

STATE OF LOUISIANA

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NO. 2014-KA-0408

VERSUS

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COURT OF APPEAL

KENDRICK BOYD

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 491-628, SECTION "H"
Honorable Camille Buras, Judge

* * * * *

Judge Tiffany G. Chase

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(Court composed of Judge Rosemary Ledet, Judge Paula A. Brown, Judge Tiffany G. Chase)

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AFFIRMED
July 25, 2018

Kendrick Boyd (hereinafter “Mr. Boyd”) appeals the resentencing resulting from his carjacking conviction. Mr. Boyd lists two assignments of error arguing that his sentence is excessive under Article I, Section 20 of the Louisiana Constitution and that his trial counsel, at sentencing, rendered ineffective assistance under the Sixth Amendment to the United States Constitution and Article I, Section 13 of the Louisiana Constitution. After consideration of the record before this Court and the applicable law, we affirm Mr. Boyd’s sentence.

The underlying facts of this case have previously been before this Court. Following an appeal of his conviction, this Court affirmed Mr. Boyd’s carjacking conviction; vacated the sentence due to the trial court’s failure to dispose of post-trial motions before imposing sentencing; and remanded the matter for resentencing. *See State v. Boyd*, 2011-1129, p. 8 (La.App. 4 Cir. 11/21/12), 104 So.3d 642, 646.

On remand, Mr. Boyd was adjudicated a second felony offender under the Habitual Offender Law and sentenced to thirty-five years, without the benefit of parole, probation or suspension of sentence. *See State v. Boyd*, 2014-0408, pp. 1-2 (La.App. 4 Cir. 2/11/15), 164 So.3d 259, 261. Mr. Boyd appealed his sentence and

listed two assignments of error: first, that his sentence was excessive under Article I, Section 20 of the Louisiana Constitution; and second, that his trial counsel, at sentencing, rendered ineffective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, Section 13 of the Louisiana Constitution. *Id.*, 2014-0408 at pp. 2-3, 164 So.3d at 261-62. This Court retained jurisdiction and issued the following decree:

We remand Kendrick Boyd's ineffective-assistance-of-counsel-at-sentencing claim to the district court which shall ensure conflict-free counsel to represent Mr. Boyd, conduct a full evidentiary hearing, and rule on the merits of the claim. Upon conclusion of the proceedings on remand, the district court shall cause a supplemental record of the proceedings on remand to be filed in this court in these proceedings.

Id., 2014-0408 at p. 10, 164 So.3d at 265. On remand the trial court did not find that trial counsel's representation of Mr. Boyd, at the time of sentencing, was ineffective. Following the evidentiary hearing, of August 24, 2017, the record was supplemented with the transcript, the judgment and Mr. Boyd's medical records.¹

Mr. Boyd's assignments of error are identical to those presented to this Court in his previous appeal, but were not fully addressed. *Id.*, 2014-0408 at pp. 2-3, 164 So.3d at 261-62. Thus, we will address the issues raised in light of the supplemental record.

Excessive Sentence

Assignment of Error 1:

Kendrick Boyd's sentence of thirty-five years for an unarmed carjacking as a second offender (based on a prior conviction for marijuana possession) is excessive under the circumstances of this case; the trial court failed to give proper consideration to the mitigating factors,

¹ The medical records complained of were produced at the hearing on remand.

particularly the fact that Mr. Boyd suffers from bipolar disorder; the trial court's reasoning for imposing such a harsh sentence is seriously flawed, and on certain matters, the trial court erroneously relied on "facts" which were contrary to the evidence.

By this assignment of error, Mr. Boyd presents several arguments. Specifically, that his sentence is excessive because he was unarmed during the carjacking; the trial court failed to consider his bipolar disorder during sentencing; and the trial court erred in relying on facts contrary to the evidence. Mr. Boyd maintains that he was diagnosed with bipolar disorder when his mother died of cancer when he was nineteen years old. He submits that he was in an "altered state of mind" when he decided to take the vehicle at the gas station. He contends that the trial court should have considered these factors when imposing his sentence.

The Louisiana Supreme Court has provided guidance when evaluating a claim of excessive sentence. Specifically, the Court held:

Louisiana Constitution of 1974, art. I, § 20 provides, in pertinent part, that "[n]o law shall subject any person to ... excessive ... punishment." (Emphasis added). Although a sentence is within statutory limits, it can be reviewed for constitutional excessiveness. *State v. Sepulvado*, 367 So.2d 762, 767 (La. 1979). A sentence is unconstitutionally excessive when it imposes punishment grossly disproportionate to the severity of the offense or constitutes nothing more than needless infliction of pain and suffering. *State v. Bonanno*, 384 So.2d 355, 357 (La.1980). A trial judge has broad discretion when imposing a sentence and a reviewing court may not set a sentence aside absent a manifest abuse of discretion. *State v. Cann*, 471 So.2d 701, 703 (La. 1985). On appellate review of a sentence, the relevant question is not whether another sentence might have been more appropriate but whether the trial court abused its broad sentencing discretion. (internal citations omitted).

State v. Smith, 2001-2574, pp. 6-7 (La. 1/4/03), 839 So.2d 1, 4. *See also State v. Carter*, 2013-0074, p. 15 (La.App. 4 Cir. 12/11/13), 131 So.3d 153, 163. We will

review this matter to determine whether the sentence imposed is grossly disproportionate to the severity of the crime committed and whether the trial court abused its discretion in imposing Mr. Boyd's sentence.

La. R.S. 14:64.2(B) provides that "[w]hoever commits the crime of carjacking shall be imprisoned at hard labor for not less than two years and for not more than twenty years, without benefit of parole, probation or suspension of sentence." At the multiple offender hearing on July 7, 2011, the trial court found Mr. Boyd to be a second offender. Under the Habitual Offender Law, "if the second felony is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then the sentence to imprisonment shall be for a determinate term not less than one-half the longest term and not more than twice the longest prescribed for a first conviction." La. R.S. 15:529.1(A)(1). As such, Mr. Boyd faced a sentence ranging between ten and forty years. The trial court sentenced Mr. Boyd to thirty-five years imprisonment without the benefit of parole, probation or suspension of sentence.

The transcript from the multiple offender hearing reveals that the trial court sentenced Mr. Boyd utilizing the sentencing guidelines set forth in La. C.Cr. P. art. 894.1. When determining whether a sentence is grossly disproportionate to the crime, we consider the punishment and the crime in light of the harm done to society and determine whether that penalty is so disproportionate that it shocks our sense of justice. *State v. Bonanno*, 384 So.2d 355, 358 (La. 1980). The trial court found that Mr. Boyd placed other citizens in peril and considered this as a factor in his sentencing. The trial court cited to the fact that Mr. Boyd drove the car across the Crescent City Connection, with a juvenile in the car, at a busy hour in the morning and ran the car into the side of the bridge.

The trial court further reasoned that although Mr. Boyd argues that his second offender status was based on a prior conviction of a less serious offense for marijuana possession, marijuana is a controlled dangerous substance which continues to be illegal in Louisiana. The trial court also noted Mr. Boyd's criminal history dating back to 2006.² It concluded that on the date of the incident, Mr. Boyd's actions endangered the safety of the victim and others. The record also reflects that Mr. Boyd's counsel advised the trial court that Mr. Boyd had been previously diagnosed with a mental health issue. After reviewing the evidence and testimony, the trial court imposed a sentence of thirty-five years, without the benefit of parole, probation or suspension of sentence, which is within the statutory guidelines for a second offender. Taking into account the harm done to society, coupled with the crime committed, we do not find the sentence imposed by the trial court "shocks our sense of justice." Therefore, we find Mr. Boyd's sentence was not grossly disproportionate to the severity of the crime and the trial court did not abuse its discretion in imposing the sentence. Accordingly, we find no merit to this assignment of error.

Ineffective Assistance of Counsel

Assignment of Error 2:

Trial counsel rendered ineffective assistance relating to sentencing by failing to investigate Kendrick Boyd's mental illness, *i.e.*, his diagnosed bipolar disorder; by failing to obtain and present documentation to the court to show that Mr. Boyd suffers from the disorder; and by failing to obtain and present testimony from an expert, *e.g.*, a psychiatrist or psychologist, who could explain the nature of bipolar disorder to the court and who could offer an opinion on whether the mental defect might have

² The trial court considered that as an adult Mr. Boyd's previous criminal history did not involve a crime of violence, arrests and/or convictions.

influenced Mr. Boyd's behavior on the day of the incident.

By this assignment of error, Mr. Boyd argues that his trial counsel was ineffective by failing to investigate his mental illness and present documentation and expert testimony from a psychiatrist regarding his bipolar disorder. He maintains that the record is unclear whether the trial court took his mental illness into consideration at sentencing. At the hearing on remand, counsel for Mr. Boyd stated that medical records from University Hospital, where Mr. Boyd was held on a "seventy-two hour hold"³, were obtained and reflect that he was discharged to DePaul's Hospital, a mental health facility which is now closed. Mr. Boyd maintains that had a record search been conducted at the time of sentencing, eight years ago, the records would have been located and documented an actual diagnosis of bipolar disorder. The State argues that whether or not the records could have been located by Mr. Boyd's original counsel is speculative and thus, Mr. Boyd has not proven ineffective assistance of counsel.

As this Court held, an ineffective assistance of counsel at sentencing claim is not cognizable in post-conviction proceedings when the sentence imposed by the trial judge falls within the authorized range of the sentencing statute. *Boyd*, 2014-

³ La. R.S. 28:52.2 provides:

- A. Any person who has a mental illness or person who is suffering from a substance-related or addictive disorder desiring admission to a treatment facility for diagnosis or treatment of a psychiatric disorder or a substance-related or addictive disorder and who is deemed suitable for formal voluntary admission by the admitting physician may be so admitted upon his written request.
- B. A patient admitted under the provisions of this Section shall not be detained in the treatment facility for longer than seventy-two hours after making a valid written request for discharge to the director or administrator of the treatment facility unless an emergency certificate is executed pursuant to R.S. 28:53, or unless judicial commitment is instituted pursuant to R.S. 28:54.

0408, p. 8, 164 So.3d at 264. “Because Mr. Boyd’s claim is not cognizable in a post-conviction proceeding, we cannot refer the claim to a post-conviction proceeding and must consider on direct review his claim that counsel rendered ineffective assistance at sentencing.” *Id.*

Under *Strickland v. Washington*, the defendant must first prove that counsel’s representation was deficient and secondly, that the deficient performance prejudiced the defense. 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *State v. Jackson*, 1997-2220, p. 8 (La.App. 4 Cir. 5/12/99), 733 So.2d 736, 741. In deciding an ineffective assistance of counsel claim, a court is not required to address both components if the defendant makes an insufficient evidentiary showing on one component. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069.

To prove the first component of deficient representation, a defendant must show that counsel made errors so serious that he was not operating as the type of counsel guaranteed by the Sixth Amendment to the United States Constitution. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. The second component of a prejudiced defense, requires the defendant to show that the error, by counsel, was so severe that it deprived the defendant of a fair trial. *Id.*; *State v. McGee*, 1998-1508, p. 4 (La.App. 4 Cir. 3/15/00), 758 So.2d 338, 342. As such, Mr. Boyd must prove that his trial counsel’s performance, at sentencing, was deficient and that he was prejudiced by the deficient performance. The burden rests with the defendant to show that there is a reasonable probability that, but for counsel’s deficient performance the result of the proceeding would have been different. *McGee*, 1998-1508, pp. 4-5, 758 So.2d at 342. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

Although the trial court was previously aware of Mr. Boyd's mental health issues, it was directed by this Court to conduct a full evidentiary hearing in order to consider evidence regarding his mental health. Mr. Boyd and the State agree that obtaining his medical records proved to be a difficult task due to the closure of the facilities. However, Mr. Boyd argues that the medical records could have been obtained at the time of his sentencing had his previous counsel conducted a search for the records. The trial court considered this argument and ultimately determined that it had no merit. On remand, the trial court considered Mr. Boyd's recently obtained medical records and found that his counsel was not ineffective regarding representation at the time of sentencing.

As we have previously opined, the trial court responsible for imposing the sentence is in the best situation to determine whether any deficiency by the trial counsel resulted in a harsher sentence for Mr. Boyd. *Boyd*, 2014-0408 at p. 9, 164 So.3d at 265. The trial court did not find deficiencies in Mr. Boyd's counsel's representation. Since Mr. Boyd has not proven that his counsel's representation was deficient, we need not consider the second component, under *Strickland*, of whether his counsel's deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069. We find the trial court did not err in concluding counsel's representation of Mr. Boyd, at sentencing, was not ineffective. Accordingly, we find no merit to this assignment of error.

Conclusion

After a thorough review of the record, we affirm Mr. Boyd's sentence.

AFFIRMED