

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 KA 1153

STATE OF LOUISIANA

VERSUS

EDDIE POWELL

Judgment Rendered: FEB 18 2014

Appealed from the
Twenty-Third Judicial District Court
In and for the Parish of Ascension, State of Louisiana
Trial Court Number 26,887

Honorable Ralph Tureau, Judge Presiding

Ricky Babin
Donaldsonville, LA

Counsel for Appellee,
State of Louisiana

Donald D. Candell
Gonzales, LA

Mary E. Roper
Baton Rouge, LA

Counsel for Defendant/Appellant,
Eddie Powell

BEFORE: WHIPPLE, C.J., WELCH AND CRAIN, JJ.

WHIPPLE, C.J.

Defendant, Eddie Powell, was charged by bill of information with first degree robbery, a violation of LSA-R.S. 14:64.1. He initially pled not guilty, but later withdrew that plea and entered a plea of guilty as charged. At a later hearing, the trial court sentenced defendant to thirty years at hard labor, without benefit of parole, probation, or suspension of sentence. Defendant filed a pro se motion to reconsider sentence, but the trial court denied that motion. Defendant now appeals alleging that he was denied the right to counsel at his sentencing hearing and that his sentence is excessive. We affirm defendant's conviction. Finding merit in his first assignment of error, we vacate defendant's sentence and remand for resentencing.

FACTS

Because defendant pled guilty, the facts of his offense were not developed at trial. At his plea hearing, defendant stipulated to the following factual basis for his guilty plea: On or about May 16, 2010, defendant committed first degree robbery against Sherri Sanders, a clerk at the Circle K convenience store located at 1902 North Airline Highway in Gonzales. Defendant led Sanders to believe that he was armed with a gun and forced her to give him money from the store's cash register.

RIGHT TO COUNSEL AT SENTENCING

In his first assignment of error, defendant argues that his right to counsel was violated at his sentencing because he was represented only by "stand-in" counsel who was unfamiliar with his case. Defendant asserts that the attorney failed to make any argument in mitigation of his sentence to the trial court.

The record reflects that attorney Raymond Gautreau represented defendant from the time of his arraignment on July 12, 2010, to the time of his guilty plea on January 10, 2011. Defendant was sentenced on June 13, 2011. Prior to defendant's sentencing, the following exchange occurred:

THE COURT: Eddie Powell represented by Mr. Raymond Gautreau. Scheduled for sentencing today. He's represented by Mr. Raymond Gautreau. Mr. [Jarrett] Ambeau, do you want to stand in for sentencing?

MR. AMBEAU: I can, your Honor, yes.

THE COURT: Okay. Your attorney, Mr. Powell, is out of state today and it's been scheduled for sentencing, so Mr. Ambeau is going to stand in for your attorney Mr. Raymond Gautreau. Anything you want to say prior to sentencing, sir?

THE DEFENDANT: No.

After this conversation, the trial court detailed its reasons for sentencing and imposed a sentence of thirty years at hard labor, without benefit of parole, probation, or suspension of sentence. Mr. Ambeau made no further statements to the trial court after expressing his willingness to stand in for defense counsel at defendant's sentencing. Defendant raised the issue of his counsel's absence in his pro se motion to reconsider sentence.

On review, we are constrained to agree with defendant that Mr. Ambeau's appointment as a "stand-in" attorney violated his right to counsel. An accused has the right to the assistance of counsel at every stage of criminal proceedings, including sentencing, unless this right is intelligently waived. See U.S. Const. amend. VI; La. Const. art. I, § 13; McConnell v. Rhay, 393 U.S. 2, 3-4, 89 S. Ct. 32, 33-34, 21 L. Ed. 2d 2 (1968) (per curiam); State v. White, 325 So. 2d 584, 585 (La. 1976). A sentence imposed in the absence of counsel is invalid and must be set aside. See State v. Austin, 255 La. 108, 114-15, 229 So. 2d 717, 719 (1969).

In the instant case, the trial court's providing of a "stand-in" attorney for defendant's sentencing constructively denied defendant's Sixth Amendment right to counsel. In Tucker v. Day, 969 F. 2d 155, 159 (5th Cir. 1992), the defendant was represented at his resentencing hearing by an appointed counsel who, according to the defendant, stated that he was just "standing in" for the defendant's proceeding. Finding merit in Tucker's argument that he had not been adequately

represented at resentencing, the court highlighted three important facts. First, Tucker was unaware of the presence of his appointed counsel. Second, the appointed counsel did not confer with Tucker prior to the resentencing. And third, the appointed counsel made no attempt at the resentencing to represent Tucker's interests as he failed to make any comment at the resentencing. On these bases, the Tucker court concluded that the failure of the defendant's counsel to provide any assistance constructively denied the defendant's right to counsel.

As in Tucker, the record shows no indication that Mr. Ambeau conferred at all with defendant prior to his sentencing.¹ Moreover, Mr. Ambeau made no arguments or statements to the trial court and thus made no attempt to advocate on defendant's behalf. While defendant's case differs from Tucker to the extent that the defendant herein was at least aware of Mr. Ambeau's presence, we are unable to say that this factor alone overcomes the conclusion that the use of "stand in" counsel was improper herein and prejudicial to defendant's right to counsel. The facts surrounding the "stand-in" counsel in Tucker do not differ in any significant respect from those in the instant case regarding defendant's "stand-in" attorney.

We recognize that the trial court deferred defendant's sentencing following his guilty plea so that a presentence investigation report ("PSI") could be completed and that the trial judge expressly noted at sentencing that he relied upon the contents of the PSI in determining defendant's sentence. The PSI recommended that defendant receive the maximum sentence of forty years at hard labor, without benefit of parole, probation, or suspension of sentence due to the serious nature of the instant offense and defendant's previous felony convictions. However, the PSI also contained information relating to defendant's family history, including a letter from his mother. Although the trial court deviated

¹Further, the record does not show that Mr. Ambeau had any familiarity whatsoever with defendant prior to his agreeing to stand in for the sentencing.

downward from the PSI's sentencing recommendation, actual or constructive denial of assistance of counsel at sentencing is presumed as a matter of law to have resulted in prejudice.² See Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d. 674 (1984); Tucker, 969 F. 2d at 159.

For the above reasons, we find merit in defendant's contention that his right to counsel was violated at the time of his sentencing. We hereby vacate defendant's sentence and remand for resentencing. Because defendant's second assignment of error relates to the vacated sentence, we pretermitt discussion of the excessiveness claim asserted by defendant therein.

CONVICTION AFFIRMED; SENTENCE VACATED AND REMANDED FOR RESENTENCING.

²We also do not find that the defendant's assignment of error should be rejected for his purported failure to raise his right-to-counsel issue at the time of his sentencing. Defendant adequately preserved this issue for review in his timely filed pro se motion to reconsider sentence.