

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2001-KA-1461**
VERSUS * **COURT OF APPEAL**
PERRY J. SENEGAL * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 415-319, SECTION "I"
Honorable Raymond C. Bigelow, Judge
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Judge Patricia Rivet Murray
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(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray,
Judge Max N. Tobias, Jr.)

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**SENTENCE AMENDED, AND AFFIRMED AS
AMENDED**

Perry J. Senegal, Sr., was charged by bill of information filed on June 29, 2000, with negligent homicide in violation of La. R.S. 14:32 and with cruelty to a juvenile in violation of La. R.S. 14:93. At his arraignment on July 14th, he pleaded not guilty on both counts. However, after a two-day trial on December 5th and 6th, a six-person jury found him guilty as charged. He was sentenced on March 20, 2001, to serve five years at hard labor without benefits on the negligent homicide conviction and to serve ten years at hard labor on the cruelty to a juvenile conviction; the sentences are to run consecutively.

At trial Detective Arnold Williams testified that on January 23, 2000, about 2 a.m., he investigated the death of Perry Senegal, Jr. When he arrived at the child's residence, he found the defendant's fiancée and a three-year-old child, Brittany. The defendant and Perry Senegal, Jr., the two-year-old victim, were at the hospital, and the officer learned that the child had died. Detective Williams described Brittany Senegal, the three-year-old, as

“rather frail looking and [she] had several marks and bruises including a burn mark on her shoulder.” The fiancée and child were taken to the Child Abuse Office for interviews. When the detective went to University Hospital, he saw the body of the two-year-old boy. The detective advised both the defendant and his fiancée of their rights and placed them under arrest; they were charged with negligent homicide. They were also charged with cruelty to a juvenile as a result of their treatment of the three-year-old girl.

Dr. James Roberts of the University Hospital Pediatric Service testified that he saw young Perry Senegal, Jr. in the hospital on January 23rd. The child was with paramedics who were trying to resuscitate him when the doctor first saw him. He was not responding; the doctor noted the child was “extremely thin, looked like he kind of wasted away. He . . . had a small laceration on his chin . . . which . . . should have been attended to at some point” The doctor estimated the cut occurred several days prior to the child’s death. The child also had lesions across the back of his legs suggesting “trauma of some sort.”

Dr. Paul McGarry, an expert forensic pathologist, testified that he performed the autopsy on Perry Senegal, Jr., on January 23, 2000. He described the child as

a very emaciated young boy who measured 29 and

¾ inches in length and weighed 14 and half pounds. He had sunken eyes. He had very little fatty tissue on his body. His skin was folded. He had some recent injuries around the right side of his face. He had a cut on his chin that was not healed; it was an open cut that had not been stitched shut. He had old markings on the center of chest of other skin injuries, some down his back over his spinal processes. He had little scars at the corners of his mouth. And he was dehydrated and emaciated, undernourished.

The doctor described “the most striking finding” as the child’s “lack of any fatty tissue anywhere in the body,” and concluded “he had been not fed . . . enough calories or the right kind of food”; the result was the child looked like “a starvation victim.” The child suffered from hypertrophic pyloric stenosis, which is a thickening of the outlet of his stomach so that his stomach would have some difficulty in emptying. That condition would cause food to back up into his esophagus where it would be regurgitated into his throat and then into his lungs. The cause of young Perry’s death was a malnutrition which made him susceptible to other problems and the stomach condition which had existed for months. Pyloric stenosis is fairly common and treatable. (Treatment consists of many small meals of soft foods that can move through the narrow section of the stomach.) The child’s death was listed on the autopsy report as due to natural causes because it was not the result of any violence. The doctor opined that Perry Senegal, Jr.’s death was

due to not being fed and having an obstructed stomach. The doctor concluded the child died because of “what was not done for him” in that he did not get food or proper care. Under cross-examination, the doctor reiterated that the cause of death was primarily malnutrition and secondarily, pyloric stenosis. When he was asked if the child would show any evidence of acute illness, he answered that the child had pneumonia and a massively dilated heart. The child would appear short of breath and coughing, but over the counter pain medications would have no effect on his condition.

Ms. Rena Darensburg of the Fatality Unit with the Office of Community Services testified that she investigated the death of young Perry Senegal. She interviewed Perry Senegal, Sr., and Joyce Evans, and she saw the three-year-old girl, Brittany. She thought that the child should be seen by a physician because she was “very frail.” The paternal grandmother took the child to University Hospital. The next day Ms. Darensburg saw the child in the hospital, and as a result of the investigation, the child was placed in OCS’s custody.

Ms. Giselle Boutte, the social worker assigned to Brittany Senegal, testified that she first saw Brittany at University Hospital where the child stayed a few days before being transferred to Children’s Hospital. The child was in bed, and Ms. Boutte said she

had never seen a baby that looked like that before. She

appeared to look almost like an animal to me. Her teeth were like they were protruding out of her mouth. Her eyes were bulging

* * * *

She was extremely small. I had never seen a child that size before or in that condition. Her skin looked like it just was tapered to her bones.

When asked if the child spoke to her, Ms. Boutte answered that the child “made sounds but I didn’t know . . . what she was saying.” The child spent a month at Children’s Hospital, and Ms. Boutte visited her three times a week. Brittany improved almost immediately. On March 15th a meeting between Perry Senegal, Sr. and his daughter occurred. Her grandmother was holding Brittany prior to the defendant’s entering the room, and the child seemed comfortable. However, when her father walked in, she became quiet and her body stiffened. She would not go to her father initially. When asked if Brittany continued to improve physically, Ms. Boutte noted that the child could not walk when she was admitted to the hospital, but less than a year later at the time of trial, the child was running and jumping.

Dr. Scott Benton, an expert in pediatric forensic medicine, testified that he examined Brittany Senegal in January in the emergency room at Children’s Hospital. He described her as “a very irritable, crying, very thin, emaciated little girl with multiple scars on her body.” Brittany, who on admission to University Hospital weighed twenty-one pounds and was fed

meals there for two days, presented at Children's Hospital with a very distended stomach. An x-ray showed her stomach full of food. At University Hospital, she had been eating so fast that she was not chewing her food. The doctor described her as having classic symptoms of severe malnutrition such as gluteal wasting of the butt muscles and lanugo or hair along the back. Pictures of the child were shown to the jury and the doctor pointed out a scar on her chin, the fact that her two top teeth were missing, scars around her mouth, looping scars on her abdomen, scratches on both sides of her arms (non-self induced fingernail scratches, he guessed), grid pattern burns on her left shoulder, her right forearm, and her left thigh, and squared, symmetric injuries on her lower left leg. None of the child's scars appeared to be from typical accidental injuries. In one month at Children's Hospital, Brittany gained thirteen pounds. When she arrived at the hospital she was unable to talk, but after ten months of speech therapy, she could speak. She now wears a patch over her right eye because of a significant previous brain injury that affected her left optic nerve. That nerve had atrophied from disuse, and the patch forces the left eye and that part of the brain to develop.

The doctor described the child's development in the hospital: it took two months to relieve her Grade Three malnourishment so that she could

tolerate therapy; then baseline testing indicated she had a development level of a year-old child. She could not walk, talk, or feed herself, and her visual problems kept her from learning motor skills. Although Brittany has progressed since she began treatment in January, Dr. Benton did not think that she would eventually catch up with other children her age. He predicted her injuries would have a “permanent and lasting affect,” [sic] meaning “she will be slower than her same age group peers.” When asked about similarities between Brittany and her younger brother’s condition, the doctor, pointing to pictures of Perry Senegal, Jr. shown to the jury, said the boy showed the same temporal wasting, sunken eyes, and prominent bones. He concluded the boy was “severely starved.”

Comparing Brittany to the average child, the doctor noted that the average child weighs thirty pounds at three and thirty-five pounds at four years of age; Brittany was three years and seven months old in January of 2000 when she weighed twenty-one pounds. The average one-year-old weighs twenty-one pounds. The circumference of Brittany’s head was smaller than normal. The doctor commented that the brain’s great period of growth is between birth and three years of age and the brain is almost adult size by the time a child is five. Food deprivation limits brain development.

Comparing Perry Senegal, Jr. to the average child, the doctor noted

that a two-year-old normally weighs twenty-five pounds and a three-year-old thirty pounds; Perry was thirty months old and weighed fourteen and one-half pounds—what a normal four-month-old baby would weigh. When asked about “crack baby syndrome,” the doctor answered that there was no such syndrome. He asserted that studies have shown no long-term effect on children of drug addicted mothers other than a slight decrease in head size and in cognition, and opined that the decrease is not statistically significant. Dr. Benton asserted the press had missed the point in publicizing the problems of children whose mothers were addicted to cocaine. He testified that a child’s difficulty does not occur when it is exposed to cocaine in the womb, but occurs after birth, when it is raised by a mother using cocaine. The doctor stated that in his opinion neither Perry Senegal, Jr. nor Brittany Senegal suffered lasting effects from their mother’s use of cocaine. He found instead that the major issues of concern were starvation and malnutrition. Perry’s stomach condition was treatable if he had been taken to the doctor, and Brittany was close to death from starvation when she was first seen at the hospital.

Ms. Shirley Paige, the defendant’s mother, testified that when she visited her grandchildren at her son’s home, she found Brittany to be a happy child and Perry, a reserved one. She saw her son interacting with the

children as a loving father would. She never saw her son or his fiancée withhold food from the children. Brittany could walk and talk, according to Ms. Paige; however, when asked if Brittany could ask for what she wanted, Ms. Paige replied that Brittany “never asked for anything.” Ms. Paige denied telling the staff at the hospital that Brittany could not walk or talk. When Perry Senegal, Sr., visited his daughter in the hospital and Ms. Paige was holding her, the child did not tense up when her father came into the room. Although she knew they were small for their ages, Ms. Paige never knew her grandchildren to be ill. Under cross-examination, Ms. Paige said she saw her grandchildren about once every six weeks. She stated that she had suggested that her son take the children to the doctor for their shots and to find out why they were so small. She also noted that Brittany constantly bumped into things because something was wrong with her eyes. Ms. Paige agreed that Joyce Evans, her son’s fiancée, could not take good care of the children because she was always sick. When Ms. Paige saw the children they were in bed or watching cartoons; they were never playing. Ms. Paige denied telling Ms. Darensburg that she did not tell anyone about the state of the children because she was afraid of what her son would do to her, and she claimed that she was told that the reason the children were small was that their mother was on drugs when she was pregnant.

Perry Senegal, Sr., the forty-four-year-old defendant who works as a pumping plant operator for the Sewerage and Water Board of New Orleans, testified that Kim Schexnayder, not Joyce Evans, is the mother of the children. When Brittany and Perry were born, they lived with their mother, who had four older children. Mr. Senegal stated that he provided for his children while they were in their mother's custody. In January of 1998, he telephoned Ms. Schexnayder, and when one of the older children answered the telephone, he learned that she had left the children alone in the house. He called Child Protection Services and the New Orleans Police Department to report the situation. As a result, the older children were placed in foster homes, and he took custody of Brittany and Perry. When he took the children home, he noticed that both had cuts all over their "bottoms." Joyce Evans helped him care for the children, and she too was charged in this case; however, at the time of trial she was in University Hospital having recently suffered a stroke. Mr. Senegal stated that he never starved or beat his children or harmed them in any way. His children regularly ate hamburgers, fries, pizzas, potato chips, cold cuts, and snack foods. Mr. Senegal thought his children somewhat under weight but not malnourished. He did think it strange that Perry could not walk when he was thirty months old; he claimed Brittany walked at nine months old. He attributed their problems to the fact

that their mother abused drugs and alcohol during her pregnancy. Mr. Senegal testified that on the evening of January 21, 2000, Perry had a runny nose and he vomited his dinner. Mr. Senegal thought his son was catching a cold and gave him Tylenol. The next evening the child was wheezing and again was given an over the counter medication. Mr. Senegal put Perry to bed about 6 p.m. and checked on him every fifteen to twenty minutes. Perry seemed to be comfortable until 2 a.m. when Mr. Senegal found the child with his eyes open but unresponsive. His body was limp when Mr. Senegal picked him up, and he immediately began to perform CPR on the child; he also called 911.

Mr. Senegal explained that even though he had health insurance through his workplace, he could never get the children seen at the Ochsner Clinic because he had no health records for them. Whenever he called to make an appointment for them at Ochsner Clinic, he stated that they could not be seen without their medical records. He tried unsuccessfully to find records at medical clinics the children's mother might have used. The children had no serious illness during the two years of his custody, and so he never took them to a doctor. Mr. Senegal claimed his daughter could walk and talk, but he acknowledged she had a nervous condition which caused her to scratch herself and to pull her hair out. He explained that he had cut her

hair very short so that the patches where her hair was missing would not look so bad. He discussed her three scars from burns as occurring once when she fell on the floor furnace and burned her shoulder, the back of one arm and the back of one thigh. Perry got the cut on his chin when he fell off his potty-chair. Mr. Senegal put ice on the cut and then used a prescription antibiotic ointment left over from his grandmother's illness. When he first saw Brittany after she had been in Children's Hospital more than a month, he could hardly recognize her because "they had blown her up so big." He claimed that Brittany was not afraid of him.

Under cross-examination, Mr. Senegal admitted that he did not take Brittany to the doctor when she fell and lost her front teeth or when she fell on the floor furnace and burned herself in three places, but he explained he did not think it necessary. He acknowledged he never allowed Brittany and Perry to see their half-brother and sisters after he assumed custody; he said there was no transportation arrangement and he could not take them.

Before addressing the assignment of error, we note an error patent. The defendant was sentenced to serve five years on the negligent homicide conviction without benefits. La. R.S. 14:32 provides

C. Whoever commits the crime of negligent homicide shall be imprisoned with or without hard labor for not more than five years, fined not more than five thousand dollars, or both. However, if the victim was killed as a result of receiving a

battery and was under the age of ten years, the offender shall be imprisoned at hard labor, without benefit of probation or suspension of sentence, for not less than two nor more than five years.

While Perry Senegal, Jr., was under the age of ten, there was no testimony at trial suggesting that he died as a result of a battery, nor did the bill of information charging the defendant with negligent homicide mention a battery. Thus, Perry Senegal, Sr., should have been sentenced under the first provision and should not have received the prohibition on benefits. His sentence is illegal, and an illegal sentence may be corrected at any time by the court imposing the sentence or by an appellate court on review. La. C.Cr.P. art. 882. Accordingly, we delete that portion of the sentence prohibiting benefits.

In a single assignment of error, the defendant contends that the trial court imposed an unconstitutionally excessive sentence. He was sentenced to the maximum terms under La. R.S. 14:32 and La. R.S. 14:93 of five years and ten years, respectively, and the sentences were imposed to run consecutively.

A review of the record reveals that the defendant did not make a motion to reconsider sentence in which he specifically stated his objections to his sentence as mandated by La. C.Cr.P. art. 881.1. Nevertheless, the sentencing transcript reflects that a contemporaneous objection to the

sentence was made at sentencing; therefore, the defendant's right to contest only the bare claim of the constitutional excessiveness of his sentences is preserved. State v. Mims, 619 So. 2d 1059 (La. 1993); State v. Thompson, 98-0988 (La. App. 4 Cir. 1/26/00), 752 So. 2d 293, writ denied, 2001-0087 (La. 11/2/01), ____ So. 2d ____.

Article I, Section 20 of the Louisiana Constitution of 1974 provides that “[n]o law shall subject any person ... to cruel, excessive or unusual punishment.” A sentence within statutory limits is constitutionally excessive if it is “grossly out of proportion to the severity of the crime” or is “nothing more than the purposeless imposition of pain and suffering.” State v. Caston, 477 So.2d 868, 871 (La. App. 4 Cir. 1985). Generally, a reviewing court must determine whether the trial judge adequately complied with the sentencing guidelines set forth in La C.Cr.P. art. 894.1 and whether the sentence is warranted in light of the particular circumstances of the case. State v. Soco, 441 So.2d 719 (La. 1983); State v. Quebedeaux, 424 So.2d 1009 (La. 1982).

If adequate compliance with the Article 894.1 is found, the reviewing court must determine whether the sentence imposed is too severe in light of the particular defendant and the circumstances of the case, keeping in mind that maximum sentences should be reserved for the most egregious violators

of the offense so charged. State v. Caston, 477 So.2d 868 (La. App. 4 Cir. 1985).

In this case, the trial judge ordered a pre-sentencing investigatory report. At the sentencing hearing the defendant's mother spoke on his behalf. She noted that he was a college graduate and had always been employed. She suggested that his fiancée's ill health and the burden of caring for the two children had overwhelmed him so that his good intentions did not protect his children. She insisted he would never intentionally harm them. Mr. Joseph Senegal, the defendant's father, also addressed the court and made essentially the same arguments.

At sentencing the judge commented that this was a "difficult" and "troubling" case, he continued:

I was troubled by these photographs . . . for a long time [T]o have two children . . . whether they were thrust upon you or –you had them their whole life—to allow the children to get in the stage that they were in when the younger child died is unforgivable to a parent. . . . I don't see how you can live with yourself knowing that you allowed your son to starve to death.

The judge then considered the sentencing guidelines in La. C.Cr.P. art. 894.1 and found as aggravating factors that the defendant manifested deliberate cruelty toward his children, had knowledge that the victims were

incapable of resistance, used his position to facilitate the commission of this offense, and created a risk of death or great bodily harm to more than one person. As to the mitigating circumstances, the judge found the defendant to be a first offender and that the crime was a result of circumstances unlikely to recur. The judge then spoke of his incredulity that the defendant had never taken his obviously ailing children to the doctor in the two-year period of his custody. The judge noted that the defendant had insurance and had gone to the doctor himself during that period. The defendant had not been able to explain his actions to the judge or the jury. The judge commented finally that the defendant should have been charged with more serious offenses.

We find that the defendant's two maximum consecutive terms are not excessive. The many witnesses at trial spoke of the appalling appearance of the children, one who starved to death and the other who was very near death from starvation. Perry Senegal, Jr.'s weight of fourteen and one-half pounds was about one-half of what a normal thirty month child should weigh. Brittany Senegal's weight of twenty-one pounds was appropriate for a year-old child, not one forty-three months old. Moreover, her many injuries and scars indicate at the very least years of suffering from a deliberate cruelty. Neither Perry nor Brittany could walk, and Brittany could

not talk. The girl suffered irremediable brain damage while in her father's custody. The father's denial of responsibility for the state of his children is chilling, and his claim to have fed the children and not to have noticed their obvious state of malnutrition is simply unbelievable. The imposition of these sentences on this defendant is not grossly out of proportion to the severity of his crimes.

Accordingly, the defendant's convictions are affirmed. His ten-year sentence for cruelty to a juvenile is affirmed. His five-year sentence for negligent homicide is amended so as to delete the prohibition on benefits, and as amended the sentence is affirmed.

SENTENCE AMENDED, AND AFFIRMED AS

AMENDED