2010 WL 3775312 (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.
September 13, 2010.

On Appeal from the Calcasieu Parish Fourteenth Judicial District
Court Docket No. 33895-09, Honorable Judge G. Michael Canaday

Original Brief on the Merits Filed on Behalf of Appellee, The State of Louisiana

John F. DeRosier, District Attorney, Tara B. Hawkins, Assistant District Attorney, Carla S. Sigler, Assistant District Attorney, La Bar Roll No. 27082, 1020 Ryan Street, Lake Charles, LA 70601, (337) 437-3400, Attorneys for the State of Louisiana.

CRIMINAL PROCEEDINGS

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***1** The appellee, the State of Louisiana, respectfully submits the following original brief on the merits in response to the appellate brief filed on behalf of the defendant-appellant, Veronica McCoy aka Pullard.

STATEMENT OF JURISDICTION

This Honorable Court exercises supervisory jurisdiction over this matter pursuant to *La. Const. of 1974 Art. V, § 10*.

STATEMENT OF THE CASE

The defendant was charged by a bill of information filed by the Calcasieu Parish District Attorney's Office (hereinafter "the State") with cruelty to the infirm, a violation of *LSA-R.S. 14:93.3*. (R. pp. 6-7). On October 28, 2009, the defendant, through court-appointed Public Defender Mr. Andy Casanave, waived a reading of the bill of information and tendered a plea of not guilty to the charge. She requested a jury trial. (R. p. 1).

On February 24, 2010, the defendant, through counsel, subsequently tendered a plea of guilty to the charge. At the guilty plea proceeding, the defendant was thoroughly *Boykinized*, and she signed a Waiver of Constitutional Rights and Plea of Guilty form which was given to her by the trial court. (R. pp. 3, 99-137). The trial court judge, the Honorable G. Michael Canaday, accepted the defendant's guilty plea. (R. pp. 101-111).

The trial court ordered that a pre-sentence investigation reportbe filed with the court by May 7, 2010. (R. p. 116). On May 17, 2010, the defendant was sentenced to ten years in the custody of the Louisiana Department of Corrections, with credit given to her for time served. (R. pp. 5, 155). The defendant filed a Motion to Reconsider Sentence on May 17, 2010, which was denied by the trial court. (R. pp. 92-94).

***2** The defendant subsequently gave notice of intent to appeal her conviction to the Third Circuit Court of Appeal. (R. pp. 5, 96- 157). The defendant's appeal claims that the sentence imposed on her was excessive. The State herein timely files its brief in response to the defendant's direct appeal.

STATEMENT OF FACTS

On July 22, 2009, in Calcasieu Parish, Louisiana, the defendant criminally **neglected** and/or mistreated the victim, Mr. Riley Jones, causing him unjustifiable pain, malnourishment, and suffering due to his failure to properly care for the victim as his live-in caregiver. The defendant also failed to provide the victim with access to medical care, medications, adequate nourishment, and a sanitary home environment. The actions and/or omissions of the defendant contributed to the victim suffering malnourishment, cardiac arrhythmia, dehydration, urinary tract infection, kidney infections, and bedsores. (R. pp. 110-111).

ISSUE

Whether the 10-year sentence imposed by the trial court 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.

ASSIGNMENT OF ERROR; THE SENTENCE IMPOSED BY THE TRIAL COURT WAS CRUEL, UNUSUAL AND EXCESSIVE, IN VIOLATION OF ARTICLE I, § 20 OF THE LOUISIANA CONSTITUTUTION OF 1974.

The defendant claims that the sentence imposed by the trial court was excessive. (Defendant's brief, pages 10-13). The defendant complains that she did not warrant the maximum sentence for a "first time offender," and she argues that the trial court's record did not show an adequate ***3** consideration of the circumstances of the case. (Defendant's brief, pages 12-13). On the contrary, the record reveals that the trial court properly imposed the maximum sentence on the defendant.

LSA-C.Cr.P. Art. 881.2 addresses appellate review of sentences. It states in pertinent part:

> A. (2) The defendant cannot appeal or seek review of a sentence imposed in conformity with a plea agreement which was set forth in the record at the time of the plea.

A defendant cannot seek appellate review of a sentence imposed in accordance with a plea agreement. *State v. Percy*, 2009-1319 (La.App. 3 Cir. 5/5/10), 36 So.2d 1115, 116.

In *State v. Gobert*, 1998-42 (La.App. 3 Cir. 10/7/98), 720 So.2d 732, the Third Circuit Court of Appeal noted that when a defendant who pleaded guilty pursuant to a plea bargain raised an excessive sentence claim on appeal, the first inquiry is whether or not appellate court review of that issue is appropriate. *Gobert*, 720 So.2d at 734. In *State v. Pickens*, 1998-1443 (La.App. 3 Cir. 4/28/99), 741 So.2d 696, the Third Circuit Court of Appeal noted that *LSA-C.Cr.P. Art. 881.2* prohibited review of a sentence imposed because of an agreed upon, definite sentence, as well as one imposed under a sentencing "cap," or a maximum sentence that the parties agree to and the trial court accepts. *Pickens*, 741 So.2d at 698. If the parties negotiate for a specific sentencing or range of sentence and the trial court imposes it, then appellate review of sentence is prohibited. *Pickens*, 741 So.2d at 698.

This defendant was not sentenced in accordance with a sentence recommendation. Instead, Honorable G. Michael Canaday ordered a presentence ***4** investigation report. (R. p. 116). Therefore, consideration of the defendant's excessive sentence claim initially appears to be appropriate.

Another item which must be reviewed before an excessive sentence analysis may be undertaken is whether or not the defendant filed a proper motion to reconsider sentence. *LSA-C.Cr.P. Art. 881.1* mandates that a defendant make or file a motion to reconsider sentence, or he is precluded from objecting to his sentence on appeal. *State v. Davis*, 2006-922 (La.App. 3 Cir. 12/29/06), 947 So.2d 201, 202-203. *LSA-C.Cr.P. Art. 881.1* requires that a motion to reconsider sentence include the specific ground on which it is based. *State v. Vollm*, 2004-837 (La.App. 3 Cir. 111/10/04), 887 So.2d 664, 668.

Failure to specify an appropriate claim within a reconsideration of sentence motion means that appellate review of it is waived. *LSA-C.Cr.P. Art. 841*; *State v. Clark*, 2007-766 (La.App. 3 Cir. 2/6/08), 976 So.2d 789, 792. An argument not made in the trial court will not be considered on appeal. *State v. Jones*, 2009-751 (La.App. 3 Cir. 2/3/10), 29 So.3d 689, 695. To preserve a constitutional excessiveness claim, no more specific ground needs to be raised other than that the sentence is excessive. *Vollm*, 887 So.2d at 668.

If an appellant fails to comply with *LSA-C.Cr.P. Art. 881.1*, such as in the case of an oral motion to reconsider sentence, or failure to file a written reconsideration motion, then the appellate court may conduct a review for a "bare claim of excessiveness." *State v. Lewis*, 2008-1308 (La.App. 3 Cir. 4/1/09), 16 So.3d 1, 2. The appellate court may do so "in the interest of justice." *State v. Davis*, 2006-922 (La.App. 3 Cir. 12/29/06), 947 So.2d 201, 202-203. In cases where an oral objection to the sentence was deemed sufficient to preserve appellate review, the opposition contained the basis for ***5** the motion. *State v. Colar*, 2000-1241 (La.App. 3 Cir/ 1/31/01), 779 So.2d 1035, 1041-1042. This defendant's motion to reconsider sentence was very specific (R. pp. 92-94).

In *State v. Office*, 2007-193 (La.App. 3 Cir. 10/3/07), 967 So.2d 1185, the Third Circuit Court of Appeal detailed the proper analysis for an excessive sentence claim:
Louisiana Constitution Article I, § 20 guarantees that, '[n]o law shall subject any person to cruel or unusual punishment.' To constitute an excessive sentence, the reviewing court must find the penalty so grossly disproportionate to the severity of the

crime as to shock our sense of justice or that the sentence makes no measurable contribution to acceptable penal goals and is, therefore, nothing more than a needless imposition of pain and suffering. *State v. Campbell*, 404 So.2d 1205 (La. 1981). The trial court has wide discretion in the imposition of sentence within the statutory limits and such sentence shall not be set aside as excessive absent a manifest abuse of discretion. *State v. Etienne*, 99-192 (La.App. 3 Cir. 10/13/99); 746 So.2d 124, *writ denied*, 00-0165 (La.6/30/00); 765 So.2d 1067. 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 (La.5/31/96); 674 So.2d 957, *cert. denied*, 519 U.S. 1043, 117 S.Ct. 615, 136 L.Ed.2d 539 (1996).

State v. Barling, 00-1241, 00-1591, p. 12 (La.App. 3 Cir. 1/31/01), 779 So.2d 1035, 1042-43, *writ denied*, 01-838 (La.2/1/02), 808 So.2d 331 (second alteration in original).

In further refining the analysis, this court has stated:

[A]n appellate court may consider several factors including the nature of the offense, the circumstances of the offender, the legislative purpose behind the punishment and a comparison of the sentences imposed for similar crimes. *State v. Smith*, 99-0606 (La.7/6/00); 766 So.2d 501. While a comparison of sentences imposed for similar crimes may provide some insight, 'it is well settled that sentences must be individualized to the particular offender and to the particular offense committed.' ***6** *State v. Batiste*, 594 So.2d 1 (La.App. 1 Cir. 1991). Additionally, it is within the purview of the trial court to particularize the sentence because the trial judge 'remains in the best position to assess the aggravating and mitigating circumstances presented by each case.' *State v. Cook*, 95-2784 (La.5/31/96); 674 So.2d 957, 958.

State v. Smith, 02-719, p. 4 (La.App. 3 Cir. 2/12/03), 846 So.2d 786, 789, *writ denied*, 03-562 (La.5/30/03), 845 So.2d 1061.

Office, 967 So.2d at 1191-1192.

An excessive sentence analysis consists of two parts: 1) the determination of whether or not the trial court complied with *LSA-C.Cr.P. Art. 894.1*, and 2) the decision as to whether or not the imposed sentence imposed is unconstitutionally harsh. *State v. Hardaway*, 1998-104 (La.App. 3 Cir. 6/3/98), 715 So.2d 507, 509-510.

Whether or not the imposed sentence is unduly severe is dependent on the defendant's background and the case's circumstances. *State v. Hardaway*, 1998-104 (La.App. 3 Cir. 6/3/98), 715 So.2d 507, 510. In *State v. Thibodeaux*, 2005-680 (La.App. 3 Cir. 12/30/05), 918 So.2d 1093, the Third Circuit Court of Appeal noted that with regard to sentences imposed for similar crimes, while this factor could be helpful, a court should not overlook the fact that sentences are to be tailored to the individual defendant and the offense that he committed. *Thibodeaux*, 918 So.2d at 1095. The trial court judge is also in the best position to assess each case's aggravating and mitigating circumstances and to specify the sentence. *Thibodeaux*, 918 So.2d at 1095.

In general, maximum sentences are imposed on the most egregious offenders who commit the gravest crimes. *State v. Edwards*, 2007-1058 (La.App. 3 Cir. 3/12/08), 979 So.2d 623, 628. In this case, the defendant ***7** criminally **neglected** this helpless, **elderly** victim, which caused him to suffer unjustifiable pain and malnourishment. This is a grave offense warranting serious punishment.

The sentencing court is required to state for the record the reasons for the sentence imposed, including the factors considered in assessing the sentence and the factual basis for it. *LSA-C.Cr.P. Art. 894.1(C)*. In *State v. Williams*, 2002-0707 (La.App. 3 Cir. 3/5/03), 839 So.2d 1095, the Third Circuit Court of Appeal noted that while there is no need for the trial court to exhaustively list all factors found within *Art. 894.1*, the record must depict that proper consideration was given to those items when imposing a defendant's sentence. *Williams*, 839 So.2d at 1100-1101. No remand for re-sentencing is necessary as long as there is a sufficient factual foundation for the imposed sentence within the record of the proceedings. *Williams*, 839 So.2d at 1101.

The trial court is allowed to consider a multitude of factors in rendering sentence, including those outside of *Art. 894.1*. *State v. Williams*, 2002-0707 (La.App. 3 Cir. 3/5/03), 839 So.2d 1095, 1101. The conventional rules of evidence do not govern the permissible sources of information a sentencing court may consider. *State v. Reynolds*, 1999-1847 (La.App. 3 Cir. 6/7/00), 772 So.2d 128, 131. Evidence of criminal conduct which did not result in a conviction is a permissible sentencing consideration. *State v. Williams*, 2002-0707 (La.App. 3 Cir. 3/5/03), 839 So.2d 1095, 1101. The defendant does have a legal right to rebut sentencing information. *State v. Myles*, 94-0217 (La. 6/3/94), 638 So.2d 218, 219. The trial court may also gauge the substantial benefit a defendant received from a plea agreement, especially when it resulted in a consideration reduction in potential imprisonment. *Williams*, 839 So.2d at 1101. Where the defendant ***8** has achieved a marked reduction in his potential length of incarceration, the trial court's discretion to impose the maximum sentence is enhanced. *State v. Edwards*, 2007-1058 (La.App. 3 Cir. 3/12/08), 979 So.2d 623, 628.

The trial court could have properly considered the two felony charges which were dismissed by the State as part of this plea agreement. (R. pp. 3, 100-101). These factors are highly pertinent in this case, because the defendant was originally charged with forgery, felony amount of issuing worthless checks, and cruelty to the infirm. Her sentencing exposure was greatly reduced through this plea bargain. (R. pp. 3, 100-101). The defendant received a reduction in sentencing exposure from a total maximum of thirty years imprisonment to a maximum sentence of ten years in prison.

The trial judge also fully complied with the requirements of *LSA-C.Cr.P. Art. 894.1*. (R. pp. 38, 145, 152-156). The sentence he imposed neither shocks one's sense of justice, nor constitutes cruel, unusual, or excessive punishment. A lesser sentence would have been disproportionate to the seriousness of the offense the defendant committed. The defendant was fairly and appropriately sentenced, and her claim otherwise lacks merit.

CONCLUSION

The defendant's appellate claim lacks merit. The sentence imposed on this defendant by the trial court was not excessive, and it was fully justified by her actions and the facts of this case. Therefore, the State respectfully submits that the sentence imposed on this defendant should be affirmed by this Honorable Court.

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