NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 KA 1651

STATE OF LOUISIANA

VERSUS

ERNEST BATTLE, JR.

On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, Louisiana
Docket No. 518143, Division "D"
Honorable Peter J. Garcia, Judge Presiding

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Defendant-Appellant
Ernest Battle, Jr.

BEFORE: PARRO, WELCH, AND KLINE,[1] JJ.

Judgment rendered MAY 06 2013

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[1] **Judge William F. Kline, Jr., retired, is serving as judge ad hoc by special appointment of the Louisiana Supreme Court.**

PARRO, J.

The defendant, Ernest Battle, Jr., was charged by bill of information with obscenity, a violation of LSA-R.S. 14:106. He pled not guilty and, following a jury trial, was found guilty as charged. The state subsequently filed a multiple offender bill of information. Following a hearing on the matter, the defendant was adjudicated a third-felony habitual offender and sentenced to two years of imprisonment at hard labor, without benefit of probation or suspension of sentence. The defendant now appeals, designating two assignments of error. We affirm the conviction, adjudication as a third-felony habitual offender, and sentence.

FACTS

Shortly before noon on February 3, 2012, Angel Trinchard was sitting in her Honda Pilot at the Heritage Park in Slidell. Angel testified at trial that, while she was reading a book and waiting for her boyfriend and his brother to meet her for lunch, someone, later identified as the defendant, knocked on her driver's side window, which was rolled up. When she looked at the defendant, he walked away and got into a white Mazda 626 that was right next to her vehicle. She did not know the defendant and assumed his knocking and walking away was a case of mistaken identity. As she began reading, she detected motion in her periphery. When she looked toward the Mazda, which was to her left, she saw the defendant masturbating in the driver's seat. She observed the defendant's exposed, erect penis. She got out of her vehicle and approached several city workers eating lunch at a table. She told them what happened. They told her the defendant was at the park almost every day, and that she needed to call 911, which she did. As one of the workers approached the defendant, he drove away. Several days later, Angel identified the defendant in a photographic lineup.

The defendant testified at trial. He denied the allegation made by Angel, and claimed that if she did see someone in the park masturbating, it was not him. According to his testimony, he owned a white Mazda 626, but he was not in the park on February 3, 2012.

ASSIGNMENTS OF ERROR NOS. 1 and 2

In these related assignments of error, the defendant argues, respectively, that the sentence imposed is excessive and that defense counsel's failure to file a motion to reconsider sentence constitutes ineffective assistance of counsel.

The record does not contain an oral or written motion to reconsider sentence. Louisiana Code of Criminal Procedure article 881.1(E) provides that the failure to make or file a motion to reconsider sentence, or to include a specific ground on which a motion to reconsider sentence may be based, precludes the defendant from raising an objection to the sentence or from urging any ground not raised in the motion on appeal. Ordinarily, pursuant to the provisions of this article and the holding of **State v. Duncan**, 94-1563 (La. App. 1st Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam), we would not consider an excessive sentence argument. However, in the interest of judicial economy, we will consider the defendant's argument that his sentence is excessive, even in the absence of a motion to reconsider sentence, in order to address the defendant's claim of ineffective counsel. See **State v. Wilkinson**, 99-0803 (La. App. 1st Cir. 2/18/00), 754 So.2d 301, 303, writ denied, 00-2336 (La. 4/20/01), 790 So.2d 631.

In **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the United States Supreme Court enunciated the test for evaluating the competence of trial counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

In evaluating the performance of counsel, the inquiry must be whether counsel's assistance was reasonable, considering all the circumstances. **State v. Morgan**, 472 So.2d 934, 937 (La. App. 1st Cir. 1985). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. **State v.**

Robinson, 471 So.2d 1035, 1038-39 (La. App. 1st Cir.), writ denied, 476 So.2d 350 (La. 1985).

Failure to file a motion to reconsider sentence in itself does not constitute ineffective assistance of counsel. However, if the defendant can show a reasonable probability that, but for counsel's error, his sentence would have been different, a basis for an ineffective assistance claim may be found. See **State v. Felder**, 00-2887 (La. App. 1st Cir. 9/28/01), 809 So.2d 360, 370, writ denied, 01-3027 (La. 10/25/02), 827 So.2d 1173.

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of cruel or excessive punishment. Although a sentence falls within statutory limits, it may be excessive. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is considered 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. Andrews**, 94-0842 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 454. The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. See **State v. Holts**, 525 So.2d 1241, 1245 (La. App. 1st Cir. 1988). Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the trial court to consider when imposing sentence. While the entire checklist of Article 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. **State v. Brown**, 02-2231 (La. App. 1st Cir. 5/9/03), 849 So.2d 566, 569.

The articulation of the factual basis for a sentence is the goal of LSA-C.Cr.P. art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary, even where there has not been full compliance with Article 894.1. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982). The trial court should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he

will commit another crime, and his potential for rehabilitation through correctional services other than confinement. See **State v. Jones**, 398 So.2d 1049, 1051-52 (La. 1981). On appellate review of a sentence, the relevant question is whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate. **State v. Thomas**, 98-1144 (La. 10/9/98), 719 So.2d 49, 50 (per curiam).

Having been adjudicated a third-felony habitual offender, the defendant faced a sentence from two years to six years. See LSA-R.S. 14:106(G)(1) and LSA-R.S. 15:529.1(A)(3)(a). The trial court imposed the minimum sentence of two years. The defendant's two prior convictions were accessory after the fact to second degree murder and third-offense DWI. The defendant argues in his brief that there is nothing in his background or history that would "implicate" him in the instant crime of obscenity and, as such, the trial court should have made a downward departure from the minimum two-year sentence.

In **State v. Dorthey**, 623 So.2d 1276, 1280-81 (La. 1993), the Louisiana Supreme Court opined that if a trial judge were to find that the punishment mandated by LSA-R.S. 15:529.1 makes no "measurable contribution to acceptable goals of punishment" or that the sentence amounted to nothing more than "the purposeful imposition of pain and suffering" and is "grossly out of proportion to the severity of the crime," he has the option, indeed the duty, to reduce such sentence to one that would not be constitutionally excessive. In **State v. Johnson**, 97-1906 (La. 3/4/98), 709 So.2d 672, 675-77, the Louisiana Supreme Court reexamined the issue of when **Dorthey** permits a downward departure from the mandatory minimum sentences in the Habitual Offender Law.

A sentencing court must always start with the presumption that a mandatory minimum sentence under the Habitual Offender Law is constitutional. A court may only depart from the minimum sentence if it finds that there is clear and convincing evidence in the particular case before it that would rebut this presumption of constitutionality. A trial court may not rely solely upon the nonviolent nature of the instant crime or of past crimes as evidence that justifies rebutting the presumption of constitutionality. While

the classification of a defendant's instant or prior offenses as nonviolent should not be discounted, this factor has already been taken into account under the Habitual Offender Law for third and fourth offenders. **Johnson**, 709 So.2d at 676.

To rebut the presumption that the mandatory minimum sentence is constitutional, the defendant must clearly and convincingly show that he is exceptional, which means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case. Given the legislature's constitutional authority to enact statutes such as the Habitual Offender Law, it is not the role of the sentencing court to question the wisdom of the legislature in requiring enhanced punishments for multiple offenders. Instead, the sentencing court is only allowed to determine whether the particular defendant before it has proven that the mandatory minimum sentence is so excessive in his case that it violates our constitution. Departures downward from the minimum sentence under the Habitual Offender Law should occur only in rare situations. **Johnson**, 709 So.2d at 676-77.

The defendant argues that the "sparcity [sic] of the sentencing transcript" indicates the trial court did not consider his individual circumstances "or the facts concerning" him. See **Johnson**, 709 So.2d at 676. It is clear from the following exchange between the trial court and the defendant that the trial court considered the facts concerning the defendant and the mitigating factors of LSA-C.Cr.P. art. 894.1, including the defendant's criminal history, in arriving at an appropriate sentence:

> By the Court: Is there anything you'd like to tell the Court before I impose sentence?
>
> [Defendant]: I'm sorry about the prior conviction, you know.
>
> By the Court: Would you like to tell me anything about the charge today and your position on the charges that I'm about to sentence you for?
>
> [Defendant]: Well, you know, yeah, pretty much, Your Honor. I have a family. From those charges that I have now, I really have changed. I bought a house for my wife and kids and grandkids, and here I am again.
>
> By the Court: You've changed since the old charges?
>
> [Defendant]: Yes, sir, I have. I changed. I made a whole u-turn. Me and my family, we got closer, and just like, I guess, got caught up in something else wrong.

By the Court: All right. Are you admitting to me you did something wrong? That's important to me.

[Defendant]: I guess I did. I got found guilty of it.

By the Court: Mr. Battle, it's a very serious part of my sentence to decide whether or not you are sorry for what you did.

[Defendant]: I am sorry. I am very sorry for what I did.

By the Court: Then you're admitting that you did, in fact, do something wrong?

[Defendant]: Yes, sir. Yes, sir.

By the Court: I'm not forcing you to say that just a [sic] get a light sentence. You're admitting that?

[Defendant]: I'm very sorry, Your Honor.

* * * * *

By the Court: I'm also going to state for the record that I've received a number of letters from people in the community. I received a letter from you. I've shared that with the state and I've shared it with Mr. Almerico [defense counsel], and he's provided me with a letter also, in support of sentencing you to a minimum sentence because of your involvement with your family and the community.

What I've got to balance that with is the nature of your offense, where it was committed, and how the community would feel about any sentence that I would impose. Having taken all of that into consideration, I think it's appropriate for me to sentence you to the minimum sentence under the law, which is two years with the Department of Corrections[.]

Considering the trial court's careful review of the circumstances, the defendant's criminal history, and the nature of the instant crime, we find no abuse of discretion by the trial court. There is nothing particularly unusual about the defendant's circumstances that would justify a downward departure from the mandatory minimum sentence of two years. The defendant has not proven by clear and convincing evidence that he is exceptional, such that a two-year sentence would not be meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case. See **Johnson**, 709 So.2d at 676. Accordingly, no downward departure from the presumptively constitutional sentence is warranted. The sentence imposed is not grossly disproportionate to the severity of the offense and, therefore, is not unconstitutionally excessive.

Because we find the sentence is not excessive, defense counsel's failure to make or file a motion to reconsider sentence, even if constituting deficient performance, did

not prejudice the defendant. See **Wilkinson**, 754 So.2d at 303; **Robinson**, 471 So.2d at 1038-39. His claim of ineffective assistance of counsel, therefore, must fall.

These assignments of error are without merit.

CONVICTION, ADJUDICATION AS A THIRD-FELONY HABITUAL OFFENDER, AND SENTENCE AFFIRMED.