

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

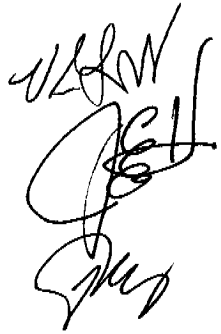
2011 KA 0575

STATE OF LOUISIANA

VERSUS

HERMAN ERIC THOMAS

Judgment Rendered: November 9, 2011



**Appealed from the
Nineteenth Judicial District Court
in and for the Parish of East Baton Rouge, State of Louisiana
Trial Court Number 04-09-0433**

Honorable Donald R. Johnson, Judge Presiding

**Hillar C. Moore, III
Adam Haney
Stacy Wright
Baton Rouge, LA**

**Counsel for Appellee,
State of Louisiana**

**Frederick Kroenke
Baton Rouge, LA**

**Counsel for Defendant/Appellant,
Herman Eric Thomas**

BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

WHIPPLE, J.

The defendant, Herman Eric Thomas, was charged by grand jury indictment with aggravated rape, a violation of LSA-R.S. 14:42 (Count 1) and aggravated burglary, a violation of LSA-R.S. 14:60 (Count 2). The defendant pled not guilty. (R.1) The defendant waived a jury trial and was tried by a judge. After the state presented its case-in-chief and the defense rested, the defendant made a motion for acquittal under LSA-C.Cr.P. art. 778. The trial judge granted the motion and acquitted the defendant as to the charge of aggravated burglary, but denied the motion as to the aggravated rape charge. After closing arguments, the trial court found the defendant guilty of aggravated rape. Thereafter, the trial court sentenced the defendant to life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. The defendant now appeals, arguing that the trial court imposed an unconstitutionally excessive sentence and that trial counsel's failure to file a motion to reconsider sentence constituted ineffective assistance of counsel. For the following reasons, we affirm the defendant's conviction and sentence.

FACTS

The record reflects that around 4:30 a.m. on August 26, 2007, the defendant entered the bedroom of two teenage sisters at the home where the girls lived with their guardian. While the defendant held a sharp metal object (thought to be a knife) against fourteen-year-old K.H., he performed oral sex on S.H., who was fifteen years old. The defendant told S.H. to remove her shorts and underwear and to open her legs. S.H. complied because she believed the defendant would hurt her. After the defendant performed oral sex on S.H., he said she "tasted good," called her a whore, and said he was the only person who cared about her.

The girls testified that although the defendant had allowed them to go to the bathroom together while he was still in their bedroom, they did not seek out their

guardian at that time because the defendant had threatened to kill them if they made any noise. When the girls returned to the bedroom, the defendant again performed oral sexual intercourse on S.H. When the defendant left the home through a window, the girls immediately ran to their guardian's bedroom and told her about the attack. The guardian called the police, who were dispatched to the home.

The girls knew the defendant's identity because for the past five years, he had lived on and off at the home. At trial, the girls identified the defendant as the man who entered their bedroom, threatened them with the sharp object, and performed oral sex on S.H.

While investigating the incident, the police searched the area for the defendant and did not locate the defendant until a K-9 officer was called to help in the search. The defendant was advised of his rights, and at the scene indicated he did not want to answer questions. After the defendant was driven to the police station and re-advised of his rights, he started talking and said he had been embarrassed to make a statement in front of all the police at the home. The defendant stated he had entered the home through a broken window and used a piece of metal, not a knife, when he went into the girls' bedroom. He admitted holding the piece of metal against K.H., but not at her throat. He also admitted telling S.H. to remove her clothing and "[l]et me lick it" and performing oral sex on S.H. The defendant stated that in the past, he and S.H. talked about him performing oral sex on her, but he did not claim that she consented to the act that night.

In her testimony, S.H. denied that she wanted the defendant to have sex with her. S.H. admitted that one night she left the home for about two hours, but because she had gotten in trouble for doing so, she did not do that again. Both girls denied they helped defendant enter the home. The day before the incident, the

defendant helped clean up debris from a broken windowpane at the home. Also, the guardian testified that she would not have noticed if the window was open when she went to bed the night before the incident.

DISCUSSION

In assignment of error number one, the defendant argues his mandatory life sentence is excessive because the trial court failed to consider the individual circumstances of the defendant and his case. The state contends that the statutorily mandated life sentence is presumed to be constitutional and that the defendant has not shown how he is exceptional or that the mandatory sentence is excessive under the facts of this case.

In assignment of error number two, the defendant argues that his trial counsel's failure to file a motion to reconsider sentence should not preclude a review of the sentence for constitutional excessiveness, and if it does, the trial counsel's failure constitutes ineffective assistance of counsel. The state argues that because the sentence imposed was statutorily mandated, the trial counsel's performance was not deficient for failing to file a motion to reconsider sentence. Moreover, the state argues that even if counsel was deficient, there is no showing of prejudice.

One purpose of the motion to reconsider is to allow the defendant to raise any errors that may have occurred in sentencing while the trial judge still has the jurisdiction to change or correct the sentence. The defendant may point out such errors or deficiencies, or may present argument or evidence not considered in the original sentencing, thereby preventing the necessity of a remand for resentencing. State v. Mims, 619 So. 2d 1059 (La. 1993) (per curiam).

Under the clear language of LSA-Cr.P. art. 881.1(E), the failure to make or file a motion to reconsider sentence precludes a defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. As noted

by the defendant, in this case a motion to reconsider sentence was not filed. Accordingly, the defendant is procedurally barred from having his challenge to the sentencing, raised in assignment of error number one, reviewed by this court on appeal. See State v. Felder, 2000-2887 (La. App. 1st Cir. 9/28/01), 809 So. 2d 360, 369, writ denied, 2001-3027 (La. 10/25/02), 827 So. 2d 1173.

However, in the interest of judicial economy, we will consider the defendant's excessiveness argument in order to address the claim of ineffective assistance of counsel. See State v. Wilkinson, 99-0803 (La. App. 1st Cir. 2/18/00), 754 So. 2d 301, 303, writ denied, 2000-2336 (La. 4/20/01), 790 So. 2d 631.

As a general rule, a claim of ineffective assistance of counsel is more properly raised in an application for post-conviction relief in the trial court rather than on appeal. This is because post-conviction relief provides the opportunity for a full evidentiary hearing under LSA-C.Cr.P. art. 930.¹ However, when the record is sufficient, this court may resolve this issue on direct appeal. State v. Lockhart, 629 So. 2d 1195, 1207 (La. App. 1st Cir. 1993), writ denied, 94-0050 (La. 4/7/94), 635 So. 2d 1132.

The claim of ineffective assistance of counsel is to be assessed by the two-part test of Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). See State v. Fuller, 454 So. 2d 119, 125 n.9 (La. 1984). The defendant must show that counsel's performance was deficient and that the deficiency prejudiced him.

Counsel's performance is deficient when it can be shown that he made errors so serious that he was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment to the United States of America. Counsel's deficient performance will have prejudiced the defendant if he shows that the errors were so

¹The defendant would have to satisfy the requirements of LSA-C.Cr.P. art. 924 *et seq.*, to receive such a hearing.

serious as to deprive him of a fair trial. The defendant must make both showings to prove that counsel was so ineffective as to require reversal. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. To carry his burden, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

The failure to file a motion to reconsider sentence in itself does not constitute ineffective assistance of counsel. Felder, 809 So. 2d at 370. However, if the defendant can show a reasonable probability that, but for counsel's error, his sentence would have been different, a basis for an ineffective assistance claim may be found. Thus, the defendant must show that but for his counsel's failure to file a motion to reconsider sentence, the sentence would have been changed, either in the district court or on appeal. Felder, 809 So. 2d at 370. Moreover, if the substantive issue an attorney failed to raise has no merit, then the claim the attorney was ineffective for failing to raise the issue also has no merit. State ex rel. Roper v. Cain, 99-2173 (La. App. 1st Cir. 10/26/99), 763 So. 2d 1, 5, writ denied, 2000-0975 (La. 11/17/00), 773 So. 2d 733.

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of excessive or cruel punishment. Under La. Const. art. I, § 20, even when a sentence is within statutory limits, it may be unconstitutionally excessive. See State v. Sepulvado, 367 So. 2d 762, 767 (La. 1979).

A mandatory minimum sentence may be unconstitutionally excessive if the sentence makes no measurable contribution to acceptable goals of punishment and amounts to the purposeful imposition of pain and suffering and is grossly disproportionate to the crime. In such instances, the trial court is duty bound to

reduce the sentence to one that would not be constitutionally excessive. See State v. Dorthey, 623 So. 2d 1276, 1280-81 (La. 1993). However, it is the legislature's prerogative to determine the length of the sentence imposed for crimes classified as felonies, and courts are charged with imposing these punishments, unless they are found to be unconstitutional. Dorthey, 623 So. 2d at 1278. In order to rebut the presumption that a mandatory minimum sentence is constitutional, the defendant must carry the burden to show clearly and convincingly that he is exceptional. See State v. Lindsey, 99-3302 (La. 10/17/00), 770 So. 2d 339, 343.

In sentencing the defendant to the mandatory life sentence for the conviction of aggravated rape, the trial court stated, in pertinent part:

[t]he fact that I've sent you to the Department for the rest of your life does not mean that's an end. You can go in that institution, become a model inmate. Maybe one day, the system will recognize that whatever appropriate relief, if any, is earned, it is granted. But based upon your violation, our law determines that you should not be out in society.

The instant case involves the aggravated rape of a fifteen-year-old girl by the defendant who was armed with a weapon, while the victim's fourteen-year-old sister was present in the room. The defendant applied a sharp metal object against K.H. while he demanded that the victim, S.H., remove her clothing. The defendant performed oral sexual intercourse twice on the victim while he was in the home. He threatened to kill both girls if they made noise. K.H. testified she went to counseling and could not sleep at night without medication after the incident.

The record reveals no reason for the trial court to have deviated from the mandatory sentence of life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The defendant did not present any particular facts regarding his personal history or any special circumstances that would support a deviation from the mandatory life sentence. Herein, the victim and her sister were defenseless teenagers and were afraid for their safety.

Based on the record before us, we find the defendant failed to show that he is exceptional or that the mandatory life sentence was not meaningfully tailored to his culpability, the gravity of the offense, and the circumstances of the case. The sentence imposed was not unconstitutionally excessive and was not grossly disproportionate to the severity of the offense. Accordingly, a downward departure from the mandatory life sentence was not required in this case. Moreover, even if defense counsel's failure to file the motion to reconsider sentence constituted deficient performance, the defendant was not prejudiced.

These assignments of error lack merit.

CONVICTION AND SENTENCE AFFIRMED.