NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 KA 1893

STATE OF LOUISIANA

VERSUS

CHRISTOPHER LEE RISNER

Judgment rendered June 7, 2013.

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Appealed from the
22nd Judicial District Court
in and for the Parish of Washington, Louisiana
Trial Court No. 11 CR8 115163
Honorable Will Crain, Judge

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HON. WALTER REED
DISTRICT ATTORNEY
FRANKLINTON, LA

KATHRYN LANDRY
SPECIAL APPEALS COUNSEL
BATON ROUGE, LA

ATTORNEYS FOR
STATE OF LOUISIANA

LIEU T. VO CLARK
LOUISIANA APPELLATE PROJECT
MANDEVILLE, LA

ATTORNEY FOR
DEFENDANT-APPELLANT
CHRISTOPHER RISNER

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BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

PETTIGREW, J.

Defendant, Christopher Lee Risner, was charged by bill of information with distribution of a schedule II controlled dangerous substance (methamphetamine), a violation of La. R.S. 40:967(A)(1) (count one), and with distribution of an imitation or counterfeit controlled dangerous substance (counterfeit MDMA), a violation of La. R.S. 40:971.1(A) (count two). Defendant pled not guilty and, after a jury trial, was found guilty as charged on both counts.[1] The trial court denied defendant's motions for new trial and postverdict judgment of acquittal. On count one, the trial court sentenced defendant to ten years imprisonment at hard labor, with the first two years to be served without the benefit of parole, probation, or suspension of sentence. On count two, the trial court sentenced defendant to five years imprisonment at hard labor, to run concurrently with the sentence on count one. Defendant moved for reconsideration of sentence, but the trial court denied that motion. Defendant now appeals, alleging two assignments of error. For the following reasons, we affirm defendant's convictions on counts one and two and his sentence on count two. We vacate his sentence on count one and remand for resentencing.

FACTS

Officers Craig James and James Folks, both of the Franklinton Police Department, used a confidential informant to conduct controlled narcotics purchases from defendant on January 18, 2011 and January 28, 2011. On January 18, 2011, the confidential informant successfully purchased 0.15 grams of methamphetamine from defendant. On January 28, 2011, the confidential informant attempted to purchase MDMA (commonly known as ecstasy) from defendant, but subsequent chemical testing revealed that defendant actually sold the confidential informant caffeine pills. On both occasions, the confidential informant recorded the transactions via concealed audio and video devices. After a jury trial, defendant was found guilty as charged on both counts.

[1] See discussion of defendant's plea in "Review for Error" section below.

REVIEW FOR ERROR

Initially, we note that our review for error is pursuant to La. Code Crim. P. art. 920, which provides that the only matters to be considered on appeal are errors designated in the assignments of error and "error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." La. Code Crim. P. art. 920(2).

Prior to trial, the district court clerk read to the jury the bill of information and indicated that defendant was arraigned and entered a plea of not guilty on both counts. However, the trial court minutes fail to reflect that defendant was arraigned, or that he entered a plea to the charges in the bill of information. Under La. Code Crim. P. art. 551(A), the arraignment and the defendant's plea shall be entered in the minutes of the court and shall constitute a part of the record. Still, a failure to arraign the defendant, or the fact that he did not plead, is waived if the defendant enters upon the trial without objecting thereto, and it shall be considered as if he had pleaded not guilty. La. Code Crim. P. art. 555.

In the instant case, we find it likely that the absence of the minute entry reflecting defendant's arraignment and pleading is a mere clerical error. However, even if defendant was not arraigned and did not plead to the charges against him, these deficiencies were waived when defendant proceeded to trial without objection. In that event, it would have been considered as if defendant had pleaded not guilty. Therefore, this error does not require correction.

We also note a sentencing error, which requires that we vacate defendant's sentence on count one and remand for resentencing for that offense. For his conviction on count one, distribution of methamphetamine, defendant was sentenced to ten years imprisonment at hard labor, with the first two years of that sentence to be served without the benefit of parole, probation, or suspension of sentence. However, the sentencing range for this conviction is imprisonment at hard labor for not less than two years nor more than thirty years, and payment of a fine up to $50,000.00. La. R.S. 40:967(B)(1). The sentencing provision does not restrict the benefits of parole,

probation, or suspension of sentence. Therefore, the trial court deviated from the statutory penalty provided for this offense. Because of the sentencing discretion involved, we vacate the sentence on count one and remand the matter to the trial court for resentencing in accordance with law. See **State v. Haynes**, 2004-1893 (La. 12/10/04), 889 So.2d 224 (per curiam).

EXCESSIVE SENTENCE

In his two assignments of error, defendant argues that the trial court erred in denying his motion to reconsider sentence and in imposing constitutionally excessive sentences. Specifically, defendant argues that his sentences are excessive because of the minimal amount of drugs he was convicted of selling. Because we have already vacated defendant's sentence on count one, we discuss these assignments of error with respect to the sentence on count two only.

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). 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 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 recite 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.), writ denied, 565 So.2d 942 (La. 1990). In light of the criteria expressed by Article 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).

For his conviction on count two, defendant was eligible to receive a sentence of imprisonment with or without hard labor of not more than five years and a fine up to $5,000.00. La. R.S. 40:971.1(C). Defendant was sentenced to five years imprisonment at hard labor on this count. Therefore, he received the maximum term of imprisonment for this offense.

Maximum sentences may be imposed only for the most serious offenses and the worst offenders, or when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. **State v. Miller**, 96-2040, p. 4 (La. App. 1 Cir. 11/7/97), 703 So.2d 698, 701, writ denied, 98-0039 (La. 5/15/98), 719 So.2d 459. In stating his reasons for defendant's sentences, the trial judge noted that defendant had been convicted of felonies on at least two prior occasions.[2] He further stated that defendant was in need of correctional treatment in a custodial environment and that defendant posed a risk of repeated criminality if he were not incarcerated. Finally, the trial judge stated that he found no mitigating factors to be applicable in the instant case.

The trial judge clearly considered defendant's past conduct of repeated criminality and concluded that any sentence less than the maximum for this offense would not be appropriate in the instant case. Considering the trial judge's stated reasons and the record as a whole, we cannot say that the trial judge abused his discretion in imposing the maximum sentence on count two.

This assignment of error is without merit with respect to count two.

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[2] However, the trial judge did not detail the crimes for which defendant had been previously convicted.

DECREE

For the foregoing reasons, we affirm defendant's convictions on counts one and two and his sentence on count two. We vacate defendant's sentence on count one and remand for resentencing on that count only.

CONVICTIONS ON COUNTS ONE AND TWO AFFIRMED. SENTENCE ON COUNT TWO AFFIRMED. SENTENCE ON COUNT ONE VACATED AND REMANDED FOR RESENTENCING.