.