

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 KA 1305

STATE OF LOUISIANA

VERSUS

NORMAN THOMAS ROUSSEL

Judgment rendered March 28, 2007.

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Appealed from the
23rd Judicial District Court
in and for the Parish of Ascension, Louisiana
Trial Court No. 17748
Honorable Guy Holdridge, Judge

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HON. ANTHONY G. (TONY) FALTERMAN
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NORMAN THOMAS ROUSSEL

* * * * *

BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

PETTIGREW, J.

The defendant, Norman Thomas Roussel, was charged by grand jury indictment with two counts of aggravated rape and one count of molestation of a juvenile, violations of La. R.S. 14:42 and La. R.S. 14:81.2. The defendant originally entered a plea of not guilty. Thereafter, the aggravated rape charges were nol-prossed, and the defendant entered a plea of guilty as charged to molestation of a juvenile. The trial court denied the defendant's subsequent motion to withdraw his guilty plea. The defendant was sentenced to ten (10) years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, raising the following assignments of error:

1. The plea in this case is defective in that the penalty provision for the offense charged and pleaded guilty to was not explained during the plea colloquy, resulting in an involuntary plea.
2. The sentence imposed in this case is illegally excessive in that it denied probation, parole and suspension eligibility and was not based upon the offense charged by the indictment or pleaded guilty to.

For the reasons set forth below, we affirm the conviction, vacate the sentence, and remand for resentencing.

FACTS

As the defendant entered a guilty plea, the facts were not fully developed. The following factual basis was presented during the guilty plea proceeding:

On or about April the 8th, 2000 through July 11th, 2004 in the parish of Ascension, Norman Thomas Roussel committed the offense of 14:81.2, Molestation of a Juvenile, by the commission of a lewd and lascivious act with and upon a minor child under the age of 17, there being an age difference of greater than two years between the defendant and the juvenile whose initials are D.J., date of birth 4/8/1990, with the intent of arousing the sexual desires of himself and the juvenile victim by the use of influence by virtue of the defendant's care, custody, and control and supervision of the juvenile.

ASSIGNMENTS OF ERROR NUMBERS ONE AND TWO

In his first assignment of error, the defendant argues that the trial court erred in denying his motion to withdraw his guilty plea. The defendant specifically argues that his guilty plea is defective because the trial court explained the penalty provision for La. R.S. 14:81.2B when the defendant should have been sentenced pursuant to section C of

the statute. The defendant contends that the trial court later imposed sentence pursuant to section D. The defendant argues that the guilty plea is unknowing and involuntary. The defendant contends that the trial court failed to comply with La. Code Crim. P. art. 556.1A(1). The defendant contends that the assigned error is not harmless, as he received a sentence that exceeds the range detailed by the trial court at the time of the guilty plea.

In his second assignment of error, the defendant argues that the sentence imposed by the trial court is illegal as it restricts parole, probation, or suspension of sentence. The defendant contends that he was sentenced pursuant to La. R.S. 14:81.2D when, in accordance with the indictment and the factual basis for the guilty plea, he should have been sentenced pursuant to section C of the statute.

Article 559A of the Louisiana Code of Criminal Procedure gives the trial court the discretion to permit a withdrawal of a guilty plea at any time prior to sentencing. Under this article, a defendant has no absolute right to withdraw a previously entered plea of guilty. The court's decision is discretionary, subject to reversal only if that discretion is abused or arbitrarily exercised. **State v. Lewis**, 633 So.2d 315, 317 (La. App. 1 Cir. 1993); **State v. Carmouche**, 589 So.2d 53, 55 (La. App. 1 Cir. 1991). Once a defendant has been sentenced, a guilty plea may not be withdrawn unless the plea is found to be constitutionally infirm. **State v. Bell**, 2000-1084, p. 5 (La. App. 5 Cir. 2/28/01), 781 So.2d 843, 847, writ denied, 2001-0776 (La. 4/26/02), 813 So.2d 1098. **Boykin v. Alabama**, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), requires the trial court to expressly enumerate three rights that must be waived by the accused prior to accepting a guilty plea. As spelled out by **Boykin**, these are the right to a jury trial, the right against self-incrimination, and the right to confront one's accusers. Generally, a denial of a motion to withdraw a guilty plea will not be reversed on appeal if the record clearly shows the defendant was informed of his rights and the consequences of his plea, and that the plea was entered into voluntarily. **State v. Raines**, 2000-1942, p. 4 (La. App. 5 Cir. 5/30/01), 788 So.2d 630, 633. A guilty plea is a conviction and,

therefore, should be afforded a great measure of finality. **State v. Thornton**, 521 So.2d 598, 600 (La. App. 1 Cir.), writ denied, 530 So.2d 85 (La. 1988).

Herein, the defendant does not contest, and the records show, that the trial court advised him of his constitutional rights as set forth in **Boykin**. Specifically, he was informed of his right against self-incrimination, and his rights to a jury trial and to confront his accusers. The defendant stated that he understood those rights, and wished to waive them. **Boykin** only requires that a defendant be informed of the three rights enumerated above. The jurisprudence has been unwilling to extend the scope of **Boykin** to include advising the defendant of any other rights that he may have. **State v. Hardeman**, 2004-0760, p. 6 (La. App. 1 Cir. 2/18/05), 906 So.2d 616, 623. In **State v. Guzman**, 99-1528, 99-1753, p. 9 (La. 5/16/00), 769 So.2d 1158, 1164, the supreme court stated that "[t]his Court has never extended the core **Boykin** constitutional requirements to include advice with respect to sentencing."

The defendant argues, however, that the trial court failed to follow La. Code Crim. P. art. 556.1 in that it provided the incorrect sentencing range during the guilty plea colloquy. Article 556.1 provides, in pertinent part:¹

A. In a felony case, the court shall not accept a plea of guilty or nolo contendere without first addressing the defendant personally in open court and informing him of, and determining that he understands, all of the following:

(1) The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law.

. . . .

E. Any variance from the procedures required by this Article which does not affect substantial rights of the accused shall not invalidate the plea.

During the time period in which the offense was committed, La. R.S. 14:81.2 provided, in pertinent part:

A. Molestation of a juvenile is the commission by anyone over the age of seventeen of any lewd or lascivious act upon the person or in the

¹ **Guzman**, 99-1753 at 10-12, 769 So.2d at 1164-1165 held that violations of Article 556.1 that do not rise to the level of **Boykin** violations are subject to harmless error analysis. The statute was later amended by 2001 La. Acts No. 243, § 1, to add the harmless error provision in section E.

presence of any child under the age of seventeen, where there is an age difference of greater than two years between the two persons, with the intention of arousing or gratifying the sexual desires of either person, by the use of force, violence, duress, menace, psychological intimidation, threat of great bodily harm, or by the use of influence by virtue of a position of control or supervision over the juvenile. Lack of knowledge of the juvenile's age shall not be a defense.

B. Whoever commits the crime of molestation of a juvenile shall be fined not more than five thousand dollars, or imprisoned, with or without hard labor, for not less than one nor more than ten years, or both, provided that the defendant shall not be eligible to have his conviction set aside or his prosecution dismissed in accordance with the provisions of Code of Criminal Procedure Article 893.

C. Whoever commits the crime of molestation of a juvenile when the offender has control or supervision over the juvenile shall be fined not more than ten thousand dollars, or imprisoned, with or without hard labor, for not less than one nor more than fifteen years, or both, provided that the defendant shall not be eligible to have his conviction set aside or his prosecution dismissed in accordance with Code of Criminal Procedure Article 893.

D (1) Whoever commits the crime of molestation of a juvenile when the incidents of molestation recur during a period of more than one year shall, on first conviction, be fined not more than ten thousand dollars or imprisoned, with or without hard labor, for not less than five nor more than fifteen years, or both. At least five years of the sentence imposed shall be without benefit of parole, probation, or suspension of sentence. After five years of the sentence have been served, the offender, who is otherwise eligible, may be eligible for parole if a licensed psychologist or a licensed clinical social worker or a board-certified psychiatrist, after psychological examination, including testing, approves.

During the guilty plea colloquy herein, the trial court (in pertinent part) recited the range of penalties as follows: "[S]hall be fined not more than \$5,000 or imprisoned with or without hard labor for not less than one nor more than ten years or both." However, when the trial court later sentenced the defendant, the court noted the recommendation of the presentence investigation report as ten years imprisonment at hard labor. The trial court specifically noted that, in his opinion, the sentence should be fifteen years imprisonment at hard labor. The trial court stated his intention to follow the recommendation, and the defendant was sentenced accordingly to ten years imprisonment at hard labor. However, the sentence was indeed imposed without the benefit of parole, probation, or suspension of sentence.

The State concedes that the trial court erred in prohibiting parole, probation, or suspension of sentence. It is evident that the trial court read the penalty range

applicable to section B of the statute. It is unclear what section of the statute the trial court considered in imposing sentence. As stated by the defendant on appeal, and in accordance with the language of the indictment and the factual basis presented for the defendant's guilty plea, the defendant should have been sentenced pursuant to La. R.S. 14:81.2C. This section of the statute does not prohibit parole, probation, or suspension of sentence. Thus, we agree that the imposed sentence is illegal and must be vacated.

Nonetheless, we conclude that the trial court did not abuse its discretion when it denied the motion to withdraw the guilty plea. Counsel represented the defendant at the guilty plea proceeding. The defendant acknowledged that his counsel explained his rights to him prior to the proceeding. In open court, the trial court thoroughly advised the defendant of his constitutional rights and determined the defendant knowingly and voluntarily waived these rights. Throughout the plea colloquy, the defendant indicated his willingness to plead guilty. The trial court specifically informed the defendant that it would base its sentencing on the presentence investigation. The defendant confirmed that he had not been threatened, coerced, or otherwise persuaded to plead guilty. The defendant was advised as to the nature and factual basis of the offense. The record reflects a knowing and voluntary waiver of defendant's rights and compliance with the constitutional requirements for the taking of voluntary guilty pleas. Although the trial court read the incorrect sentencing provision of the statute, we cannot say that the defendant's substantial rights were affected as the defendant was sentenced to an imprisonment term of ten years, the maximum penalty recited by the trial court at the time of the plea. Moreover, this court is hereby vacating the imposed sentence as it illegally prohibits parole.

Based on the totality of the circumstances, the defendant knowingly and intelligently waived his rights. Therefore, we find no merit to the defendant's arguments pertaining to the validity of the guilty plea, and the plea will not be set aside. However,

as the sentencing error involves discretion, we must vacate the sentence and remand for resentencing in accordance with the views expressed in this opinion.²

CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED FOR RESENTENCING.

² In accordance with the version of La. R.S. 14:81.2C in effect at the time of the offense, the defendant shall be fined not more than ten thousand dollars or imprisoned, with or without hard labor, for not less than one nor more than fifteen years, or both. Although the correction of the sentencing error involves discretion, we reiterate the trial court's recitation during the guilty plea proceeding, indicating to the defendant that the maximum penalty is ten years imprisonment at hard labor. Any sentence in excess of ten years imprisonment at hard labor, while still falling within the applicable range of one to fifteen years, would violate the plea agreement.