

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

No. 2022-KP-00508

VS.

KEVIN O'BRIEN ALLEN

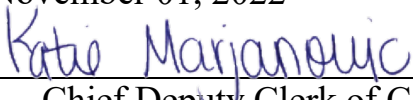
IN RE: Kevin O'Brien Allen - Applicant Defendant; Applying For Supervisory Writ,
Parish of Bossier, 26th Judicial District Court Number(s) 199,853, Court of Appeal,
Second Circuit, Number(s) 54,569-KW;

November 01, 2022

Writ application granted. See per curiam.

SJC
JLW
JTG
JBM
PDG

Hughes, J., concurs and assigns reasons.
Crain, J., dissents and assigns reasons.

Supreme Court of Louisiana
November 01, 2022


Chief Deputy Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA

No. 2022-KP-00508

STATE OF LOUISIANA

VERSUS

KEVIN O'BRIEN ALLEN

**ON SUPERVISORY WRIT TO THE TWENTY-SIXTH JUDICIAL
DISTRICT COURT, PARISH OF BOSSIER**

PER CURIAM

Writ granted. In 2014, Kevin O'Brien Allen was convicted of two counts of distribution of marijuana in violation of La. R.S. 40:966. For these crimes, Mr. Allen faced a sentencing exposure of not less than five, nor more than 30 years imprisonment at hard labor on each count. La. R.S. 40:966(B)(3). The trial court imposed two ten-year concurrent sentences. Eighteen months later, Mr. Allen was adjudicated a five-time habitual offender¹ and given the then-mandatory sentence of life imprisonment pursuant to La. R.S. 15:529.1.²

Counsel for Mr. Allen filed a motion to reconsider the sentence. In the motion, sentencing counsel misstated Mr. Allen's habitual offender sentencing range as 20 years to life, asserted the life sentence was excessive in violation of Article I, Section 20 of the Louisiana Constitution, and asked the court to reconsider the sentence. The trial court denied the motion finding the sentence was required by statute.

Mr. Allen subsequently filed an application for post-conviction relief in which he argued that he was denied effective assistance of counsel in relation to his habitual offender sentencing. In *State v. Harris*, 18-1012, p. 1 (La. 7/9/20), 340 So.3d 845,

¹ Mr. Allen's predicate offenses were: 1) possession with intent to distribute marijuana; 2) second-offense possession of marijuana; 3) second-offense possession of marijuana; and 4) possession of a Schedule II controlled dangerous substance.

² In 2017, the Louisiana Legislature passed ameliorative amendments to the Habitual Offender Law, such that, if he were convicted today, Mr. Allen would not be subject to a mandatory minimum life sentence, but rather a minimum 20-year sentence. La. R.S. 15:529.1(A)(4)(b).

847, we held that an “ineffective assistance of counsel at sentencing claim is cognizable on collateral review.” Under the standard for ineffective assistance of counsel provided in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), a reviewing court must vacate a sentence if the defendant establishes (1) that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel’s deficient performance prejudiced defendant to the extent that the outcome of the proceeding is rendered unreliable. We have explained that

[a]n objectively reasonable standard of performance requires that counsel be aware of the sentencing options in the case and ensure that all reasonably available mitigating information and legal arguments are presented to the court. Since Louisiana law prohibits excessive sentences, and requires that individual circumstances be considered, counsel acts unprofessionally when he fails to conduct a reasonable investigation into factors which may warrant a downward departure from the mandatory minimum.

Harris, 18-1012, p. 19, 340 So.3d at 858.

A sentence may be excessive under Article I, Section 20 of the Louisiana Constitution, even if it falls within the statutory range established by the Legislature. *State v. Johnson*, 97-1906, p. 6 (La. 3/4/98), 709 So.2d 672, 676; *State v. Sepulvado*, 367 So.2d 762, 767 (La. 1979). In *State v. Dorthey*, 623 So.2d 1276, 1280–81 (La. 1993), we held that this extends to the minimum sentences mandated by the Habitual Offender Law and that the trial court must reduce a sentence to one not unconstitutionally excessive if the trial court finds that the sentence mandated by the Habitual Offender Law “makes no measurable contribution to acceptable goals of punishment” or is nothing more than “the purposeful imposition of pain and suffering” and “is grossly out of proportion to the severity of the crime.”

Here, in the motion to reconsider the sentence, defense counsel failed to apprise the trial court of its duty of depart from the mandatory life sentence under *Dorthey* on the grounds it was excessive. Counsel also failed to present any

mitigating evidence. In particular, counsel failed to emphasize that none of Mr. Allen's predicate offenses were violent or sexual in nature. The initial sentence—on the lower end of the sentencing range—was based on the information contained in a presentence investigation report that described not only Mr. Allen's prior convictions and arrests but also mitigating information. In the motion to reconsider the habitual offender sentence, which was filed 18 months after the initial sentencing, counsel failed to remind the trial court of these individual circumstances including that Mr. Allen had obtained his GED, was an employed father two young children, and that he desired treatment for his dependency on marijuana.

We find that sentencing counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. As a result of her deficient performance, the trial court imposed a mandatory life sentence that was excessive as applied to Mr. Allen. Accordingly, Mr. Allen's right to effective assistance of counsel as required by the Sixth Amendment to the Constitution of the United States and Article I, Section 13 of the Louisiana Constitution was violated and his sentence must be vacated.

Accordingly, we reverse the ruling of the trial court, which denied the application for post-conviction relief. We vacate Mr. Allen's life sentence and remand to the trial court, which is instructed to re-sentence Mr. Allen to a term imprisonment that is not unconstitutionally excessive. In resentencing, the trial court must state for the record its considerations and factual basis. *See* La.C.Cr.P. art. 894.1(C). We note that while ameliorative sentencing changes may not apply retroactively, they may guide the court when imposing the new sentence. *See generally State v. Clark*, 391 So.2d 1174 (La. 1980).

REVERSED AND REMANDED