NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 2236

STATE OF LOUISIANA

VERSUS

CHARLES DOUGLAS McCOY

On Appeal from the 23rd Judicial District Court
Parish of Ascension, Louisiana
Docket Nos. 24,768 and 24,770, Division "B"
Honorable Thomas J. Kliebert, Jr., Judge Presiding

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BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Judgment rendered JUN 17 2011

Hughes, J., dissents and would remand for re-sentencing pursuant to the plea bargain.

PARRO, J.

The defendant, Charles Douglas McCoy, was charged by separate bills of indictment with two counts of aggravated incest, violations of LSA-R.S. 14:78.1. Initially, he pled not guilty but, pursuant to a plea bargain, he later withdrew that plea and entered a guilty plea to both counts. Under the terms of the plea bargain, the defendant was to receive concurrent sentences for the two convictions of aggravated incest. Thereafter, the trial court sentenced the defendant on count number one to serve twenty years of imprisonment at hard labor, to pay a fine of $2,500, and to register as a sex offender in accordance with LSA-R.S. 15:542. On count number two, the court sentenced the defendant to serve twenty years of imprisonment at hard labor to run consecutive to count number one, to pay a fine of $2,500, and to register as a sex offender in accordance with LSA-R.S. 15:542.

The defendant now appeals, designating the following three assignments of error: (1) the trial court erred in failing to articulate any justification for imposing consecutive sentences; (2) the trial court erred in imposing consecutive sentences when the convictions were based on the same act, transaction, course of conduct, or scheme; and (3) the trial court erred in imposing excessive sentences. After taking the instant appeal, the defendant apparently filed a "Motion to Correct Sentence" in the trial court, which is not contained in the record before us. Nevertheless, according to the briefs of both parties, the trial court granted the motion on January 12, 2011, and corrected the sentences to provide, in accordance with the plea bargain, that they be served concurrently. For the following reasons, we affirm the convictions, amend the sentences, and, as amended, affirm the sentences.

FACTS[1]

On numerous occasions between January 1, 2000, and May 23, 2008, the defendant sexually molested his two step-granddaughters, K.P. and P.P. According to K.P., the defendant began molesting her when she was seven or eight years old. He later

[1] Since there was no trial in the instant matter, the facts of the offenses are derived from the pre-sentence investigation report (PSI), which was filed into the record. Furthermore, pursuant to LSA-R.S. 46:1844(W), the initials of the minor victims will be used to protect their identities.

began molesting her younger sister, P.P., when she was also approximately seven or eight years old.

The defendant frequently molested the two victims together. He fondled their breasts and genitals, kissed them lasciviously, and made them perform oral sex on him. On one occasion when the defendant attempted to have P.P. perform oral sex, she became nauseous and vomited. The defendant also performed oral sex on K.P. Both victims reported that the defendant showed them photographs in pornographic magazines and made them duplicate the sexual acts depicted in the photographs. He sometimes made them perform these sexual acts on one another. Additionally, the defendant took nude photographs of both victims.

K.P. indicated she was molested every time she visited the defendant. She estimated these incidents occurred approximately one hundred times. When she was between the ages of ten and eleven, the defendant attempted to have sexual intercourse with her, but stopped when she experienced pain. P.P. also described an incident when the defendant's penis was inside her body, but she indicated intercourse did not occur because she was "too little down there." P.P. indicated that the sexual abuse became worse when she was approximately nine years old, at which time the defendant began licking her "bottom."

According to P.P., the molestation and abuse ceased after several years when she and K.P. discussed it and agreed to stop. P.P. indicated she was experiencing numerous problems at that time and was crying every day. She ultimately talked to her father's ex-girlfriend, which apparently led to the incest being reported to the authorities.

EXCESSIVE SENTENCES

In his brief, the defendant specifically abandoned his first and second assignments of error, relating to the consecutive nature of the sentences imposed, due to the fact that the trial court granted his motion to correct these sentences on January 12, 2011. However, we note that the purported correction of the sentences occurred after the order of appeal was entered in this matter. Further, while the trial court did not impose

concurrent sentences as promised in the plea bargain, neither of the sentences was illegal on its face. See LSA-R.S. 14:78.1(D); **State v. Acey**, 517 So.2d 447, 449 (La. App. 1st Cir. 1987). The sentences were within statutory limits, even though they were not made in accordance with the plea bargain. Therefore, since an order of appeal had been entered at the time of the purported correction, the trial court lacked jurisdiction to amend the legal sentences previously imposed upon the defendant. See LSA-C.Cr.P. art. 916; **State v. Stephens**, 438 So.2d 203, 204 (La. 1983). See also LSA-C.Cr.P. art. 881, Official Revision Comment (b). Hence, the purported correction of the sentences was invalid. See **Acey**, 517 So.2d at 449.

Normally, when a defendant clearly has received a sentence greater than the one promised by a plea bargain agreement, the remedy would be to remand the matter and order the sentencing court to abide by the terms of the plea bargain or allow the defendant to withdraw his guilty plea. **Acey**, 517 So.2d at 449. In the instant case, the trial court's intention to abide by the plea bargain was illustrated by its invalid attempt to correct the sentences. Moreover, where there is no sentencing discretion involved in correcting a sentence, it is immaterial whether the correction is effected by the trial court or this court, since the result will be the same. Accordingly, rather than remanding this matter to the trial court, we amend the original sentences to provide that they be served concurrently with one another, rather than consecutively. See **Acey**, 517 So.2d at 449. Therefore, in view of our correction of the sentences, it is unnecessary to address assignments of error numbers one and two, relating to the consecutiveness of the sentences.

In the defendant's only remaining assignment of error, he argues that the sentences imposed were unconstitutionally excessive. Specifically, he contends that the trial court abused its discretion in imposing the maximum sentences, because the defendant, a first-time offender, was not one of the most egregious types of offender for whom maximum sentences were intended. In brief, the defendant admits that the manner in which he touched the victims was "inexcusable." Nevertheless, he contends the

nature of that touching was not of the same degree of abuse usually associated with the imposition of maximum sentences. Additionally, the defendant argues that, in view of the fact that he was sixty-three years old and has numerous serious health problems, the concurrent twenty-year sentences essentially constitute life sentences.

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of excessive punishment. Even when a sentence falls within statutory limits, it may be unconstitutionally excessive. See **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). A sentence is considered unconstitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it shocks the sense of justice. **State v. Andrews**, 94-0842 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 454. Louisiana Code of Criminal Procedure article 894.1 sets forth factors the trial court should consider when imposing sentence. The trial court has wide discretion in imposing a sentence within statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. See **State v. Brown**, 02-2231 (La. App. 1st Cir. 5/9/03), 849 So.2d 566, 569.

For the crime of aggravated incest, the defendant was subject to a fine of not more than $50,000, imprisonment with or without hard labor for a term not less than five years nor more than twenty years, or both. See LSA-R.S. 14:78.1(D).[2] He received a sentence of twenty years at hard labor and a fine of $2,500 on each of his convictions. The terms of imprisonment imposed were the maximum allowed. This court has stated that maximum sentences permitted under a statute may be imposed only for the most serious

[2] The indictments charge that the instant offenses occurred between January 1, 2000, and May 23, 2008. For the majority of this period, from January 1, 2000, until August 15, 2006, LSA-R.S. 14:78.1(D) provided the penalty stated. However, this provision was amended in 2006, and LSA-R.S. 14:78.1(D)(2) was added to provide that, when the victim of the aggravated incest was under the age of thirteen and the offender was seventeen years of age or older, the penalty should be imprisonment at hard labor for not less than twenty-five years nor more than life imprisonment, with at least twenty-five years of the sentence to be served without benefit of parole, probation, or suspension of sentence. See 2006 La. Acts, No. 325, §2, effective August 15, 2006. In 2008, LSA-R.S. 14:78.1(D)(2) was again amended to provide that the maximum penalty for aggravated incest, when the victim was under the age of thirteen and the offender was seventeen years of age or older, was ninety-nine years of imprisonment at hard labor. See 2008 La. Acts, No. 33, §1, effective August 15, 2008. The defendant in the instant case was sentenced pursuant to the penalty provided by LSA-R.S. 14:78.1(D) as it existed prior to its amendment in 2006.

offenses and the worst offenders, or when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. **State v. Hilton**, 99-1239 (La. App. 1st Cir. 3/31/00), 764 So.2d 1027, 1037, writ denied, 00-0958 (La. 3/9/01), 786 So.2d 113.

Before sentencing the defendant in this case, the trial court indicated it had considered the PSI, the victim impact statements, and the character reference letters submitted on the defendant's behalf. Additionally, the trial court specifically considered all of the enumerated factors of LSA-C.Cr.P. art. 894.1. In imposing sentence, the trial court gave the following extensive oral reasons in support of its decision to impose the maximum term of imprisonment on each conviction:

> The Court believes that there is an undue risk during the period of suspended sentence or probation that the defendant would commit another crime, that he is in need of correctional treatment of a custodial environment, which can be provided most effectively by his commitment to an institution, and that anything less than the sentence to be imposed herein would deprecate the seriousness of the defendant's crime. ... The offender knew or should have known that the victims of the offense were particularly vulnerable or incapable of resistance due to their extreme youth. The offender used his position or status to facilitate the commission of the offense. The offense resulted in significant permanent injury to the victims and their families. The offense involved multiple victims or instances for which separate offenses and sentences have not been imposed. The Court did consider the offenders [sic] age, work status, and social history, as previously noted, as well as the mitigating factors under Subsection B [LSA-C.Cr.P. art. 894.1], that the defendant has no history of a prior delinquency or criminal activity and has led a law-abiding life prior [sic] for a substantial period of time before the commission of the crime. The Court notes in particular the victims were [children] ranging in [age] from seven to eight when the defendant perpetrated his crimes, over a period of six to seven years, as evidenced in the Pre-Sentence Investigation Report. What particularly concerns the Court is the defendant's use of his position of control or supervision over these victims in order to accomplish his acts for sexual gratifications, and the deep psychological impact on his victims. His conduct and actions with his step-granddaughters were reprehensible to say the least. What has particularly concerned the Court is that in the records submitted by the defendant for the Court's consideration [in] sentencing, the defendant has failed on [sic] his own choosing to comply with attempts by his own psychological evaluator to complete the testing of the defendant that he voluntarily began, which included a psycho-sexual evaluation.

Our review indicates that the trial court considered the guidelines of LSA-C.Cr.P. art. 894.1, as well as the mitigating factors cited by the defendant, including his age and status as a first offender. The trial court articulated a more than ample basis for the

imposition of the maximum sentences upon the defendant. As noted by the trial court, the defendant exploited his position of authority and trust as the victims' step-grandfather to molest and sexually abuse them in an egregious manner. Furthermore, the molestation and sexual abuse occurred repeatedly over a number of years, beginning when the victims were extremely young and vulnerable, at approximately seven to eight years old. K.P. estimated she had been molested and/or abused by the defendant approximately one hundred times. The defendant fondled the victims, attempted to have intercourse with them, performed oral sex on at least one victim, and made them perform oral sex on him. Additionally, he took nude photographs of them and showed them pornographic pictures, making them duplicate the sexual acts depicted, sometimes upon each other.

K.P. and P.P. were both present at the defendant's sentencing hearing, and K.P. was permitted to make a statement. The irrevocable damage and broken trust experienced by the victims as a result of the defendant's crimes is illustrated by K.P.'s remarks to the defendant that "you ruined a lot, and we could have had a much better life if you wouldn't have done what you did, because we really thought that you loved us." The PSI indicates both victims have been in and out of counseling since the discovery of the acts of incest committed by the defendant.

The defendant urges as a mitigating factor that he employed no physical violence in committing the offenses. However, even though the defendant may not have employed physical violence on the victims, he clearly took advantage of their trust and feelings for him as their step-grandfather to sexually exploit them in an exceedingly repugnant manner. His actions undoubtedly harmed them and caused serious psychological damage, as illustrated by the fact that P.P. reported she was experiencing a lot of problems and crying every day at one point.

Another allegedly mitigating factor cited by the defendant was the fact that the molestation and sexual abuse ended four years before his arrest. However, we disagree that this factor mitigates in the defendant's favor. First, by the time the molestation and abuse ended, the defendant had already molested and abused the victims for years.

Second, there was no indication the defendant ceased his criminal conduct voluntarily. According to P.P., it was she and K.P. who ended the incidents when they grew old enough to be able to stop it.

Considering the trial court's careful review of the circumstances and the nature of the defendant's crimes, we find that no abuse of the trial court's sentencing discretion occurred in this case. Despite the defendant's contention to the contrary, these offenses are among the worst incidents of aggravated incest, and the defendant was the worst type of offender. See **State v. Wall**, 33,385 (La. App. 2nd Cir. 6/21/00), 764 So.2d 1191, 1194. The sentences imposed by the trial court were not grossly disproportionate to the severity of the offenses and do not shock the sense of justice. Thus, we conclude that the sentences, as amended, are not unconstitutionally excessive.

This assignment of error is without merit.

CONVICTIONS AFFIRMED; SENTENCES AMENDED, AND AFFIRMED AS AMENDED.