NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA NO. 05-KA-279

VERSUS FIFTH CIRCUIT

THOMAS H. TOUPS COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 04-1925, DIVISION "P"
HONORABLE MELVIN C. ZENO, JUDGE PRESIDING

NOVEMBER 29, 2005

JAMES C. GULOTTA
JUDGE PRO TEMPORE

Panel composed of Judges Edward A. Dufresne, Jr.,
Clarence E. McManus, and James C. Gulotta, Pro Tempore

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AFFIRMED

Thomas H. Toups appeals his sentence following his guilty plea to a charge of vehicular homicide in violation of La.R.S. 14:32.1. In sixteen assignments of error, defendant contends that his sentence is excessive. Finding no merit in these assignments, we affirm his conviction and sentence.

FACTS

On May 2, 2003, defendant was driving a vehicle at a high rate of speed in the wrong direction on 21st Street, a divided roadway in Kenner. After entering a controlled intersection, still driving against traffic, defendant collided head-on with a vehicle driven by the victim, Theodore Dunnigan. Defendant's vehicle struck the victim's car so hard that it was propelled more than 80 feet before crashing into a nearby residence at 2100 Roosevelt Boulevard. The victim was dead at the scene and the seat belt had to be cut in order to extract the victim from his car.

Officer William Rainey of the Kenner Police Department saw furrows made by car tires in the median indicating where defendant's car had crossed into the lanes of oncoming traffic. The officer further observed that defendant had traveled through three intersections that he could have used to return to the correct lanes of traffic before striking the victim's car.

Defendant was arrested at the scene and agreed to submit to an Intoxilyzer breath test, which was negative for the presence of alcohol. However, defendant admitted that he took Soma and Hydrocodone tablets prior to the accident. Defendant also submitted to a blood test, which revealed the presence of Clarisprodol, known as Soma, which is a muscle relaxant, Hydrocodone, a Schedule II Narcotic, and Meprobamate, an anti-anxiety medication, which is a Schedule IV narcotic.[1]

Defendant did not appear for arraignment, but pled not guilty in absentia through his attorney. Defendant withdrew a plea of not guilty entered on his behalf by his attorney and entered a plea of guilty as charged. The trial court ordered a pre-sentence investigation and deferred imposition of sentence. After an extensive hearing, the trial judge sentenced defendant to eighteen years imprisonment at hard labor, with the first year to be served without benefit of parole, probation or suspension of sentence. The trial judge imposed a fine of $10,000 and ordered defendant to receive substance abuse treatment.

Defendant filed a timely motion to reconsider sentence, which the trial judge denied without a hearing. However, the trial judge granted defendant's motion to proffer evidence that he would have offered at a hearing on the motion to reconsider. Thereafter, defendant proffered evidence and testimony outside of the presence of the trial judge. This timely appeal follows.

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[1] The foregoing was taken from the pre-sentence investigation report.

According to the pre-sentence investigation report, defendant was under the care of a psychologist from May to September 2003. However, in February 2004, less than one year after the death of the victim in this case, and while on bond for the instant offense, defendant ran a red light in Kenner. Other vehicles had to take evasive action to avoid striking the defendant's vehicle. He was arrested for driving while intoxicated, reckless operation of a motor vehicle, failure to have a driver's license on his person, and ignoring a traffic signal. Although the Intoxilyzer test was negative for the presence of alcohol, defendant told an officer during booking at the Kenner jail that he had taken Vicodin at some point prior to his arrest that night.[2]

In March 2004, defendant entered a substance abuse outpatient treatment program at River Oaks Hospital under the care of Dr. Richard Gerstein. In a letter dated June 9, 2004, Dr. Gerstein stated that defendant was making progress and had maintained his sobriety since March 2004. Dr. Gerstein opined that, barring unforeseen problems, defendant would continue to remain sober. On April 20, 2004, defendant entered an outpatient substance abuse program at the New Orleans V.A. Medical Center under the care of Dr. Milton Harris. In a letter dated June 2, 2004, Dr. Harris stated that defendant completed the program on May 18, 2004 and that his toxicology tests were negative since his admission to the program. According to Dr. Harris, defendant's progress is "guarded" and his "recovery is contingent" on his following the treatment plan. In a letter dated July 27, 2004, Dr. Harris indicated that defendant continued to participate in his treatment plan. According to Dr. Harris, defendant's prognosis was positive and his recovery remained contingent on adhering to the treatment plan.

[2] The foregoing was taken from the police report of the February 2004 DWI and the bond hearing on June 16, 2004.

Defendant assigns sixteen errors which all relate to the excessiveness of his eighteen-year sentence. Specifically he argues it is excessive because it was only two years less than the maximum sentencing exposure. He contends the trial court failed to comply with La.C.Cr.P. art. 894.1. He also claims that several statements made by the trial judge were unsupported by the record and that the trial judge erred in considering the pre-sentence investigation report because it contained errors. Defendant also claims in several assignments that the trial judge failed to consider his addiction to prescription drugs. The State responds that the sentence is not excessive and that it is fully supported by the record, which reveals adequate compliance with La.C.Cr.P. art. 894.1.

The Eighth Amendment to the United States Constitution and Article I, Section 20 of the Louisiana Constitution prohibit the imposition of cruel or excessive punishment. A sentence is excessive if it is grossly disproportionate to the seriousness of the offense so as to shock our sense of justice, or if it imposes needless and purposeless pain and suffering. State v. Lobato, 603 So.2d 739, 751 (La. 1992); State v. Brown, 01-160 (La. App. 5 Cir. 5/30/01), 788 So.2d 667, 674.

In reviewing a sentence for excessiveness, this Court must consider the punishment and the crime in light of the harm to society and gauge whether the penalty is so disproportionate as to shock our sense of justice, recognizing at the same time the wide discretion afforded the trial judge in determining and imposing sentence. A sentence within statutory limits will not be set aside as excessive absent manifest abuse of discretion. State v. Lobato, supra, at 751; State v. Bacuzzi, 97-573 (La. App. 5 Cir. 1/27/98), 708 So.2d 1065, 1069.

In determining whether a sentence is excessive, the test imposed on the reviewing court is two-pronged. First, the record must show that the trial court took cognizance of the sentencing guidelines set forth in La.C.Cr.P. art. 894.1.

State v. White, 01-134 (La. App. 5 Cir. 7/30/01), 792 So.2d 146, 154, writ denied, 01-2439 (La. 9/13/02), 824 So.2d 1190. While the trial judge need not articulate every aggravating and mitigating circumstance outlined in the sentencing guidelines, the record must reflect that the judge adequately considered those guidelines in particularizing the sentence to the defendant. State v. White, supra. The articulation of the factual basis for a sentence is the goal of La.C.Cr.P. art. 894.1; hence, there need not be rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary, even though there has not been full compliance with the statute. State v. White, supra.

At the time defendant committed this offense on May 2, 2003, vehicular homicide was punishable by a fine of not more than $15,000 and imprisonment with or without hard labor for not less than two years and not more than 20 years. At least one year of the sentence shall be imposed without benefit of parole, probation or suspension of sentence. It is noted that in 2004, the legislature raised the maximum term of imprisonment to 30 years.[3]

The trial judge ordered a pre-sentence investigation report, which he considered prior to sentencing. The judge stated that he also considered letters submitted on defendant's behalf and letters from the victim's family and friends. Additionally, the judge listened to impact statements by the victim's daughter, fiancée, and adopted daughter. Defendant, his mother, brother, and sister, testified in mitigation. Thereafter, the trial judge in sentencing the defendant gave well considered and analyzed reasons for judgment as follows:

[3] See, Acts 2004, No. 750, § 1 and Acts 2004, No. 381, § 1.

THE COURT:

This matter is now before the Court for purposes of sentencing, the Court noting that the defendant, Thomas Toups, has entered a guilty plea to vehicular homicide.

In imposing sentence, the Court takes into considerations the Code of Criminal Procedure, Article 894.1 and, further, the following factors: We take into consideration the pre-sentence investigation report, which has been submitted to us; impact statements, which have been given before us; that impact statement carries along with it some thirty correspondences from members of the victim's family and some twenty-two letters and documents from persons on behalf of the defendant. We also take into consideration the statements which have been given during this sentencing hearing.

We note that the defendant in this case has been convicted of a felony. We further note his prior criminal history. The record reflects that he has a prior conviction for driving while intoxicated, as well as careless operation of a motor vehicle. While both of those convictions are misdemeanors, he does not appear before this Court as a first offender. We are of the opinion that there is undue risk, that if the Court were to impose any period of probation or suspension of sentence in this matter, that there is a good likelihood that this defendant would commit an additional crime. We are further of the opinion that any lesser sentence than that which I will now impose would deprecate the seriousness of the defendant's conduct.

We note that the testimony indicates that the victim in this case was a citizen of outstanding character in this community and was engaged in no conduct which would justify his death. This Court has heard a number of cases in the twelve years in which it has sat on this bench and the thirty years that he has been involved in the practice of law in the justice system. A number of cases. I have yet to hear of any case wherein a victim has risen to the level of this gentlemen [sic]. The testimony would suggest that he lived a life worthy of remembrance. There is some reference in the documents submitted before us that he was a Job kind of person. A Job kind of person being one who loved the Lord and eschewed evil. He has made a great impact upon the lives of many, and many are suffering as a result of this defendant's conduct.

While the defendant and those who speak on his behalf now suggest to the Court that there is some remorse on his part, I am not satisfied that that is the case. I have reviewed in my mind these proceedings over the past year. It is now in excess of one year since this incident occurred. It was in July that the defendant pled guilty. I recall the efforts to avoid jail on his part. I'm also aware that in his statement in the Presentence Investigation Report, he states in the report that it would not benefit anyone - - and that's the essence of what he says - - that he should go to jail. But it is jail that's the only

thing that is going to prevent not only his causing another loss of life in this community but his own death, as well.

It's obvious that the defendant has a substance abuse problem. Whether he has come to grips and repented of his ways is not yet made known by his conduct. His conduct reveals that notwithstanding this Court had allowed him out on bond - - he had successfully posted bond - - a high bond, I might say - - he nevertheless was arrested thereafter for another violation. A violation wherein he went through a signal light, allegedly, and could have possibly taken the life of another.

It is my experience that when we reach these stages of the proceedings, it is often that folk come in now and would suggest to the judge that there has been a change of mind and heart. But my approach is, to watch cases as they proceed because I'm always aware that there is an outcome somewhere down the road, and I have to look for the indicators that are presented throughout the proceedings. And the indicators in this case tell this judge that this defendant has not changed. And that if he should receive probation, that he will kill someone else upon the streets of this community. I will not permit that to happen. We further note that he has caused the death of another human being. And while that life can not be restored on this side, this Court's responsibility is not only to this defendant but to this community. And, therefore, we believe that an appropriate period of incarceration is the only hope that the life of this gentlemen [sic] would be changed.

Several letters that we have received on behalf of the defendant requests mercy. The Court is mindful of its obligations to impose justice. Justice carries with it a sense of mercy. It carries with it a balancing of what should or should not be and that it should be done in accordance with that which is indicated before us by virtue of the conduct of the defendant and the suggestion as to what his possible rehabilitation would be.

For the reasons cited, the Court imposes the following sentence:

I sentence the defendant to eighteen years at hard labor. The first year of that sentence must be served without benefit of probation, parole or suspension of sentence. I further order him to pay a fine of $10,000. I order that he receive substance abuse treatment during his period of incarceration. Pursuant to requirements of law, he is ordered to be given credit for time served. The Court further informs the defendant that he has two years after his judgment and conviction of sentence has become final, by which to file an application of post-conviction relief. We note that in imposing the sentence herein, there is a mandatory minimum sentence of one year which can not be suspended, neither is there probation, parole or suspension of sentence available. We note that the maximum penalty permitted by the Court in this case is twenty years. We have sentenced the defendant to

> eighteen years. Considering the impact statements and the statements of parties that have been made on his behalf, those mitigating factors, we are satisfied that the sentence in this case is appropriate in light of the legislative provisions that are provided herein.
>
> The defendant is remanded to the custody of the Department of Public Safety and Corrections for execution of sentence.

After sentencing, the defendant filed a motion to reconsider sentence. After the trial judge denied the motion to reconsider without a hearing, defendant filed a motion to proffer evidence he would have offered if there had been a hearing on the motion to reconsider sentence. The trial judge granted the motion, and at the proffer hearing on January 3, 2005, defendant, his mother, and Dr. Gerstein testified. Defendant also introduced evidence, including letters regarding his treatment at River Oaks Hospital and at the V.A. Hospital, and his V.A. medical records.

The first issue presented by this appeal concerns the proffered evidence. According to La.C.Cr.P. art. 881.4(D) as amended by Act 2003, No. 167 § 1,[4] a party may proffer evidence after a trial court denies a motion to reconsider without a hearing:

> The trial court may deny a motion to reconsider sentence without a hearing, but may not grant a motion to reconsider without a contradictory hearing. If the court denies the motion without a hearing, the party who made or filed the motion may proffer the evidence it would have offered in support of the motion.

It is well-settled that the courts of appeal and the Supreme Court have the constitutional authority to review excessiveness of sentences under Article I, Section 20, of the Louisiana Constitution of 1974. See, State v. Taves, 03-0518 (La. 12/3/03), 861 So.2d 144, 147. Additionally, La.C.C.P. art. 881.3 provides that the "appellate court may consider the record of the case which shall include any evidence or relevant information introduced at preliminary hearings, hearings on

[4] The Act also added the word "contradictory" in the first sentence of this paragraph.

motions, arraignments, or sentencing proceedings, and any relevant information included in a presentence investigation report filed into the record at sentencing."

However, Article 881.3, which was added in 1991, does not answer the question of whether or not the reviewing court can consider proffered evidence in determining whether the trial court imposed an excessive sentence. That is, should a court of appeal review the proffered evidence to determine whether the trial court erred in denying the motion to reconsider without a hearing? Or, should a court of appeal review the proffered evidence to determine whether the sentence is excessive?

For the following reasons, we need not resolve this issue in order to address the defendant's assignments of error. Defendant claims that the proffered material demonstrated his addiction to pain medication, and that the trial judge erred in failing to consider his addiction as a mitigating factor when imposing sentence. However, the extensive reasons given for the sentence reflect that the trial judge did take defendant's addiction into consideration.[5] The pre-sentence investigation report, which the trial judge said he considered, contains detailed information from the defendant regarding his addiction. In addition, the record reflects that the letters from the defendant's physicians and the defendant's medical records from the V.A. Hospital were included for the trial judge's consideration before the judge imposed sentence.

Next, defendant contends that the trial judge failed to consider the factors in Article 894.1 and that he failed to articulate a factual basis for the sentence. The record shows otherwise. The judge specifically stated that he imposed a sentence of imprisonment because he believed it was the only measure that would prevent defendant from causing another death. The judge also believed that it was likely

[5] It is noted that defendant's motion to reconsider filed in the trial court contains virtually the same arguments as the appellate brief filed in this Court.

defendant would commit another crime during any period of probation or suspended sentence and he specifically stated that a lesser sentence would deprecate the seriousness of the offense.

Defendant also claims that the trial improperly emphasized the accomplishments of the victim, as if these accomplishments aggravated the offense. However, a review of the trial judge's reasons indicates that his remarks were in recognition of the loss suffered by the victim's family and the fact that the victim did not induce or facilitate the defendant's crime, as provided by La.C.Cr.P. art. 894.1(B)(9) and (26).[6]

Defendant also claims the judge erred in stating that defendant had not exhibited remorse and that defendant had delayed the proceedings. However, defendant mischaracterizes the trial judge remarks. The trial judge did not attribute the delays in the proceedings to the defendant. Rather, the judge was doubtful defendant was sincerely remorseful. He said he recalled the defendant's efforts to avoid jail following his guilty plea, and the judge pointed out that the pre-sentence investigation report indicated defendant said he did not believe that going to jail would be beneficial. The judge recalled that defendant was arrested for another DWI while on bond and was concerned defendant would cause the death of another person if he were released on probation.

Defendant also claims that the trial judge erred in considering the pre-sentence investigation report because the victim's daughter made an inaccurate statement regarding defendant's failure to make court appearances and because the report mischaracterizes some of his statements to the reporting officer. On appeal, however, defendant neither briefs nor argues this assignment of error. In State v.

[6] Paragraph B provides a list of factors that for the trial judge to consider in determining suspension of sentence or probation.

Kafieh, 590 So.2d 100, 103 (La. App. 5 Cir. 1991), writ denied, 625 So.2d 1053 (La. 1993), defendant made a similar claim without briefing the assignment. This Court held that, under Rule 2-12.4 of the Uniform Rules-Courts of Appeal, defendant's assignment of error could be considered abandoned. The Kafieh court noted parenthetically that the challenged portion of the report was the victim impact statement, which was required by La.C.Cr.P. art. 895(B). In the present case, we find that this claim is likewise abandoned. Of note, the trial judge did not refer to any of the challenged portions of the pre-sentence investigation report when imposing sentence.

Defendant also claims that the trial court erred in failing to consider Federal Sentencing Guidelines for similar offenses and in failing to consider the Louisiana Sentencing Guidelines, which are now repealed. This Court concluded that reviewing a sentence under the repealed guidelines is a waste of judicial resources in State v. Mequet, 96-238 (La. App. 5 Cir. 8/28/96), 680 So.2d 98, 100, as follows:

> The Louisiana Sentencing Guidelines are no longer in effect. La.R.S. 15:325-329, which provided for the adoption and promulgation of those guidelines were repealed by Acts 1995, No. 942, § 3, effective August 15, 1995. La.C.Cr.P. art. 894.1 was amended and reenacted by Act 942 to delete reference to those guidelines and to provide sentencing guidelines which were in effect at the time of the sentencing and which are now in effect. It would be a waste of judicial resources for this court to review the sentence in light of guidelines which are no longer in effect. See, State v. Hidalgo, 95-319 (La. App. 5 Cir. 1/17/96), 668 So.2d 1188.

Thus, there is no reason to address defendant's arguments regarding the repealed state sentencing guidelines. In addition, there is no statutory or jurisprudential requirement for this Court to review defendant's sentence against the backdrop of Federal Sentencing Guidelines.

Further, a review of the record reflects that the sentence is not constitutionally excessive given the circumstances of the case and the background of the defendant. The record reflects that the judge showed mercy when imposing the sentence in that the judge did not impose the maximum term of incarceration or the maximum fine. Further, while the judge could have imposed a greater period of the sentence without benefits, he only restricted benefits for the mandatory minimum period of one year of the sentence. Additionally, the sentence reflects the judge's concern that defendant would make a change in his life, since the judge said he believed a sentence of incarceration was defendant's only hope to reform his life.

Despite defendant's contention to the contrary, the trial judge properly characterized defendant's criminal history when stating that defendant was not a first offender. Prior criminal activity is one of the factors to be considered by the trial judge in sentencing a defendant. State v. McCorkle, 97-966 (La. App. 5 Cir. 2/25/98), 708 So.2d 1212, 1219. The record indicates that, even though the present offense was his first felony, defendant was not a first offender. According to the PSI, defendant was forty-seven years-old at sentencing. That document also reflects defendant was arrested in 1978 when he was twenty-one years-old for driving while intoxicated, along with other traffic offenses. He pled guilty to a reduced charge of careless operation of a motor vehicle. In 1982, defendant was arrested for disturbing the peace while drunk. Defendant was again arrested in 1985 for driving while intoxicated, to which defendant pled guilty. Defendant received a six-month suspended sentence and he completed substance abuse treatment. He was also arrested for reckless operation and negligent injury, charges that were dismissed. However, in May 2003, defendant committed the

instant offense in which Theordore Dunnigan lost his life. Less than a year later in February 2004, defendant was arrested for DWI in 2004.

A review of the jurisprudence indicates the sentence is in line with similarly situated offenders. For example, in State v. Norris, 36,614 (La. App. 2 Cir. 1/29/03), 837 So.2d 723, writ denied, 03-0982 (La. 11/7/03), 857 So.2d 518, the court held that a sentence of seventeen years at hard labor, with the first year imposed without benefit of parole, probation or suspension of sentence was not excessive for a forty-one year-old defendant who had two prior DWI convictions. In State v. Kezerle, 01-79 (La. App. 3 Cir. 6/6/01), 789 So.2d 725, 728, writ denied, State v. Kezerle, 01-2011 (La. 6/7/02), 817 So.2d 1143, the court held that the maximum twenty-year sentence for vehicular homicide was not constitutionally excessive, where defendant had numerous past offenses for driving while intoxicated and defendant had refused or was incapable of achieving successful alcohol abuse rehabilitation in the past, which led him to cause the death of a thirty-seven year-old wife, mother, and youth leader.

On appellate review of a sentence, the relevant question is not whether another sentence might have been more appropriate but whether the trial judge abused his broad sentencing discretion. State v. Smith, 01-2574 (La. 1/14/03), 839 So.2d 1, 4. Under the circumstances in this case and after considering the jurisprudence, we find that the trial judge did not abuse his sentencing discretion in this case.

For the foregoing reasons, we affirm defendant's conviction and sentence.

AFFIRMED

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CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED ON OR DELIVERED THIS DAY **NOVEMBER 29, 2005** TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

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