Judgment rendered February 24, 2016
Application for rehearing may be filed
within the delay allowed by Art. 922,
La. C.Cr.P.

No. 50,428-KA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

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STATE OF LOUISIANA Appellee

versus

BOBBY RAY DANIEL, JR. Appellant

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Appealed from the
Fourth Judicial District Court for the
Parish of Ouachita, Louisiana
Trial Court No. 12-F-0262

Honorable Scott Leehy, Judge

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Appellant

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Before CARAWAY, DREW and CALLOWAY (Ad Hoc), JJ.

CARAWAY, J.

Bobby Ray Daniel Jr. appeals the 20-year hard labor sentence imposed for his aggravated incest conviction. His appointed appellate counsel filed a motion to withdraw, together with an *Anders*[1] brief in support of the motion. Daniel filed no brief after this court held the motion in abeyance for 30 days. We grant counsel's motion to withdraw and affirm Daniel's conviction and sentence.

*Facts*

On March 8, 2012, Bobby Ray Daniel Jr. was charged with one count of aggravated incest and three counts of indecent behavior with a juvenile because of his conduct in 2011 and 2012 with two different juvenile females. The bill alleged that the victim of aggravated incest was under the age of 13 at the time of the crime.

On May 30, 2013, Daniel entered a plea of guilty to one count of aggravated incest. The terms of the guilty plea included the dismissal of the three indecent behavior charges and a stipulation that the court would impose a sentence under the aggravated incest penalty provision for victims who were 13 years old or older. The court accepted the stipulation and proceeded with the guilty plea. Following the plea, the court ordered a presentence investigation ("PSI") and set sentencing for August 21, 2013.

At the sentencing hearing, the court considered Daniel's PSI and observed that the defendant had engaged in "approximately ten" acts of sexual intercourse with a child under the age of 13, which acts could have

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[1] The brief is filed in accordance with *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

been charged and punished as aggravated rape. The court further stated that the victim was struggling with the effects of these offenses and would probably require counseling for a very long time. As aggravating factors, the court stated that Daniel should have known that the victim was vulnerable due to her age, used his status as a relative to commit the offense and the significant permanent injury caused to the victim. Further, the court observed that Daniel committed this offense multiple times but would only be sentenced for one offense.

The court also considered that Daniel was a 43-year-old first felony offender, high school graduate, lived with his mother and worked sporadically. There was no indication that Daniel's incarceration would be a financial hardship to his adult children. Accordingly, the court sentenced Daniel to 75 years at hard labor, with the first 25 years without benefits.[2]

Daniel appealed but the trial court, *sua sponte*, noted the sentencing error and moved that the case be set for resentencing on May 12, 2015. On May 28, 2015, this court in *State v. Daniel*, 50,165 (La. App. 2d Cir. 5/28/15), 166 So.3d 1220, vacated Daniel's sentence and remanded the case for resentencing.

On June 2, 2015, the trial judge resentenced Daniel to 20 years at hard labor. Daniel filed a timely motion to reconsider sentence, arguing that his first felony status precluded the imposition of the maximum sentence. The court denied that motion, and Daniel appealed again.

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[2]This sentence would have been a legal penalty for a violation of the enhanced "under 13" subsection of the statute, La. R.S. 14:78.1(D)(2). However, it exceeded the maximum sentence for the base violation of the statute, La. R.S. 14:78.1(D)(1), and the imposition of sentence under the latter provision was one of the terms of the defendant's plea bargain.

Daniel's appellate counsel has filed an *Anders* brief seeking to withdraw and alleging the lack of nonfrivolous issues to raise on appeal. *See Anders*, *supra; State v. Jyles*, 96-2669 (La. 12/12/97), 704 So.2d 241; *State v. Mouton*, 95-0981 (La. 4/28/95), 653 So.2d 1176; *State v. Benjamin*, 573 So.2d 528 (La. App. 4th Cir. 1990). The brief outlines the procedural history including Daniel's *Boykin*-compliant plea colloquy. The brief also contains "a detailed and reviewable assessment for both the defendant and the appellate court of whether the appeal is worth pursuing in the first place," pursuant to *Jyles, supra*. Defense counsel has verified that he has mailed copies of the motion to withdraw and his brief to Daniel, in accordance with *Anders, Jyles, Mouton,* and *Benjamin, supra*. This Court issued an order holding the motion to withdraw by appellate counsel in abeyance and rescinding the previous deadline for filing a pro se brief. Daniel did not file a pro-se brief.

*Discussion*

An error patent review of the appellate record has been conducted and no errors patent were found in the guilty plea or sentencing proceedings. The only arguable error in this appeal is excessive sentence.

Daniel's appointed counsel points out that the sentence would likely not be found excessive on appeal given the benefit the defendant received from the dismissal of other charges and the sentencing stipulation which substantially reduced Daniel's sentencing exposure.

The investigation into this offense showed that the 12-year-old victim accused Daniel of having sexual intercourse with her on numerous

occasions. The trial court astutely observed that this conduct amounted to aggravated rape, for which Daniel would have received life imprisonment, and that Daniel had engaged in multiple acts of rape of this child. Daniel was the beneficiary of a very generous plea bargain under which he reduced his maximum sentence exposure to a fixed term of 20 years rather than 99 years under La. R.S. 14:78.1(D)(2) or for the remainder of his life had the offense been charged as aggravated rape.

The trial court articulated extensive reasons for its original 75-year sentence. Those reasons are amply supported by the presentence investigation which outlines the shocking and depraved conduct of Daniel. Although the 20-year sentence was the maximum available under the plea bargain, Daniel received a very substantial benefit from that agreement because the base offense of aggravated incest does not fully describe or punish the defendant's acts.

*Decree*

For the foregoing reasons, we grant appellate counsel's motion to withdraw and affirm Daniel's conviction and sentence.

**MOTION TO WITHDRAW GRANTED**; **CONVICTION AND SENTENCE AFFIRMED.**