2010 WL 3495412 (La.App. 3 Cir.) (Appellate Brief)
Court of Appeal of Louisiana, Third Circuit.

STATE OF LOUISIANA,

v.

Veronica MCCOY aka Pullard.

No. KA 10-863.
August 16, 2010.

On Appeal from the 14th Judicial District Court Parish of Calcasieu,
Criminal Docket No. 33895-09, Hon. G. Michael Canaday, Presiding

Original Brief on Behalf of Veronica McCoy Defendant - Appellant

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4 *STATEMENT OF JURISDICTION

Jurisdiction in this case vests in this Honorable Court pursuant to the provisions of Article V, Section 10 of the Louisiana Constitution of 1974.

*5 *ASSIGNMENT OF ERROR*

1. The sentence imposed by the trial court was cruel, unusual and excessive, in violation of Article I, § 20 of the Louisiana Constitution of 1974.

ISSUE OF LAW

1. Whether the 10-year sentence imposed by the trial court cruel was cruel and unusual, and excessive, in violation of Article I, § 20 of the Louisiana Constitution of 1974, particularly in light of the fact that the trial court erred in failing to review mitigating factors relevant to a reduced sentence.

*6 *STATEMENT OF THE CASE*

Ms. Veronica McCoy was charged with cruelty to the infirm, in violation of La. R.S. 14:93.3. (T. R., p. 6). She was not a professional caregiver, but a sometimes live-in girlfriend of a Mr. Riley Jones, in DeQuincy. (T. R., p. 142). Although she had been a certified nurse's assistant in the past, it was not a professional relationship. (T. R., p. 146). Instead, the two lived together on and off for five years. (T. R., p. 145). Mr. Riley was an alcoholic. (T. R., p. 144). He became ill in April, 2009, and was given only a short time to live if he did not stop drinking. (T. R., p. 145). She tried to give Mr. Jones his medication, and he refused. She tried to help him with his medical needs, but he refused any treatment. (T. R., p. 143). After she was arrested, Mr. Jones was hospitalized for various medical problems. He died a short time later.

Ms. McCoy initially pled not guilty, and the matter proceeded forward towards trial. Ms. McCoy filed a motion for a speedy trial.

On February 24, 2010, a hearing was held on her motion for speedy trial. (T. R., p. 99 et seq). He trial counsel announced that she was withdrawing the motion, and withdrawing her guilty plea, and entering a no contest plea to the charge, pursuant to *North Carolina v. Alford*. (T. R., p. 100). The state agreed to dismiss to other charges, a forgery charge and a worthless check charge. (T. R., p. 101). The state made no recommendation as to any sentence. (T. R., p. 112).

The trial court determined that Ms McCoy had a 12th grade education, understood the English language, and had no physical or mental condition that would prevent her from understanding the proceedings. (T. R., p. 102.

***7** She told the trial court she had discussed the case, the facts, the possible defenses, and the consequences of his plea with his trial counsel, and that she was satisfied with the advise and counsel of her attorney. (T. R., p. 102-3). She reviewed a rights waiver form with her trial counsel, and signed it. (T. R., p. 103).

The trial court explained to Ms. McCoy the elements of the charge of cruelty to the infirm, the maximum sentence, and the fact that the conviction could be used to enhance the sentence in any subsequent conviction. (T. R., p. 104-105).

The trial court advised her of the rights she would be waiving with her plea. This included the right to a jury trial in which the state would have the burden of proving its case against her beyond a reasonable doubt, the trial court also advised her the right against self-incrimination, and the right to confront and cross-examine the witnesses the state produces, together with the right to compel witnesses to appear and testify on her behalf, (T. R., p. 106-109).

Ms. McCoy advised the trial court that she understood that by pleading no contest that she would be waiving all of the above rights. (T. R, p. 109-110).

The state alleged a factual basis that Ms. McCoy was a live-in caregiver for a Riley Jones, and that on June 22, 2009, she **neglected** and/or mistreated him, causing him unnecessary pain, malnourishment and suffering. (T. R., p. 110).

Although Ms. McCoy did not admit any guilt, she acknowledged that if the state went forward with the case, it would likely obtain a guilty verdict. (T. R., p. 111). The trial court accepted her plea. (T. R., p. 111-112). It ordered a presentence investigation report. (T. R., p. 116).

***8** On May 10, 2010, Ms. McCoy was sentenced. Her trial counsel advised the trial court that he had reviewed the PSI, and had no objections, amendments or supplements to it. (T. R., p. 140).

Ms. McCoy testified that the relationship was not as a professional caregiver, but a romantic relationship. (T. R., p. 142-146). Belinda Jones, a daughter of Mr. Jones testified that Ms. McCoy lived with her father, "as a partner." (T. R., p. 149). Ms. Jones accused her of taking all of her father's money. (T. R., p. 150). Defense trial counsel noted to the trial court that there had been no evidence adduced that Ms. McCoy took any money from Mr. Jones. (T. R.,p. 151).

The trial court stated that pursuant to La. C. Cr. P. Art. 894.1, it found her to be a first felony offender. As to the question of whether Ms. McCoy was in need of correctional treatment or a custodial environment, the trial court stated that without a history, the answer would be in the negative, but with regard to the facts of the case, the answer would be in the affirmative, "...so that could go either way." (T. R., p. 152). It found a lesser sentence would deprecate the seriousness of the offense. (T. R., p. 152).

The trial court found as an aggravating factor that Ms. McCoy's conduct manifested deliberate cruelty to the victim. (T. R., p. 153). The trial court found that Ms. McCoy had been offered or received something of value for the commission of the offense. (T. R, p. 153). It found that Ms. McCoy had a substance abuse problem. (T. R., p. 153). It found the **neglect** caused amedical complications that shortened the life of Mr. Jones. (T. R., p. 154).

***9** The trial court found that Ms. McCoy would be likely to respond to probationary treatment. (T. R., p. 155). The trial court then stated that in 11 years on the bench, it had never given a first offender a maximum sentence, but that it was giving a maximum sentence of 10 years to Ms. McCoy. It found her eligible for good time, and would have to serve close to five years before being eligible for release under diminution of sentence. (T. R., p. 155-156). It advised her of her delays for filing for post-conviction relief and appeal. Trial counsel objected to the sentence. (T. R, p. 156).

On May 17, 2010, Ms. McCoy filed a motion to reconsider the sentence. It asserted the maximum sentence was unconstitutionally excessive in that she had absolutely no prior criminal history, she took responsibility for her actions, and the victim's family was also responsible for abandoning him. The motion was denied without a hearing. (T. R., p. 92-94). This appeal followed.

*10 ARGUMENT

1. The sentence imposed by the trial court was cruel, unusual and excessive, in violation of Article I, § 20 of the Louisiana Constitution of 1974.

The *Eighth Amendment to the United States Constitution* and the *Louisiana Constitution of 1974, Article I, § 20*, both prohibit the imposition of cruel or excessive punishment. La. Const. Art. I, § 20 provides, in pertinent part: "No law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment." Although the trial court is given wide discretion in imposing a sentence, a sentence which falls within the statutory limits may nevertheless be excessive under the circumstances. *State v. Sepulvado*, 367 So.2d 762 (La. 1979). The excessiveness of a sentence becomes a question of law reviewable under the appellate jurisdiction of the appellate courts. *State v. Dorthey*, 623 So.2d 1276, 1280 (La. 1993).

A sentence is constitutionally excessive if it "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." *State v. Dorthey*, 623 So.2d 1276, 1280 (La. 1993). A grossly disproportionate sentence is one which shocks the sense of justice when "the crime and punishment are considered in light of the harm done to society." *State v. Lobato*, 603 So.2d 739, 751 (La. 1992). The trial judge is given wide discretion in imposing sentence, and a sentence imposed within the statutory limits will not be deemed excessive in the absence of manifest abuse of discretion. *State v. Howard*, 414 So.2d 1210, 1217 (La. 1982). Nonetheless, the reviewing court should look to the particulars of the crime and the individual defendant in ***11** determining whether a particular sentence is excessive. *State v. Tilley*, 400 So.2d 1363 (La. 1981).

The Legislature has provided criteria to aid a sentencing court in determining whether a sentence of imprisonment should be imposed and whether suspension of a sentence or probation is warranted. La.Code Crim.P. art. 894.1; *State v. Klause*, 525 So.2d 1076 (La.App. 3 Cir. 1988). Paragraph C of Article 894.1 requires the court to state for the record the considerations taken into account and the factual basis used when imposing a sentence. The trial court need not refer to every aggravating and mitigating circumstance in order to comply with the article.

However, the record must affirmatively reflect that adequate consideration was given to the codai guidelines in particularizing the defendant's sentence. *State v. Smith*, 433 So.2d 688 (La. 1983). If there is an adequate factual basis for the sentence contained in the record, the trial court's failure to articulate every circumstance listed in Article 894.1 will not necessitate a remand for resentencing. *State v. Cottingin*, 476 So.2d 1184 (La.App. 3 Cir. 1985), *appeal after remand*, 496 So.2d 1379 (La.App. 3 Cir. 1986).

Ms. McCoy was sentenced under La. R.S. 14:93.3, which provides:
A. Cruelty to the infirmed is the intentional or criminally negligent mistreatment or **neglect** by any person, including a caregiver, whereby unjustifiable pain, malnourishment, or suffering is caused to the infirmed, a disabled adult, or an aged person, including but not limited to a person who is a resident of a nursing home, mental retardation facility, mental health facility, hospital, or other residential facility.

B. "Caregiver" is defined as any person or persons who temporarily or permanently is responsible for the care of the infirmed, physically or mentally disabled adult, or aged person, whether such care is voluntarily assumed or is assigned. Caregiver includes but is not ***12** limited to adult children, parents, relatives, neighbors, daycare institutions and facilities, adult congregate living facilities, and nursing homes which or who have voluntarily assumed or been assigned the care of an aged or infirmed person or disabled adult, or have assumed voluntary residence with an aged or infirmed person or disabled adult.

C. For the purposes of this Section, an aged person is any individual sixty years of age or older.

D. The providing of treatment by a caregiver in accordance with a well-recognized spiritual method of healing, in lieu of medical treatment, shall not for that reason alone be considered the intentional or criminally negligent mistreatment or **neglect** of an infirmed, a disabled adult, or an aged person. The provisions of this Subsection shall be an affirmative defense to a prosecution under this Section.

E.(1) Whoever commits the crime of cruelty to any infirmed person, disabled adult, or aged person shall be fined not more than ten thousand dollars or imprisoned with or without hard labor for not more than ten years, or both.

The constitutional concern here is the fact that the trial court handed out a maximum sentence for a "first time offender," who was not even a professional heath care provider, as generally provided for in La. R. S. 14:93.3. She was his girlfriend, attempting to help someone with a substance abuse problem.

The record shows the trial court a review for mitigating factors listed in La. C. Cr. P. art. 894.1. In fact, the trial court found it was up in the air as to whether incarceration was needed. It further found that Ms. McCoy would favorably respond to probationary treatment. (T. R, p. 155). It further found that it had never assessed a maximum sentence for a first time offender. (T. R., p. 156).

Yet, it gave Ms. McCoy the maximum, ten-year sentence. The facts in the present case are similar to the fact in *State v. Browhow*, 41,686 (La. App. 2dCir. 12/13/06), 945 So. 2d 890. In that case, the trial court sentenced Browhow to five years, and this Honorable Court found that sentence not to be excessive.

***13** This case is also unusual in that the trial court specifically found that Ms. McCoy was a first time offender, who would favorable respond to probationary treatment, but then sentenced her to the maximum sentence. A trial court abuses its discretion when it sentences a defendant to a maximum or near maximum sentence without the record showing an adequate consideration of the circumstances of the case, particularly when the defendant takes responsibility for his actions. *State v. Matyln*, 08-1533 (La. App. 3 Cir. 6/10/09), 2009 La. App. LEXIS 1136. Ms. McCoy's maximum sentence is a Constitutionally excessive sentence, considering the lack of record to support it.

This Honorable Court, in *State v. Helou*, 02-0077 (La. App. 3rd Cir. 06/05/02), 822 So. 2d 647, at 651, held that although a fact finder's discretion will be impinged only to the extent necessary to guarantee the fundamental protection of due process of law. Only irrational decisions to convict will be overturned. The trial court's finding Ms. McCoy was a first time offender, would respond to probationary treatment, but then giving her the maximum sentence is clearly irrational.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Ms. McCoy's 10-year sentence is unconstitutionally excessive, given the facts of this case. It should be vacated, and the matter remanded to the trial court for resentencing her to a maximum sentence of five years.

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