NOT DESIGNATED FOR PUBLICATION

COURT OF APPEAL

STATE OF LOUISIANA

FIRST CIRCUIT

2008 KA 2403

STATE OF LOUISIANA

VERSUS

TRAVIS GALMON

Judgment rendered: MAY - 8 2009

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On Appeal from the 20th Judicial District Court
Parish of East Feliciana, State of Louisiana
Number: 06-CR-629; Division: A
The Honorable George H. Ware, Jr., Judge Presiding

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BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

DOWNING, J.

Defendant, Travis Galmon, was charged by bill of information with two counts of attempted second degree murder, violations of La. R.S. 14:27 and 30.1. Defendant pled not guilty to both counts. He was tried before a jury. The jury determined defendant was guilty on both counts of the responsive offense of attempted manslaughter, a violation of La. R.S. 14:27 and 31.

The trial court subsequently sentenced defendant to fifteen years at hard labor on each count, with the sentences to be served consecutively.

Defendant appeals, citing the following as error:

> 1. The sentences imposed, both by their length and their consecutive service, were based upon an inadequate presentence investigation, were not justified, and are excessive under the circumstances of the case.
>
> 2. In its attempt to make defendant's sentences even lengthier than those imposed, the trial court usurped the province of another court by ordering that the sentences be served consecutive to any sentence defendant should receive as a result of a probation revocation. The condition is an illegal one.

We affirm defendant's convictions, amend his sentences and affirm his sentences as amended.

FACTS

On the evening of July 21, 2006, Tammy Wallace, the owner of the Dragon Lounge located at 640 Scott Bar Road in East Feliciana Parish, called the Sheriff's Department to respond to a disturbance at the bar. Wallace testified she heard gunshots, but did not know or see who fired a weapon.

Officer Darren Kilcrease of the East Feliciana Parish Sheriff's Department was dispatched to the Dragon Lounge. When he arrived, there were very few people there. Officer Kilcrease spoke with Wallace and examined the parking lot. During his examination, Officer Kilcrease recovered two .40 rounds. He noted the presence of blood in different areas of the parking lot. None of the people who

remained at the scene would provide a statement to Officer Kilcrease. Officer Kilcrease eventually learned that two victims, Teyhones Elliott and Damien Ross, had been taken to Lane Memorial Hospital by private vehicle.

Officer Kilcrease proceeded to the hospital in order to interview the victims; however, due to the nature of their injuries, neither victim could speak with him at that time. During the ensuing investigation, defendant was identified as the individual who shot both victims.

At trial, both Ross and Elliott identified defendant as the person who shot them. Elliot testified that he and Ross were standing outside the bar after they had just broken up a fight involving a group of men. Defendant retrieved a gun from an individual who was standing in the area. Defendant walked away from the crowd and stood behind two vehicles and began firing. Ross sustained a gunshot wound through his right lung, while Elliot was shot in the back, with the bullet exiting from his mouth.

EXCESSIVE SENTENCES

Through his first assignment of error, defendant argues his sentences are excessive by their length and consecutive service and that they are based on an inadequate presentence investigation (PSI).

Inadequate Presentence Investigation

Defendant argues that the PSI failed to comply with the requirements of La. Code Crim. P. art. 875(A)(1), which provides, in part, that "the probation officer shall inquire into the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, his family situation and background, economic and employment status, education, and personal habits." Defendant contends that apart from setting forth his prior misdemeanor convictions and felony theft conviction, the PSI contained no information regarding his family, work history, or background.

A trial court considers the case's aggravating and mitigating factors before imposing a sentence, but ultimately it can sentence a defendant on whichever ground(s) it believes most relevant. In other words, the trial court has much discretion in sentencing. **State v. Milstead**, 95-1983, p. 5 (La. App. 1 Cir. 9/27/96), 681 So.2d 1274, 1277.

Though defendant does not have an absolute right to demand the PSI, the trial court may, in its discretion, allow defendant to review it. La. Code Crim. P. art. 877(B). The record reflects defense counsel was given such an opportunity to review the PSI. At the conclusion of the March 18, 2008 hearing on defendant's Motion for Post-Verdict Judgment of Acquittal, in response to defense counsel's inquiry of whether a PSI had been received, the trial court stated if defense counsel would stop by chambers, "I'll share a copy of that with you." Moreover, defendant has a constitutional right to rebut a PSI if it is prejudicial to his case. He must timely request this right or else it will be waived. **Milstead**, 95-1983 at pp. 5-6, 681 So.2d at 1277.

At the July 8, 2008 sentencing hearing, the trial court stated it had reviewed the PSI and materials supplied by defense counsel regarding defendant's educational history. At no time during the hearing did defense counsel complain or object that the PSI was incomplete. We do not find that such incompleteness would materially affect the sentence. The trial judge who conducted the sentencing hearing was the same judge who presided over the trial; thus, we find the trial court was properly informed of the facts and circumstances of the offenses.[1] Accordingly, because the trial court can base its sentence on the factors it deems most relevant, this portion of the assignment of error is without merit.

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[1] Defendant argues that the trial court's commentary indicated it made errors in referring to the facts and circumstances of the offense. Although the trial court initially stated that the situation seemed like a "drive-by," we note the record reflects trial counsel objected and corrected the trial court. Moreover, defendant takes issue with the trial court's statement that one of the victims sustained serious and permanent damage to his lung as a result of sustaining a gunshot wound. We note the victim himself testified that the bullet went through his lung, and he was

Length of Sentences and Consecutive Service

Through this portion of the assignment of error, defendant argues that the trial court imposed excessive sentences. Article I, Section 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979); see also **State v. Lanieu**, 98-1260, p. 12 (La. App. 1 Cir. 4/1/99), 734 So.2d 89, 97. A sentence is constitutionally excessive if it is grossly disproportionate to the severity of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. See **State v. Dorthey**, 623 So.2d 1276, 1280 (La. 1993). A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. **State v. Hogan**, 480 So.2d 288, 291 (La. 1985). A trial court is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed by it should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Lobato**, 603 So.2d 739, 751 (La. 1992).

The penalty for attempted manslaughter provides for a maximum term of imprisonment at hard labor for not more than twenty years. La. R.S. 14:27(D)(3) & 31(B). In the present case, the trial court sentenced defendant to a term of fifteen years at hard labor on each count.

The Louisiana Code of Criminal Procedure sets forth items that must be considered by the trial court before imposing sentence. La. Code Crim. P. art. 894.1. The trial court need not cite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the guidelines. **State v. Herrin**, 562 So.2d 1, 11 (La. App. 1 Cir. 1990). In light of the criteria expressed by Article

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required to recuperate for four to five days in the hospital following this incident. Further, the trial court noted that this victim displayed the scar caused by the bullet. (r. 312-13)

894.1, a review for individual excessiveness should consider the circumstances of the crime and the trial court's stated reasons and factual basis for its sentencing decision. **State v. Watkins**, 532 So.2d 1182, 1186 (La. App. 1 Cir. 1988). Remand for full compliance with Article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982).

In sentencing defendant, the trial court noted defendant's criminal record began in 2001 with misdemeanor convictions for disturbing the peace and battery of a school teacher. The trial court further noted defendant had a 2003 conviction for misdemeanor theft and was arrested in 2005, but prosecution was dropped. In 2006, defendant was convicted of felony theft and again placed on probation, which was in effect at the time defendant committed the present offenses. In articulating its reasons for sentencing defendant, the trial court placed particular emphasis on defendant's continued criminal behavior, despite having been given probation on more than one occasion. The trial court stated that defendant's action had nearly resulted in two deaths and that there was no indication these shootings were accidental.

The trial court noted that there were many aggravating circumstances present in the commission of these offenses, including: the deliberate cruelty towards the victims; the knowing creation of risk of death or great bodily harm for more than one person; the significant bodily harm suffered by the victims; defendant used a dangerous weapon; the injuring of multiple victims; defendant's acting without provocation; and he continued to display a lack of remorse.

La. Code Crim. P. art. 883 provides in pertinent part:

> If the defendant is convicted of two or more offenses based on the same act or transaction, or constituting parts of a common scheme or plan, the terms of imprisonment shall be served concurrently unless the court expressly directs that some or all be served consecutively.

The imposition of consecutive sentences requires particular justification when the crimes arise from a single course of conduct. However, even if the convictions arise out of a single course of conduct, consecutive sentences are not necessarily excessive. Other factors must be taken into consideration in making this determination. For instance, consecutive sentences are justified when the offender poses an unusual risk to the safety of the public due to his past conduct or repeated criminality. **State v. Johnson**, 99-0385, p. 7 (La. App. 1 Cir. 11/5/99), 745 So.2d 217, 221.

Considering the trial court's reasons for sentencing, the factual details of the offenses, defendant's past conduct and repeated criminality, which appeared to escalate, the record supports a conclusion that defendant poses an unusual risk to the public. Accordingly, we cannot say the trial court's imposition of sentences of fifteen years at hard labor on each count to be served consecutively is excessive.

This assignment of error is without merit.

CONSECUTIVE SENTENCES WITH OTHER CONVICTIONS

In defendant's second assignment of error, he contends the trial court usurped the province of another court by ordering that the sentences for the present offenses be served consecutively to any sentence he would receive as a result of a probation revocation. Defendant maintains that such a condition is an illegal condition.

Louisiana Code of Criminal Procedure article 901, addresses revocation of probation for commission of another offense. The article provides:

> A. In addition to the grounds for revocation of probation enumerated in Louisiana Code of Criminal Procedure Article 900, when a defendant who is on probation for a felony commits or is convicted of a felony under the laws of this state, or under the laws of another state, the United States, or the District of Columbia, or is convicted of a misdemeanor under the provisions of Title 14 of the Louisiana Revised Statutes of 1950, or is convicted of a misdemeanor under the provisions of the Uniform Controlled Dangerous Substances Law contained in Title 40 of the Louisiana Revised Statutes of 1950,

his probation may be revoked as of the date of the commission of the felony or final conviction of the felony or misdemeanor.

B. When a defendant who is under a suspended sentence or on probation for a misdemeanor commits or is convicted of any offense under the laws of this state, a political subdivision thereof, another state or a political subdivision thereof, the United States, or the District of Columbia, his suspended sentence or probation may be revoked as of the date of the commission or final conviction of the offense.

C. In cases of revocation provided for in this Article:

(1) No credit shall be allowed for time spent on probation or for the time elapsed during suspension of the sentence; and

(2) When the new conviction is a Louisiana conviction, the sentence shall run consecutively with the sentence for the new conviction, unless the court originally imposing the suspension or probation specifically orders that said sentences are to be served concurrently, in which case the court minutes shall reflect the date from which the sentences are to run concurrently.

Although we recognize the codal authority provides that sentences imposed in cases of revocation shall run consecutively with sentences for a new conviction unless the revocation sentencing court specifically orders otherwise, the jurisprudence has held that only the court that revokes the probation has the jurisdiction to determine whether the sentence ordered following revocation will be consecutive or concurrent with the sentence for a new conviction. See **State v. Hines**, 07-313, p. 3 (La. App. 5 Cir. 11/27/07), 970 So.2d 707, 708; **State v. Bruce**, 03-918, p. 8 (La. App. 5 Cir. 12/30/03), 864 So.2d 854, 859; **State v. Welch**, 03-905, p. 7 (La. App. 5 Cir. 11/25/03), 864 So.2d 204, 208-09; **State v. Rowlins**, 463 So.2d 829, 830 (La. App. 2 Cir. 1985).

Accordingly, because the trial court had no jurisdiction to order that these sentences be run consecutively with any sentence imposed on a probation revocation, we delete that condition of the sentences.

DECREE

For the foregoing reasons, the convictions are affirmed. The sentences are amended to delete the provision ordering the sentences to be served consecutive to any other sentence. We affirm the sentences as amended.

CONVICTIONS AFFIRMED; SENTENCES AMENDED TO DELETE PROVISION ORDERING SENTENCES TO BE SERVED CONSECUTIVE TO ANY OTHER SENTENCE; SENTENCES AFFIRMED AS AMENDED