Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **10th day of December, 2021** are as follows:

PER CURIAM:

2021-K-00174 ***STATE OF LOUISIANA VS. NOE A. AGULIAR-BENITEZ AKA NOE AGUILAR-BENITEZ (PARISH OF JEFFERSON)***

REVERSED. SEE PER CURIAM.

Hughes, J., dissents and would affirm the decision of the court of appeal.
Crichton, J., additionally concurs and assigns reasons.
Crain, J., additionally concurs and assigns reasons.

SUPREME COURT OF LOUISIANA

No. 2021-K-00174

STATE OF LOUISIANA

VS.

NOE A. AGULIAR-BENITEZ AKA NOE AGUILAR-BENITEZ

On Writ of Certiorari to the Court of Appeal, Fifth Circuit, Parish of Jefferson

PER CURIAM:

On November 10, 2015, a Jefferson Parish jury unanimously found respondent guilty of attempted aggravated rape,[1] La. R.S. 14:42, 14:27; and sexual battery, La. R.S. 14:43.1. The evidence presented at trial established that respondent, while a guest in the home, sexually abused an 8-year-old child who resided there. As part of that abuse, he raped or attempted to rape her. Respondent claimed the offenses occurred during a single incident; the victim described repeated abuse.

The trial court sentenced respondent to serve the statutory maximum sentences of 50 years imprisonment at hard labor for attempted aggravated rape and 99 years imprisonment at hard labor for sexual battery, to run concurrently and without parole eligibility.[2] The court of appeal vacated the sentences, and remanded to the trial court with instructions to rule on respondent's motion for new trial before resentencing. *State v. Aguliar-Benetiz*, 16-336 (La. App. 5 Cir. 12/7/16), 206 So.3d 472.

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[1] Respondent was charged with aggravated rape. The jury found him guilty of the lesser included offense of attempted aggravated rape. By 2015 La. Acts 184, aggravated rape was redesignated as first degree rape.

[2] Because the victim was under 13 years of age, and respondent is 17 years of age or older, the sentencing range for sexual battery is not less than 25 years nor more than 99 years imprisonment at hard labor, with at least 25 years of the sentence imposed to be served without parole eligibility. La. R.S. 14:43.1(C)(2).

On remand, the trial court denied respondent's motion for new trial before resentencing him to the same terms of imprisonment. The court of appeal affirmed the convictions but vacated the sentences as unconstitutionally excessive, and remanded for resentencing a second time. The court of appeal suggested sentencing ranges of 35–40 years imprisonment for attempted aggravated rape, and 35–55 years imprisonment for sexual battery. *State v. Aguliar-Benitez*, 17-361 (La. App. 5 Cir. 12/10/18), 260 So.3d 1247, *writ denied*, 2019-0147 (La. 6/3/19), 272 So.3d 543.

On remand, the trial court resentenced respondent to serve 40 years imprisonment at hard labor for attempted aggravated rape and 75 years imprisonment at hard labor for sexual battery, to run concurrently and without parole eligibility. The court of appeal affirmed the 40-year sentence for attempted aggravated rape,[3] but vacated the 75-year sentence for sexual battery as unconstitutionally excessive, and remanded for resentencing a third time. The court of appeal found the trial court failed to offer a compelling reason for exceeding the sentencing range it previously suggested. *State v. Aguliar-Benitez*, 20-32 (La. App. 5 Cir. 12/30/20), 308 So.3d 1259.

We granted the State's application to determine whether the trial court, after the second remand, abused its discretion in imposing a sentence for sexual battery that, while it is 24 years less than the sentence originally imposed, is still 20 years greater than the maximum recommended by the court of appeal. After reviewing the record, we find that the trial court did not abuse its broad discretion in sentencing following the second remand. Furthermore, we respectfully disagree with the court of appeal's emphasis on whether the trial court articulated a sufficient justification for departing from the court of appeal's recommended sentencing range. Accordingly, we reverse the court of appeal in part and reinstate the 75-year sentence

[3] The sentence for attempted aggravated rape is no longer at issue, so it is not discussed further in this opinion.

imposed by the trial court for sexual battery.

As stated above, the court of appeal (in respondent's second appeal) found that the originally imposed sentence of 99 years imprisonment for sexual battery is unconstitutionally excessive. *Aguliar-Benitez*, 17-361, pp. 21–26, 260 So.3d at 1263–66. Acknowledging that defendant committed the crime by exploiting a position of trust, the court of appeal nonetheless found that imposing the maximum sentence was not justified because respondent was not among the worst class of offenders, and the circumstances of the crime were not among the most serious violations of that offense. In particular, the court of appeal found it significant that "there is little evidence to prove a prolonged pattern of abuse nor that penetration occurred . . . ." *Id.*, 17-361, p. 22, 260 So.3d at 1247. The court of appeal also observed that respondent had no prior criminal record.

After surveying the jurisprudence, the court of appeal "suggest[ed] a sentence of thirty-five to fifty-five years for the conviction of sexual battery to run concurrently with the sentence for attempted aggravated rape would be a constitutionally reasonable sentence." *Id.*, 17-361, p. 26, 260 So.3d at 1266. The court of appeal observed that it recommended this sentencing range pursuant to La.C.Cr.P. art. 881.4(A), which provides: "If the appellate court finds that a sentence must be set aside on any ground, the court shall remand for resentence by the trial court. The appellate court may give direction to the trial court concerning the proper sentence to impose."

Following the second remand, the trial court heard argument before resentencing defendant to a term of imprisonment of 75 years without parole eligibility. The trial court observed that respondent's self-serving claim that the offenses were committed during a single occasion was contradicted by the victim's testimony. The trial court emphasized that respondent was a trusted family friend who responded to the kindness of the victim's family—who took him into their home

when he had nowhere to stay—by molesting the young victim, who was clearly traumatized by the abuse.

After reviewing two appellate decisions[4] that affirmed sentences imposed after remand that were higher than the range previously recommended by the appellate court, the court of appeal concluded that "before this Court will affirm a sentence upon resentencing that is greater than the recommendation of the first reviewing panel, the trial court must articulate some compelling reason, or provide additional pertinent information that was not before the first reviewing panel, that justifies the new sentence." *Aguliar-Benitez*, 20-32, p. 12, 308 So.3d at 1268. Because the trial court offered reasons for imposing a 75-year sentence on remand that were already supported by the record when it recommended a sentencing range of 35–55 years, the court of appeal found the trial court had not provided a sufficient justification for imposing a sentence outside of that range.

Judge Molaison dissented from this portion of the court of appeal's ruling, and would affirm the 75-year sentence. *Aguliar-Benitez*, 20-32, pp. 1–9, 308 So.3d at 1273–78 (Molaison, J., dissents in part). As an initial matter, the dissent observed that sexual battery does not require a prolonged pattern of abuse or penetration, and therefore the presence or absence of these circumstances was not particularly dispositive as to whether the sentence imposed is unconstitutionally excessive. With regard to Article 881.4, the dissent observed that while it authorizes that an "appellate court *may* give direction to the trial court concerning the proper sentence to impose," it also contains the prohibition that an "appellate court *shall not* set aside a sentence for excessiveness if the record supports the sentence imposed." According to the dissent, the sentencing range suggested previously by the court of appeal was simply that—a suggestion—and the trial court is best situated to determine a fair and

[4] *State v. Dixon*, 19-7 (La. App. 5 Cir. 12/30/19), 289 So.3d 170, *writ denied*, 2020-00143 (La. 7/17/20), 298 So.3d 176; *State v. Arceneaux*, 19-472 (La. App. 5 Cir. 1/29/20), 290 So.3d 313, *writ denied*, 2020-00324 (La. 5/14/20), 296 So.3d 608.

appropriate sentence for the criminal conduct, which determination should be upheld unless the record shows that broad sentencing discretion is abused.

Respondent contends that to reverse the court of appeal here would be to limit appellate courts to the "rote approval of any sentence within the statutory range that the trial court may impose." Brief, pp. 9–10. We disagree. It is well settled that sentences within the statutory sentencing range can be reviewed for constitutional excessiveness. *State v. Sepulvado*, 367 So.2d 762 (La. 1979). On appellate review of 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. Cook*, 95-2784, p. 3 (La. 5/31/96), 674 So.2d 957, 959 (quoting *State v. Humphrey*, 445 So.2d 1155, 1165 (La. 1984)), *cert. denied*, 519 U.S. 1043, 117 S.Ct. 615, 136 L.Ed.2d 539 (1996). In this context, a trial court "abuses its sentencing discretion only when it contravenes the prohibition of excessive punishment in La. Const. art. I, § 20, i.e., when it imposes 'punishment disproportionate to the offense.'" *State v. Soraparu*, 97-1027 (La.10/13/97), 703 So.2d 608 (quoting *State v. Sepulvado*, 367 So.2d at 767)).

The court of appeal acknowledged this jurisprudence but expressed concern that its prior review of the maximum 99-year sentence must not become a "meaningless exercise." *Aguliar-Benitez*, 20-32, p. 10, 308 So.3d at 1268. Therefore, the court of appeal focused its attention primarily on determining whether the imposition of the 75-year sentence, which was outside the range it had recommended, was sufficiently justified by the trial court following remand. While we share the court of appeal's concern for the efficient use of appellate resources, we ultimately agree with the dissent that the trial court was not bound to adhere to the sentencing range suggested by the court of appeal, and further that the record does not support a determination that the trial court abused its broad discretion in sentencing.

However, we cannot help but note the lack of judicial economy demonstrated here by repeated trips up and down the appellate ladder, and three tries to sentence the respondent. Indeed, this is not the first case this court has seen in which the trial court chooses not to follow the directives of the court of appeal or this court on resentencing. *See, e.g., State v. Ste. Marie*, 2001-1253 (La. App. 3 Cir. 4/10/02), 824 So.2d 358, *writ denied*, 2002-1117 (La. 12/19/02), 835 So.2d 1288; *State v. Harris*, 95-1272 (La. 9/29/95), 661 So.2d 142; *State v. Telsee*, 425 So.2d 1251 (La. 1983). It may be more efficient for a trial court that disagrees with a court of appeal's sentencing directive to adhere to it on remand regardless, while articulating reasons for the court's disagreement as to the appropriateness of the sentence, leaving the resolution of the conflicting views for this court's ultimate resolution.[5]

When a sentence bounces back and forth between a trial and appellate court repeatedly like this one has, an appellate court has a few options to carefully consider. The appellate court might exercise its authority, pursuant to La.C.Cr.P. art. 881.4(B), to remand for resentencing before a judge other than the judge who imposed the initial sentence. *See, e.g., State v. Ste. Marie, supra*. Under the right circumstances, the appellate court can instead amend the sentence itself. *See Telsee, supra*. A court of appeal should weigh those options carefully, however, and exercise them sparingly while remaining cognizant of the trial court's duty, and broad discretion while carrying out that duty, to impose a sentence within the statutory limits established by the legislature.

Nonetheless, after reviewing the record, we do not find that the trial court abused its broad sentencing discretion.[6] We do not find that the imposed punishment

[5] Such a procedure presupposed compliance with the requirements of La.C.Cr.P. art. 881.2 in order that the issue be preserved for review.

[6] While a pre-sentence report is not mandatory, La.C.Cr.P. art. 875, if the trial court had exercised its discretion to order a PSI, it might have been of considerable utility. We do not find that the trial court abused its discretion in not ordering a PSI. However, the trial court would be well advised to consider obtaining one in a case such as this in the future.

makes no measurable contribution to acceptable goals of punishment and is nothing more than the purposeless imposition of pain and suffering and is grossly out of proportion to the severity of the crime—which is required by the jurisprudence if the 75-year sentence is to be set aside by a reviewing court as constitutionally excessive.

Accordingly, we reverse the court of appeal to the extent that it vacated the 75-year sentence imposed by the trial court for sexual battery following remand from *State v. Aguliar-Benitez*, 17-361 (La. App. 5 Cir. 12/10/18), 260 So.3d 1247, *writ denied*, 2019-0147 (La. 6/3/19), 272 So.3d 543. We reinstate the sentence of 75 years imprisonment at hard labor without parole eligibility that was imposed by the trial court.

REVERSED

SUPREME COURT OF LOUISIANA

No. 2021-K-00174

STATE OF LOUISIANA

VS.

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Crichton, J., additionally concurs and assigns reasons:

I concur in the opinion, which finds that the trial court did not abuse its broad discretion in sentencing the defendant to 75 years imprisonment at hard labor without parole eligibility for such a horrendous crime. The sentence imposed by the trial court is well-justified by a record that shows that defendant sexually assaulted an 8-year-old child while defendant was a trusted guest in the home. I write separately to express my frustration with the lack of judicial economy here, which I believe could have been avoided by conducting a few additional steps in the trial court.

The opinion observes that the trial court is not required to obtain a pre-sentence investigation, La.C.Cr.P. art. 875, although it may have been better if the court had obtained one here. In the absence of a PSI, however, I believe a full sentencing hearing should be conducted in which the trial court is presented with all mitigating and aggravating circumstances, so that the trial court can carefully apply the sentencing guidelines provided in La.C.Cr.P. art. 894.1. Moreover, sentencing is a critical stage of the proceedings at which the right to the effective assistance of counsel is sacrosanct. *See generally State v. Harris*, 2018-1012 (La. 7/9/20), ___ So.3d ___, available at 2020 WL 3867207. Even in the absence of a PSI, it is

incumbent upon both the State and defense counsel to call witnesses and present evidence to inform the court of the nature of the person standing before it who is to be sentenced. Furthermore, a fully developed record is crucial for appellate review, especially if, after repeated and fruitless remands, a reviewing court decides it is appropriate to amend the sentence, pursuant to *State v. Telsee*, 425 So.2d 1251 (La. 1983), which the opinion offers as one option for an appellate court to consider when it is faced with the alternative of repeated unfruitful remands.[1]

After the second remand in this case, the trial court heard only the argument of the State and defense counsel before exceeding the sentencing range recommended by the court of appeal. The court of appeal's recommendation, which came after careful review of the record, was due great respect, and it would have been better if the trial court had adhered to it, as described in the opinion. In the absence of such adherence, however, I believe the trial court should have given the parties the opportunity to call witnesses and present additional evidence of any mitigating and aggravating circumstances before that court decided to reject the court of appeal's guidance. The trial court's rejection of the guidance is an outlier that draws immediate scrutiny. Nonetheless, a review of the record ultimately supports the sentence imposed, as explained in the opinion, and therefore I concur in affirming the sentence imposed for this heinous crime committed upon a young child.

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[1] In noting that a further remand would be a waste of judicial resources, the Court in *Telsee* stated:

> Coming on the heels of our remand and instructions to fully state the facts which formed the basis for the maximum term sentence of 40 years at hard labor, the trial judge's omissions suggest a dereliction of his judicial duty that fails to justify disciplinary inquiry, only because our careful review of the record convinces us that his persistence in error resulted from lack of understanding rather than recalcitrance.

Telsee, 425 So.2d at 1260 (citing *State v. Wimberly*, 414 So.2d 666 (La. 1982).

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CRAIN, J., additionally concurs and assigns reasons.

I agree the trial court did not abuse its discretion in sentencing defendant to seventy-five years without parole for his sexual battery conviction. The facts of this case are particularly egregious. *See State v. Aguliar-Benitez*, 17-361 (La. App. 5 Cir. 12/10/18), 260 So. 3d 1247, 1252-53, *writ denied*, 19-0147 (La. 6/3/19), 272 So. 3d 543. After being welcomed into a family's home in a time of need, defendant befriended and then repeatedly molested their 8 year-old child. The trial court's discretion to determine an appropriate sentence for these criminal acts was not confined by the court of appeal's recommended sentencing range in its earlier opinion. Louisiana Code of Criminal Procedure article 881.4A provides an appellate court, when remanding for resentencing, "may give direction to the trial court concerning the proper sentence to impose." As recognized by the dissenting judge below, this directive "is nothing more than a non-binding suggestion." *State v. Aguliar-Benitez*, 20-32 (La. App. 5 Cir. 12/30/20), 308 So. 3d 1259, 1275 (Molaison, J., dissenting in part). While I agree pre-sentence reports are good tools, they do not always add anything to the observations of the trial court over the course of a trial. The trial court listened to the testimony at trial, observed the defendant throughout, and properly exercised its sentencing discretion.