NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

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2018 KA 1000

STATE OF LOUISIANA

VERSUS

WILLIAM PAYTON CORKERN

JUDGMENT RENDERED: DEC 21 2018

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On appeal from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany • State of Louisiana
Docket Number 573122 • Division A

The Honorable Raymond S. Childress, Judge Presiding

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BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

WELCH, J.

The State of Louisiana charged the defendant, William Payton Corkern, by bill of information, with two counts of possession of alprazolam, a violation La. R.S. 40:969(C) (counts 1 and 2); possession of hydrocodone, a violation La. R.S. 40:967(C) (count 3); and possession with intent to distribute amphetamine, a violation La. R.S. 40:967(A)(1) (count 4). The defendant pled not guilty to all charges. Following a jury trial, the jury found the defendant guilty as charged on counts 1, 2, and 3; and guilty on count 4 of the responsive offense of possession of amphetamine, a violation of La. R.S. 40:967(C). The defendant filed a motion for postverdict judgment of acquittal, which the trial court denied.

The State filed a habitual offender bill of information.[1] The defendant stipulated to his adjudication as a fourth-felony habitual offender. The trial court sentenced the defendant to five years imprisonment at hard labor on counts 2, 3, and 4 and ordered that the sentences run concurrently with one another. The trial court sentenced the defendant to twenty years imprisonment at hard labor on the enhanced count 1, and ordered that the enhanced sentence run concurrently with the sentences on counts 2, 3, and 4.

The defendant appeals, designating two counseled assignments of error and three *pro se* assignments of error. For the following reasons, we affirm the defendant's convictions, habitual offender adjudication, and sentences.

BACKGROUND

On February 1, 2016, the defendant's parole officer, Agent David Balfantz with the Division of Probation and Parole in the Covington District Office, received a phone call that the defendant was using drugs intravenously. Agent Balfantz and three other agents went to the defendant's trailer in Folsom, off of La.

Highway 1077. The defendant and an acquaintance, Amanda Neff, were the only two people in the trailer. The agents administered a drug screen to the defendant (*i.e.*, a urine test), whereupon he tested positive for drugs, including benzodiazepines, opiates, and amphetamines. The agents then found a syringe and three pill bottles, containing hydrocodone, amphetamine, and alprazolam tablets under the mattress of his daughter's bed. The defendant told detectives that he was selling those drugs to support his heroin addiction. The defendant did not testify at trial.

DISCUSSION

COUNSELED ASSIGNMENT OF ERROR NO. 1

The defendant argues the trial court erred in adjudicating him a habitual offender since the record did not show he was properly advised of his right to a hearing or that he acknowledged the truth of the habitual offender bill of information.

If, at any time, either after conviction or sentence, it shall appear that a person convicted of a felony has previously been convicted of a felony, the district attorney of the parish in which the subsequent conviction was had may file an information accusing the person of a previous conviction. See La. R.S. 15:529.1(D)(1)(a). After a habitual offender bill of information is filed, the court in which the subsequent conviction was had shall cause the person to be brought before it and shall inform him of the allegation contained in the information and of his right to be tried as to the truth thereof according to law and shall also require the offender to say whether the allegations are true. **Id.** The statute further implicitly provides that the court should advise the defendant of his right to remain silent. **State v. Griffin**, 525 So.2d 705, 706 (La. App. 1st Cir. 1988).

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[1] The defendant had three prior convictions in the 22nd Judicial District Court, Parish of St. Tammany, State of Louisiana: (1) bank fraud, a violation of La. R.S. 14:71.1, docket no. 461728; (2) possession of hydrocodone, a violation of La. R.S. 40:967(C), docket no. 390981;

Generally, the failure of the trial court to advise a defendant of his right to a hearing and his right to remain silent is not considered reversible error where the State has offered competent evidence of the defendant's status as a habitual offender at a hearing. **State v. Bell**, 2003-217 (La. App. 5th Cir. 5/28/03), 848 So.2d 87, 90. When the defendant's guilt, however, is proven by his own stipulation or admission without having been informed of his right to a hearing or his right to remain silent, by either the trial court or his attorney, there is reversible error. **Id**. The language of the Habitual Offender Law must be strictly construed. In this regard, an implicit and integral aspect of the requirements of La. R.S. 15:529.1 is the court's duty to inform the defendant of his right to remain silent. **State v. Gonsoulin**, 2003-2473 (La. App. 1st Cir. 6/25/04), 886 So.2d 499, 501 (*en banc*), writ denied, 2004-1917 (La. 12/10/04), 888 So.2d 835.

The defendant asserts that the record does not support a finding that he was adequately advised of his right to a hearing and to remain silent. This assertion is baseless. After informing the defendant that the allegations contained in the multiple offender bill of information indicated he was facing his fourth felony conviction, the trial court specifically stated: "You have the right to be tried as to the truth of that charge. You also have the right to stand mute, as it pertains to these proceedings." The trial court then reiterated the defendant's right to a hearing and to remain silent when it stated, "So you have the right to have the hearing to determine the truthfulness of the allegation, the right to remain silent throughout[,] and you have the right to affirmatively require [t]he State to affirmatively prove these prior convictions."

The record indicates the defendant then conferred with his counsel. Thereafter, the following exchange occurred:

MR. ALMERICO [defense counsel]:

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and (3) possession of alprazolam, a violation of La. R.S. 40:969(C), docket no. 356693.

He'd stipulate.

THE COURT:

You'd like to stipulate?

DEFENDANT CORKERN:

Yes, sir.

THE COURT:

All right. The record will reflect -- so therefore, the Motion to Quash the Multiple Bill is hereby moot; correct?

MR. ALMERICO:

Correct, Your Honor.

The defendant further avers that there is not sufficient support that he admitted to his status as a habitual offender. The defendant argues that he signed no waiver form setting forth the rights he was giving up. There is no requirement of a waiver form under the Habitual Offender Law. Further, the defendant's stipulation was, in fact, an admission to being a habitual offender. Accordingly, the defendant was clearly informed of his rights under the Habitual Offender Law. Upon his stipulation, the defendant waived those rights, including the requirement of the State to offer competent evidence of the defendant's status as a habitual offender at a hearing. See La. R.S. 15:529.1(D)(3); **State v. Kelly**, 2017-221 (La. App. 5th Cir. 12/29/17), 237 So.3d 1226, 1236-37, writ denied, 2018-0153 (La. 11/5/18), 255 So.3d 1051; **Gonsoulin**, 886 So.2d at 502 (finding that the law requires that the record demonstrate that *the proceedings as a whole* were fundamentally fair and accorded the defendant due process of law). Accordingly, this counseled assignment of error is without merit.

COUNSELED ASSIGNMENT OF ERROR NO. 2

The defendant argues the evidence was insufficient to support the verdicts. A conviction based on insufficient evidence cannot stand as it violates Due Process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of

review for the sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979); see La. C.Cr.P. art. 821(B); **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). The **Jackson** standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See **State v. Patorno**, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

To support a conviction of possession of a controlled dangerous substance, the State must prove that the defendant was in possession of the illegal drug and that he knowingly or intentionally possessed the drug. Guilty knowledge therefore is an essential element of the crime of possession. A determination of whether or not there is "possession" sufficient to convict depends on the peculiar facts of each case. To be guilty of the crime of possession of a controlled dangerous substance, one need not physically possess the substance; constructive possession is sufficient. In order to establish constructive possession of the substance, the State must prove that the defendant had dominion and control over the contraband. A variety of factors are considered in determining whether or not a defendant exercised "dominion and control" over a drug, including: a defendant's knowledge that illegal drugs are in the area; the defendant's relationship with any person found to be in actual possession of the substance; the defendant's access to the area where the drugs were found; evidence of recent drug use by the defendant; the defendant's physical proximity to the drugs; and any evidence that the particular

area was frequented by drug users. **State v. Harris**, 94-0696 (La. App. 1st Cir. 6/23/95), 657 So.2d 1072, 1074-75, writ denied, 95-2046 (La. 11/13/95), 662 So.2d 477; see **State v. Trahan**, 425 So.2d 1222, 1226 (La. 1983). A determination of whether there is sufficient "possession" of a drug to convict depends on the peculiar facts of each case. **Trahan**, 425 So.2d at 1226.

The defendant argues that the State failed to establish that he constructively possessed the seized drugs. According to the defendant, when the police entered his trailer, Amanda Neff was the person nearest to the contraband; that is, she was observed near the child's bedroom where the drugs were found. Thus, the defendant asserts, the evidence did not exclude the reasonable hypothesis of innocence that it was Amanda Neff who was exercising dominion and control over the drugs.

The evidence at trial established that, pursuant to the factors listed in **Harris**, the defendant exercised dominion and control over the drugs. According to Agent Balfantz, the defendant's parole officer, when he arrived at the defendant's trailer with the three other agents, the only two people in the trailer were the defendant and Amanda Neff. Agent Kenneth Tanner, the defendant's former parole officer, took the defendant to the bathroom to conduct a urine drug screen. The defendant tested positive for benzodiazepines, opiates, and amphetamines. The defendant was handcuffed and sat at the kitchen table while Agents Balfantz, Tanner, and another agent, searched the defendant's bedroom. One of the agents found a jar, which contained marijuana, inside a speaker box for a car. Based on the results of his positive drug screen, Agent Tanner asked the defendant where those drugs were located. The defendant nodded toward the hallway. When asked to show them, the defendant brought the agents to his daughter's bedroom. When asked where the drugs were in the bedroom, the defendant nodded toward, and motioned with his elbow at, his daughter's bed. The agents lifted the mattress and found three pill

bottles and a syringe. One bottle contained thirteen hydrocodone tablets; one bottle contained 78 amphetamine tablets; and one bottle contained 31 alprazolam tablets. Two of the bottles had the labels ripped off, and one bottle had a label on it with the name Kristen Marshall.

The agents transported the defendant to the Covington District Probation and Parole Office, where the agents contacted the St. Tammany Parish Sheriff's Office. Upon the arrival of St. Tammany Parish Sheriff's Office Narcotics Detectives Jay Quinn and Scott Maitrejean, the agents released the evidence into their custody. The agents then transported the defendant to the St. Tammany Parish Jail. Three days later, on February 4, 2016, Detectives Quinn and Maitrejean, after confirming the identity of the pills found in the defendant's trailer, went to the jail to execute an arrest warrant. They took the defendant to an office and **Mirandized** him.[2] The defendant informed the detectives that he was selling those pills so that he could support his heroin addiction. When Detective Quinn asked why the pills were under the mattress of his daughter's bed, the defendant indicated that when he saw the probation and parole units arrive at his residence, he placed the pills in a different bedroom in an attempt to hide them.

Based on the foregoing, the State clearly established the defendant possessed the drugs that were found in his residence. The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. **State v. Taylor**, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932. The due process standard of **Jackson v. Virginia**

[2] Prior to any questioning, the person must be warned that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently. **Miranda v. Arizona**, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966).

does not require the reviewing court to determine whether it believes the witnesses or whether it believes the evidence establishes guilt beyond a reasonable doubt. **State v. Mire**, 2014-2295, p. 8 (La. 1/27/16), ___ So.3d ___, ___, 2016 WL 314814, at *4 (*per curiam*). The facts established by the direct evidence and inferred from the circumstances established by that evidence must be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. **State v. Alexander**, 2014-1619 (La. App. 1st Cir. 9/18/15), 182 So.3d 126, 129-30, writ denied, 2015-1912 (La. 1/25/16), 185 So.3d 748. The weight given evidence is not subject to appellate review; therefore, evidence will not be reweighed by an appellate court to overturn a factfinder's determination of guilt. See **State v. Moultrie**, 2014-1535 (La. App. 1st Cir. 12/14/17), 234 So.3d 142, 146, writ denied, 2018-0134 (La. 12/3/18), ___ So.3d ___, 2018 WL 6322101.

In this case, the jury was presented with two theories of who possessed the drugs found in the defendant's trailer: the State's theory that the defendant knowingly and constructively possessed the drugs, and the defense's theory that the drugs belonged to someone else, namely Amanda Neff. When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. **State v. Moten**, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). In the absence of internal contradiction or irreconcilable conflict with the physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a factual conclusion. **State v. Higgins**, 2003-1980 (La. 4/1/05), 898 So.2d 1219, 1226, cert. denied, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005). The jury's verdicts reflected the reasonable conclusion that, based on the physical and documentary evidence, the testimony of several witnesses, and the defendant's

own admission, the defendant was guilty as charged on counts one, two, and three, and guilty of the responsive offense on count 4. In finding the defendant guilty, the jury clearly rejected the defendant's theory of innocence. See **Moten**, 510 So.2d at 61.

After a thorough review of the record, we find that the evidence supports the unanimous guilty verdicts. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of possession of alprazolam, hydrocodone, and amphetamine. See **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (*per curiam*). Accordingly, this counseled assignment of error is without merit.

***PRO SE* ASSIGNMENT OF ERROR NO. 1**

In his first *pro se* assignment of error, the defendant argues defense counsel was ineffective with regards to his habitual offender adjudication and sentencing.

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."

Strickland, 466 U.S. at 688, 104 S.Ct. at 2065. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." **Strickland**, 466 U.S. at 694, 104 S.Ct. at 2068. It is unnecessary to address the issues of both counsel's performance and prejudice to the defendant if the defendant makes an inadequate showing on one of the components. **State v. Serigny**, 610 So.2d 857, 860 (La. App. 1st Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993). A claim of ineffective assistance of counsel is more properly raised by an application for post-conviction relief in the district court where a full evidentiary hearing may be conducted. However, where the record discloses evidence needed to decide the issue of ineffective assistance of counsel, and that issue is raised by assignment of error on appeal, the issue may be addressed in the interest of judicial economy. **State v. Carter**, 96-0337 (La. App. 1st Cir. 11/8/96), 684 So.2d 432, 438.

Claims of ineffective assistance of counsel, by their very nature, are highly fact-sensitive. **State v. Henry**, 2000-2250 (La. App. 1st Cir. 5/11/01), 788 So.2d 535, 540, writ denied, 2001-2299 (La. 6/21/02), 818 So.2d 791. A defendant who asserts a claim of ineffective counsel based upon a failure to investigate must allege with specificity what the investigation would have revealed and how it would have altered the outcome of a trial or sentencing. General statements and conclusory charges will not suffice. See **State v. Castaneda**, 94-1118 (La. App. 1st Cir. 6/23/95), 658 So.2d 297, 306. Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. **Strickland**, 466 U.S. at 690-91, 104 S.Ct. at 2066. In other words, counsel has a duty to make reasonable investigations or to

make a reasonable decision that makes particular investigations unnecessary. **Id.** In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. **Id.**

The defendant avers in brief that defense counsel was ineffective for three reasons. According to the defendant, defense counsel failed to file a motion to obtain production of the documents of his prior convictions, alleged in the habitual offender bill of information; failed to file or request a **Dorthey**[3] hearing; and failed to inform him (the defendant) of the allegations in the habitual offender bill or whether he (the defendant) would be a double, triple, or fourth-felony habitual offender. According to the defendant, had defense counsel had the "transcripts" alleged in the habitual offender bill of information, he would have found "an infringement of irregularity in those transcripts."

At the habitual offender hearing, the State indicated it was prepared to move forward. The trial court noted that the defendant had filed an answer and motion to quash the multiple offender bill. The trial court then informed the defendant of his rights regarding a habitual offender adjudication. Defense counsel then conferred with the defendant off the record, and the defendant stipulated to the allegations in the habitual offender bill.

Based on the foregoing, particularly the filing of the defendant's answer and

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[3] 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 La. 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, 676-77, the Louisiana Supreme Court reexamined the issue of when **Dorthey** permits a downward departure from the mandatory minimum sentences in the Habitual Offender Law. The defendant does not mention **Johnson** in his *pro se* brief, however, he alleges his defense counsel failed to file a request for a **Dorthey** hearing to determine whether a "downward departure would fit the criteria." While both **Dorthey** and **Johnson** involve the mandatory minimum sentences imposed under the Habitual Offender Law, the Louisiana Supreme Court has held that the sentencing review principles espoused in **Dorthey** are not restricted in application to the penalties provided by La. R.S. 15:529.1. See **State v. Galloway**, 2015-1519 (La. App. 1st Cir. 4/15/16) (*unpublished*), 2016 WL 1535162, at *2, writ denied,

motion to quash the habitual offender bill of information, it appears the defendant was fully informed of the allegations against him and his status as a felony habitual offender. Because the defendant stipulated at the habitual offender hearing, there is nothing in the record before us regarding what the defendant was shown by, or discussed with, his defense counsel. Further, because of the stipulation, the State did not introduce any documentation of the defendant's prior convictions. In any event, the State would have obtained the documents of the defendant's prior convictions and provided copies of such to defense counsel. Accordingly, we find nothing in the record to suggest that defense counsel was ineffective.

In his second *pro se* assignment of error, discussed below, the defendant argues his sentence is excessive and that the trial court should have deviated below the mandatory minimum sentence. Because we find that the trial court did not abuse its discretion in sentencing the defendant to twenty years imprisonment on the enhanced sentence, defense counsel was not ineffective for not requesting a "**Dorthey** hearing."

The third claim of ineffective assistance of counsel—where the defendant argues that counsel failed to inform him (the defendant) of the allegations in the habitual offender bill or whether he (the defendant) would be a double, triple, or fourth-felony habitual offender—is fully addressed in the defendant's third *pro se* assignment of error. Based on our finding that the defendant was fully informed of what he would be facing as a habitual offender, defense counsel was not ineffective.

Regarding these claims of ineffective assistance of counsel, the defendant has made no showing of deficient performance by defense counsel; and even had he shown deficient performance, the defendant has failed to demonstrate how such deficiency would have prejudiced him. The defendant has provided only general

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2016-1050 (La. 5/1/17), 220 So.3d 744.

statements and conclusory assertions, failing to set forth his arguments with any specificity to support his assertions regarding counsel's deficiencies. The defendant's claims of ineffective assistance of counsel, therefore, must fall. See **State v. Robinson**, 471 So.2d 1035, 1038-39 (La. App. 1st Cir.), writ denied, 476 So.2d 350 (La. 1985).

If the defendant feels there is evidence to present beyond what is contained in the instant record, such evidence must be adduced in an evidentiary hearing in the district court. The defendant would have to file an application for post-conviction relief and satisfy the requirements of La. C.Cr.P. art. 924, *et seq.*, in order to receive such a hearing. See **State v. Albert**, 96-1991 (La. App. 1st Cir. 6/20/97), 697 So.2d 1355, 1363-64. Accordingly, this *pro se* assignment of error is without merit.

***PRO SE* ASSIGNMENT OF ERROR NO. 2**

In his second *pro se* assignment of error, the defendant argues that his enhanced twenty-year sentence as a habitual offender is unconstitutionally excessive. Specifically, the defendant contends that the trial court should have departed from the mandatory minimum sentence.

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 La. C.Cr.P. art. 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. **State v. Brown**, 2002-2231 (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 La. 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 La. C.Cr.P. art. 894.1. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982). The trial judge 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*).

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 La. 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. **Dorthey**, 623 So.2d at 1280-81. In **State v. Johnson**, 97-1906 (La. 3/4/98), 709 So.2d 672, 676-77, 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 judge 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 which would rebut this presumption of constitutionality. A trial judge may not rely solely upon the non-violent nature of the instant crime or of past crimes as evidence which justifies rebutting the presumption of constitutionality. While the classification of a defendant's instant or prior offenses as non-violent 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 the 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 committed the instant offenses on February 1, 2016.

Accordingly, the applicable provisions of the Habitual Offender Statute are those as they existed on the date the offenses were committed. See **State v. Parker**, 2003-0924 (La. 4/14/04), 871 So.2d 317, 327 ("the punishment to be imposed on defendant, a habitual offender, is that provided by La. R.S. 15:529.1 as it existed on the date he committed the underlying offense"). At the time the instant offenses were committed, La. R.S. 15:529.1(A) provided, in pertinent part:

> (4) If the fourth or subsequent felony is such that, upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life then:
>
> (a) The person shall be sentenced to imprisonment for the fourth or subsequent felony for a determinate term not less than the longest prescribed for a first conviction but in no event less than twenty years and not more than his natural life[.]

The defendant stipulated to being a fourth-felony habitual offender. Accordingly, his sentencing range was twenty years to life imprisonment. The defendant argues in brief that his twenty-year sentence is excessive because of his age (thirty-four years old); the small amount of drugs he possessed; his criminal history does not consist of crimes of violence or sex crimes; and the drug crimes that he did commit were not punishable by ten years or more. The defendant notes that the maximum sentence allowable for each of the instant convictions was five years.

The record reflects that the defendant was not sentenced to twenty years imprisonment for the instant offenses, all of which carried sentences for not more than five years imprisonment. See La. R.S. 40:967(C)(2) & 40:969(C)(2). The defendant received the *enhanced* sentence because of his continued lawlessness. The major reasons the Legislature passed the Habitual Offender Law were to deter and punish recidivism. Under this statute, a defendant with multiple felony convictions is treated as a recidivist who is to be punished for the instant crime in light of his continuing disregard for the laws of our state. He is subjected to a

longer sentence because he continues to break the law. **Johnson**, 709 So.2d at 677. Moreover, it would seem that the defendant's age, the instant offenses, and his criminal history of non-violent offenses is precisely the reason he was sentenced to only the minimum of twenty years imprisonment under a sentencing range that included life imprisonment.[4]

The defendant has not pointed to any instances of how his situation is unique. In any case, there is nothing particularly unusual about the defendant's circumstances that would justify a downward departure from the mandatory sentence under La. R.S. 15:529.1(A)(4)(a). The record before us established an adequate factual basis for the sentence imposed. The defendant has not shown by clear and convincing evidence that he is exceptional such that the 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 mandatory minimum sentence is warranted. The enhanced twenty-year sentence imposed is not grossly disproportionate to the severity of the offenses and, therefore, is not unconstitutionally excessive. This *pro se* assignment of error is without merit.

***PRO SE* ASSIGNMENT OF ERROR NO. 3**

In his third *pro se* assignment of error, the defendant argues the trial court erred in not telling him the sentencing range he would be exposed to as a fourth felony habitual offender.

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[4] The habitual offender statute was significantly amended in 2017. See 2017 La. Acts No. 257, § 1 and 2017 La. Acts No. 282, § 1 (eff. Nov. 1, 2017). In enacting those amendments, the Legislature provided that Acts 257 and 282 "shall become effective November 1, 2017, and shall have prospective application only to offenders whose convictions became final on or after November 1, 2017." See 2017 La. Acts No. 257, § 2 and 2017 La. Acts No. 282, § 2. We are aware of **State v. Williams**, 2017-1753 (La. 6/15/18), 245 So.3d 1042 (*per curiam*) and **State v. Purvis**, 2017-1013 (La. App. 3d Cir. 4/18/18), 244 So.3d 496, which gave limited retroactive application to the 2017 amendments. However, we consider those decisions effectively abrogated by the 2018 enactment of La. R.S. 15:529.1(K)(1). See 2018 La. Acts No. 542, § 1 (eff. Aug. 1, 2018) and **State v. Floyd**, 52,183 (La. App. 2d Cir. 8/15/18), 254 So.3d 38, 43 n.2.

The defendant avers that had he been aware of his sentencing enhancement as "a quad-offender he most certainly would not have agreed to a sentence" of twenty years. According to the defendant, the trial court violated his constitutional right to due process by failing to adopt the provisions of La. C.Cr.P. art. 556.1 as "a constitutional prerequisite during the sentencing enhancement" proceedings.

Louisiana Code of Criminal Procedure article 556.1 provides, in pertinent part:

> A. In a felony case, the court shall not accept a plea of guilty or nolo contendere without first addressing the defendant personally in open court and informing him of, and determining that he understands, all of the following:
>
> (1) The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law.
>
> (2) If the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if financially unable to employ counsel, one will be appointed to represent him.
>
> (3) That he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself.
>
> (4) That if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial.
>
> B. In a felony case, the court shall not accept a plea of guilty or nolo contendere without first addressing the defendant personally in open court and determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement.
>
> C. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the district attorney and the defendant or his attorney. If a plea agreement has been reached by the parties, the court, on the record, shall require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered.
>
> D. In a felony case a verbatim record shall be made of the

> proceedings at which the defendant enters a plea of guilty or nolo contendere.
>
> E. Any variance from the procedures required by this Article which does not affect substantial rights of the accused shall not invalidate the plea.

There is nothing in the record before us that suggests the defendant entered into a plea agreement before he was adjudicated. Accordingly, La. C.Cr.P. art. 556.1 had no applicability to the defendant's stipulation. Moreover, even if there was some type of agreement between the defendant and the State (not transcribed in the record), the trial court was not required under Article 556.1 to inform the defendant of sentencing enhancements. See **State v. Guzman**, 99-1528, 99-1753 (La. 5/16/00), 769 So.2d 1158, 1163 (finding that advice regarding the penalties for subsequent offenses is not required to be given before the plea is taken; thus, under the plain language of La. C.Cr.P. art. 556.1, clearly the failure of a trial judge to advise the defendant of the penalties for subsequent offenses under La. C.Cr.P. art. 556.1(E) is not reversible error). Moreover, as a response to **Guzman**, Paragraph (E) of Article 556.1 was amended to remove the requirement that the court advise the defendant regarding penalties for subsequent offense.[5] See Paragraph (b) of the 2001 Official Comments of La. C.Cr.P. art. 556.1; see also **State v. Harrell**, 2009-364 (La. App. 5th Cir. 5/11/10), 40 So.3d 311, 318-19, writ denied, 2010-1377 (La. 2/10/12), 80 So.3d 473.

Louisiana jurisprudence has consistently held that, in a multiple offender proceeding, a trial court must advise a defendant of his right to a hearing at which the State is required to prove the allegations of the multiple bill, and of his right to remain silent. **State v. Perrilloux**, 2001-509 (La. App. 5th Cir. 11/14/01), 802 So.2d 772, 777. If the record reflects the defendant was advised of his multiple offender rights by the trial judge and/or his attorney, then the defendant

[5] Pursuant to 2001 La. Acts No. 243 § 1 (eff. Aug. 15, 2001), Paragraph (E) of La. C.Cr.P. art. 556.1 was amended to: "Any variance from the procedures required by this Article which does not affect substantial rights of the accused shall not invalidate the plea."

intelligently waived his rights. **Id**. Nothing more, regarding what information the defendant is entitled to, is required under the law.

Moreover, the defendant did, indeed, know what his sentencing exposure would be if he turned down the deal offered by the State. The defendant was informed more than once, pretrial, that he was being offered a ten-year sentence as a second-felony habitual offender; and that if he rejected this offer and went to trial, he could be adjudicated a fourth-felony habitual offender and face a minimum of twenty years imprisonment.

The defendant was present at a pretrial hearing on July 14, 2016, (about 3 weeks before trial). The State *nolle prossed* count 5 because nothing was found on the syringe. The following exchange then took place, regarding the State's offer to the defendant:

> I have made an offer to Mr. Corkern, that I've communicated through Mr. Almerico, that we have approval for him to either go to re-entry court or he would be a double and 10 -- a double bill and 10 years.
>
> Mr. Corkern, according to his criminal history, is a quad-bill. If you are found as a fourth felony offender, the minimum you can get on that is 20 years.
>
> I will keep this offer open until the next date. Mr. Almerico asked that we continue it. He said he was going to file a motion. I have no objection to the July 27 date.
>
> At that time, you will either have to accept one of those offers or they will be gone forever. And we will proceed as a priority trial for the week of August 8.
>
> THE COURT:
>
> Fine.
>
> THE STATE:
>
> And he will be a quad-bill.

The defendant was also present at a motions hearing the day before trial

(8/8/16). After the trial court denied motions to suppress, the following exchange took place:

> THE COURT:
>
> We will note it. We will be picking a jury tomorrow morning. Be here for 9:00 and I would assume -- my recollection is we've already discussed, with Mr. Corkern, the offer that was made by The State and explained to Mr. Corkern, the fact that that offer will no longer be available to him. And that the matter goes to trial, he's going to be, certainly if he's convicted, a multiple offender candidate who is looking at -- what, you're looking at a double?
>
> THE STATE:
>
> Well, he turned down a double and 10. And he turned down an offer of re-entry court. He's actually turned those offers down twice. So, he is a quad-bill.
>
> THE COURT:
>
> Oh.
>
> THE STATE:
>
> Depending on how The State chooses to bill him, he could get 20 to life.
>
> THE COURT:
>
> Right.
>
> THE STATE:
>
> Or he could get, I think, 30 to life.
>
> THE COURT:
>
> Right.
>
> MR. ALMERICO [defense counsel]:
>
> And Your Honor, I spoke to Mr. Corkern last week on Wednesday, which was before the stated deadline that Ms. Hollen had made.
>
> He expressed his desire to not accept the offer. We had spoken prior to that, also. But that was his answer. I had spoken to him previously.
>
> THE COURT:

And I just wanted to make the record reflect that there was no question that he had been advised as to offer and understood it. And understood the fact that, if he's convicted, he could be multiple-billed with a serious potential sentence.

And he's elected not to enter any type of a guilty plea. So we will see you in the morning[,] and we will pick a jury and we will go to trial.

During *voir dire*, prior to the second panel being picked, the trial court, State, and defense counsel again discussed the offer proposed and how it had been rejected by the defendant:

THE STATE:

Becky Hollen for The State, Your Honor. During the break and even this morning before court, The Defendant's attorney had asked The State for some special consideration to re-offer the deals that had previously been offered to The Defendant, multiple times, which he had rejected, which this morning we withdrew those offers.

It was asked, during the break, if those offers could be, once again, re-extended or if a new offer could be made.

During the break just now, Mr. Almerico and myself went and met with Mr. Sims from our office and we talked about the case.

And at this time, The State is declining to re-offer The Defendant any new offer. He's already previously turned down an offer of re-entry and an offer of a double and 10.

Those offers have expired and we do not wish to offer him any other offer at this time.

MR. ALMERICO [defense counsel]:

John Almerico on behalf of Mr. Corkern, who is present. That is correct, Your Honor. I had met with Ms.

Hollen's office and they have declined to reissue the offer that was previously extended.

THE COURT:

And just so the record is clear, I think, on two occasions, we discussed on the record what the offer was[,] and Mr. Corkern indicated he understood it and indicated he was not interested in taking it[,] and it was made abundantly clear yesterday that that offer would no longer be on the table.

I'm glad y'all had an opportunity to further discuss to see if something could be resolved. And since nothing has been resolved, we will proceed with our next panel.

A record minute entry indicates the following: "Court advised counsels that jury selection will begin August 9, 2016 and any offers that have been made to the defendant will no longer stand. The defendant at this time turned down all offers." Accordingly, despite what the defendant has represented here, he was given an offer of ten years imprisonment, which he rejected. And he was well aware prior to, and throughout trial, that as a fourth-felony habitual offender, his sentence exposure was at least twenty years imprisonment. See **Gonsoulin**, 886 So.2d at 501-02. Accordingly, this *pro se* assignment of error is without merit.

DECREE

For the foregoing reasons, the defendant's convictions, habitual offender adjudication, and sentences are affirmed.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.