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STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2015 KA 0824

STATE OF LOUISIANA

VERSUS

TROY WILLIAMS

Judgment Rendered: DEC 23 2015

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 07-13-0362

Honorable Donald Johnson, Judge

* * * * * * *

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* * * * * *

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

WELCH, J.

The defendant, Troy Williams, was charged by grand jury indictment with aggravated rape (of a child under the age of thirteen), a violation of La. R.S. 14:42 (count 1); and indecent behavior with a juvenile (of a child under the age of thirteen), a violation of La. R.S. 14:81. The defendant pled not guilty to the charges and waived his right to a trial by jury. Following a bench trial, the defendant was found guilty as charged on count 2. On count 1 (aggravated rape), the trial judge found the defendant guilty of the responsive offense of indecent behavior with a juvenile (of a child under the age of thirteen). On each count, the defendant was sentenced to a term of ten-years imprisonment at hard labor with the first two years of the sentence to be served without benefit of parole, probation, or suspension of sentence. The sentences were ordered to run concurrently. The defendant now appeals, designating two assignments of error. We affirm the convictions and sentences.

FACTS

On February 7, 2013, eleven-year-old J.S.[1] and her mother were staying at the defendant's home on Poydras Avenue in Baton Rouge. J.S.'s mother had been living with the defendant, and they had several children together; during this particular time, however, due to relationship problems, J.S.'s mother was not living with the defendant. J.S.'s mother would, instead, occasionally sleep at the defendant's house. On this particular night (February 7), J.S.'s mother woke up (apparently in the living room where she had fallen asleep) shortly before midnight and discovered J.S. was not in her bed. J.S.'s mother searched the house, calling out for J.S., but could not find her. J.S.'s mother went to the defendant's bedroom and found the door locked. She knocked on the door, and several minutes later, the defendant opened the door. The defendant then walked through the house with

[1] The victim is referred to by her initials. See La. R.S. 46:1844(W).

J.S.'s mother looking for J.S. They did not find J.S. and went back to the defendant's bedroom. When J.S.'s mother sat on the bed, which was already broken, the box-spring collapsed. J.S.'s mother looked under the bed and saw J.S. on the floor in her underwear, crying. She removed J.S. from under the bed and asked the defendant for an explanation. When the defendant failed to offer any reasons why J.S. was under his bed, J.S.'s mother had one of the older children call the police, who arrived shortly thereafter.

J.S. spoke to the police and was brought to Our Lady of the Lake Hospital. Based on what J.S. told the police, the doctor at the hospital, and her mother, as well as J.S.'s own testimony at trial, the defendant had awakened J.S. that night and told her to go to his bedroom. The defendant went to his bedroom, locked the door, and pulled down J.S.'s pants. J.S. pulled her pants back up. The defendant then apparently struggled with J.S. as he repeatedly tried to remove her pants. When J.S.'s mother knocked on the locked bedroom door, the defendant lifted the box-spring, and told J.S. (or placed her there, himself) to get under the bed. According to J.S., the defendant had been sexually abusing her since she was ten years old. She claimed the defendant had had vaginal sexual intercourse with her more than ten times; also, he performed oral sex on her and forced her to perform oral sex on him. On the night in question (February 7), J.S. indicated there was no sexual activity involved and that the only thing that had occurred was the defendant's repeated attempts to remove her pants.

The defendant testified at trial. He denied ever having had sex (vaginal or oral) with J.S. He also denied bringing J.S. to his room and trying to take off her pants on the night of February 7. According to the defendant, he regularly locked his bedroom door and, that night, when he was going to bed, he discovered J.S. in his bathroom. When J.S.'s mother began knocking on the door, he told J.S. to get under the bed. According to the defendant, he had J.S. hide so that J.S.'s mother

would not get mad at him.

ASSIGNMENTS OF ERROR NOS. 1 and 2

In these related assignments of error, the defendant argues, respectively, that the sentence imposed is excessive, and defense counsel's failure to file a motion to reconsider sentence constitutes ineffective assistance of counsel. The defendant received two ten-year concurrent sentences and, as such, we presume the defendant is attacking both sentences as excessive.

The record does not contain an oral or written motion to reconsider sentence. Louisiana Code of Criminal Procedure article 881.1(E) provides that the failure to file or make a motion to reconsider sentence precludes the defendant from raising an excessive sentence argument on appeal. Ordinarily, pursuant to the provisions of this Article and the holding of **State v. Duncan**, 94-1563 (La. App. 1st Cir. 12/15/95), 667 So.2d 1141, 1143 (*en banc per curiam*), we would not consider an excessive sentence argument. However, in the interest of judicial economy, we will consider the defendant's argument that his sentences are excessive, even in the absence of a motion to reconsider sentence, in order to address the defendant's claim of ineffective counsel. See **State v. Wilkinson**, 99-0803 (La. App. 1st Cir. 2/18/00), 754 So.2d 301, 303, writ denied, 2000-2336 (La. 4/20/01), 790 So.2d 631.

In **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the United States Supreme Court enunciated the test for evaluating the competence of trial counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process

that renders the result unreliable.

In evaluating the performance of counsel, the inquiry must be whether counsel's assistance was reasonable considering all the circumstances. **State v. Morgan**, 472 So.2d 934, 937 (La. App. 1st Cir. 1985). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. **State v. Robinson**, 471 So.2d 1035, 1038-39 (La. App. 1st Cir.), writ denied, 476 So.2d 350 (La. 1985).

Failure to file a motion to reconsider sentence in itself does not constitute ineffective assistance of counsel. However, if the defendant can show a reasonable probability that, but for counsel's error, his sentences would have been different, a basis for an ineffective assistance claim may be found. See **State v. Felder**, 2000-2887 (La. App. 1st Cir. 9/28/01), 809 So.2d 360, 370, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173.

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of cruel or excessive punishment. Although a sentence falls within statutory limits, it may be excessive. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. **State v. Andrews**, 94-0842 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 454. The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. See **State v. Holts**, 525 So.2d 1241, 1245 (La. App. 1st Cir. 1988). Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the trial court to consider when imposing sentence. While the entire

checklist of La. C.Cr.P. art. 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. **State v. Brown**, 2002-2231 (La. App. 1st Cir. 5/9/03), 849 So.2d 566, 569.

The articulation of the factual basis for a sentence is the goal of La. 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 where there has not been full compliance with La. C.Cr.P. art. 894.1. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982). The trial judge should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than confinement. See **State v. Jones**, 398 So.2d 1049, 1051-1052 (La. 1981). On appellate review of a sentence, the relevant question is whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate. **State v. Thomas**, 98-1144 (La. 10/9/98), 719 So.2d 49, 50 (*per curiam*).

The defendant argues in brief that the ten-year concurrent sentences are excessive because he is fifty years old and has several children for which he is responsible. These sentences, according to the defendant, have deprived "the five remaining children of the money and attention needed for their welfare and nurturing."

The trial judge (of the bench trial) was also the sentencing judge. During the trial, the trial judge heard the many details regarding the defendant's children, his caretaking functions, and his financial situation. Accordingly, the trial judge at sentencing was well aware of the defendant's personal history. Moreover, while not specifically mentioned by name, it is clear in his reasons for the sentences that the trial judge considered La. C.Cr.P. art. 894.1. In arriving at appropriate

sentences, the trial court stated in pertinent part:

> I've reviewed the correspondence -- handwritten letter of one page letter. I've reviewed the pre sentence [sic] report. Not to incarcerate the defendant would undermine the seriousness of the type of conduct, the age of the victim.

Whoever commits the crime of indecent behavior with juveniles on a victim under the age of thirteen when the offender is seventeen years of age or older, shall be punished by imprisonment at hard labor for not less than two nor more than twenty-five years. At least two years of the sentence imposed shall be served without benefit of parole, probation, or suspension of sentence. La. R.S. 14:81(H)(2). The record before us clearly established an adequate factual basis for the sentences imposed. The defendant lived together for several years with J.S. and her mother, and ostensibly took on the roles of guardian and caretaker. The defendant used this parental relationship to exploit J.S.'s trust and sexually abuse her. See **State v. Kirsch**, 2002-0993 (La. App. 1st Cir. 12/20/02), 836 So.2d 390, 395-396, writ denied, 2003-0238 (La. 9/5/03), 852 So.2d 1024. Considering the trial court's review of the circumstances, the nature of the crimes, and the fact that the defendant was sentenced to less than half of the maximum sentence of twenty-five years he could have received (for each sentence), we find no abuse of discretion by the trial judge. Accordingly, the sentences imposed by the trial judge are not grossly disproportionate to the severity of the offenses and, therefore, are not unconstitutionally excessive.

Because we find the sentences are not excessive, defense counsel's failure to file or make a motion to reconsider sentence, even if constituting deficient performance, did not prejudice the defendant. See **Wilkinson**, 754 So.2d at 303; **Robinson**, 471 So.2d at 1038-1039. The claim of ineffective assistance of counsel, therefore, must fall.

These assignments of error are without merit.

For the foregoing reasons, the defendant's convictions and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.