NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-2606**
VERSUS	*	**COURT OF APPEAL**
WARREN J. JACKSON, JR.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 410-075, SECTION "F"
Honorable Dennis J. Waldron, Judge
* * * * * *
Judge Miriam G. Waltzer
* * * * * *

(Court composed of Judge Miriam G. Waltzer, Judge Patricia Rivet Murray and Judge Max N. Tobias, Jr.)

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CONVICTION AND SENTENCE AFFIRMED.

STATEMENT OF CASE

On 8 October 1999, the State charged Warren Jackson, Jr. with armed robbery. Defendant pled not guilty at his arraignment on 14 October 1999 and, on 28 February 2000, he withdrew his not guilty plea and pled guilty under *State v. Crosby*, 338 So. 2d 584 (La. 1976). On 14 July 2000, the court sentenced defendant to twenty years hard labor, without benefit of parole, probation or suspension of sentence, but with credit for time served.

STATEMENT OF FACT

At approximately 9:30 p.m. on 11 August 1999, three masked males, one armed with a sawed off shotgun, entered Mother's Restaurant on Poydras Street in New Orleans. The armed robber ordered the employees and patrons to lie on the floor. He then fired at the safe box located behind the counter, and when the lock on the box did not break, one of the other robbers emptied the cash register. The robbers escaped in a waiting vehicle.

As they fled, a restaurant employee saw their faces and noted the license plate number of the getaway car.

The police broadcast a description of the suspects and the license plate number of the getaway car. About fifteen minutes after the robbery, police stopped the getaway car on Camp Street near the St. Thomas Housing Development. Three suspects exited the vehicle and ran; the police, however, apprehended one. The fourth suspect was captured in the getaway vehicle. Follow up investigation developed the defendant as a suspect, who confessed to being the shotgun-wielding robber and owner of the getaway car.

ERRORS PATENT

A review for errors patent on the face of the record reveals none.

<u>FIRST ASSIGNMENT OF ERROR:</u> The trial court erred in denying defendant's motion to suppress his statement because he was unlawfully interrogated in violation of the rule of *Dunaway v. New York,* 442 U.S. 200, 99 S.Ct. 2248 (1979)

The State has the burden of proving the admissibility of an inculpatory statement at a motion to suppress hearing. La.C.Cr.P. art. 703

(D). Before a statement or confession can be admitted into evidence, the State must show that it was made freely and voluntarily and not under the influence of fear, duress, intimidation, menace, threats, inducements or promises. La.R.S. 15:451. The testimony of police officers alone can be sufficient to prove the defendant's statements were freely and voluntarily given. *State v. Gibson*, 93-0305 (La.App. 4 Cir. 10/13/94), 644 So.2d 1093, 1097.

In determining the voluntariness of a statement, the district court must review the totality of the circumstances. *State v. Sepulvado*, 93-2692 (La.4/8/96), 672 So.2d 158, 163. A district court's determination as to the admissibility of a statement is within the sound discretion of the district court; and the court's decision will not be disturbed unless unsupported by the evidence. *State v. Tart*, 93-0772 (La.2/9/96), 672 So.2d 116, 126.

At the hearing on defendant's motion to suppress his statement, Officer Andre Jeanfreau testified that he and Officer Chris Cambiotti went to the defendant's home three days after the robbery. The defendant's eighteen-year-old sister answered the door. The officers identified themselves and asked to speak with the defendant, who, they knew, was the owner of the getaway car. The sister admitted the officers, and directed them to the defendant's bedroom. When the defendant saw the officers, he said: "I been

waiting for y'all. I knew y'all would come." Officer Jeanfreau advised the defendant that they were investigating the armed robbery of Mother's Restaurant and requested that the defendant come to the police station for questioning. The officer read the defendant his *Miranda* rights. The defendant voluntarily accompanied the officers. Before placing the defendant in the police car, Officer Jeanfreau handcuffed him.

Terez Jackson, the defendant's thirteen-year old brother, testified that he answered the door the day the officers came to question his brother. The officers asked if they could enter the house and Terez's eighteen-year old sister showed them in. The officers searched the house without permission and found the defendant asleep in his bed. The defendant asked if he could change his clothes and accompanied the officers outside where he was handcuffed and placed in the police car. Terez Jackson did not hear any conversation between the officers and his brother.

The defendant argues that his being handcuffed constituted an arrest for which the officers had neither a warrant nor probable cause. Consequently, the defendant maintains, his statement was the fruit of an unlawful arrest and should have been suppressed.

La.C.Cr.P. art. 201 provides that an arrest is the taking of one person into custody by another by actual restraint of the person. In determining

whether a person has been seized under the Fourth Amendment, the court must determine whether or not a reasonable person would have believed he was free to leave. *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870 (1980). In *State v. Allen*, 95-1754 (La.9/5/96), 682 So.2d 713, 719, the Supreme Court stated:

> This court has considered this issue and determined that "it is the circumstances indicating the intent to effect an extended restraint on the liberty of the accused, rather than the precise timing of an officer's statements: 'You are under arrest,' that are determinative of when an arrest is actually made." *State v. Giovanni*, 375 So.2d 1360, 1363 (La.1979) (quoting *State v. Sherer*, 354 So.2d 1038, 1042 (La.1978)).

The Supreme Court has emphasized that "any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account 'all the circumstances surrounding the incident' in each individual case." *Michigan v. Chesternut*, 486 U.S. 567, 108 S.Ct. 1975 (1988) (quoting *INS v. Delgado*, 466 U.S. 210, 104 S.Ct. 1758 (1984), and *United States v. Mendenhall*, *supra*.). A seizure occurs "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id*. 486 U.S. at 572, 108 S.Ct. at 1978.

In this case, Officer Jeanfreau admitted that he did not have a warrant for the defendant’s arrest. He denied having told the defendant that he was

under arrest or that he had to accompany the officers to the police station. Officer Jeanfreau explained that he handcuffed the defendant for his (Jeanfreau's) protection because the unmarked unit he was driving did not have a protective grill between the front and rear seats.

At the station, the defendant met with his parents for about fifteen minutes prior to giving his statement. Officers testified that he was never deprived of the use of bathroom facilities or water, nor was he told that he would receive any benefit from making a statement.

In *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248 (1979), the Supreme Court reversed the conviction of a man who had confessed to a robbery-murder in New York. Police learned from an informant that the defendant might have been involved in the crime but did not have "enough information to get a warrant" for the defendant's arrest. 442 U.S. at 203, 99 S.Ct. at 2251. Nevertheless, police detained the defendant, took him into police headquarters in a marked police car and forbade him to leave. Dunaway then waived his *Miranda* rights and made an inculpatory statement. A lower court found that the defendant had not voluntarily appeared at the police station to make a statement; however, New York's highest court affirmed the defendant's conviction. The United States Supreme Court reversed, holding that this procedure was in violation of the

defendant's Fourth Amendment rights against seizure on less than probable cause.

Officer Jeanfreau's testimony indicates that the defendant voluntarily accompanied the officers to the station. The defendant did not refuse or object to the officers' request. Moreover, Terez Jackson's testimony did not refute Officer Jeanfreau's contention the defendant's actions were voluntary. The evidence shows that Jackson, unlike the defendant in *Dunaway*, voluntarily complied with the officer's request, and was free to leave the station had he chosen to do so. This assignment is without merit.

<u>SECOND ASSIGNMENT OF ERROR:</u> Defendant's sentence is excessive, considering that this was his first offense.

Although a sentence is within the statutory limits, a sentence may still violate a defendant's constitutional right against excessive punishment. *State v. Sepulvado*, 367 So.2d 762 (La.1979). A sentence is unconstitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless and needless imposition of pain and suffering, and is grossly out of proportion to the severity of the crime. *State v. Lobato*, 603 So.2d 739 (La.1992). The trial court has great discretion in sentencing within the statutory limits. *State*

v. Trahan, 425 So.2d 1222 (La.1983). La.C.Cr.P. art. 894.1 sets forth sentencing guidelines to be followed so that a trial judge can tailor the sentence to the particular defendant and his particular crime; but, it is not necessary that the judge recite all of the factors in Article 894.1 as long as there is evidence in the record that the judge considered the factors and tailored the sentence to fit the defendant and his crime. *State v. Welch*, 550 So.2d 265 (La.App. 4 Cir.1989).

Once adequate compliance with La.C.Cr.P. art. 894.1 is found, the court may consider whether the sentence is excessive in light of sentences imposed by other courts in similar circumstances.

A review of the appeal record, including the sentencing hearing of 14 July 2000, convinces us that the trial court complied with La.C.Cr.P. art. 894.1. To assist the court in determining an appropriate sentence, the court requested a presentence investigation report ("PSI"). Although information contained in the PSI revealed that the defendant was a first-time felony offender, the report also advised that the defendant abused drugs and alcohol. The PSI contained no information to indicate that mitigating factors should result in a lesser sentence for the defendant. The official who prepared the PSI concluded that because of the violent nature of the offense, Jackson was not eligible for parole. La. R.S. 15:574.4.

The court noted the emotional and physical trauma the defendant inflicted upon the elderly patrons and employees in the restaurant. Jackson ordered the victims to lay on the ground and then fired the shotgun twice, placing the victims in fear of life and limb. The court also noted the emotional pain and suffering inflicted upon the defendant's family because of his actions.

According to La. R.S. 14:64, the maximum sentence for armed robbery is ninety-nine years and a minimum of ten years. The defendant pled guilty to armed robbery and was sentenced to twenty years, without benefit of parole, probation or suspension of sentence.

The defendant, his parents, brother and sister testified at the sentencing hearing, pleading for leniency. Mr. and Mrs. Jackson and the defendant's siblings noted that the defendant had never been in trouble before, was a role model for younger family members and was on the brink of embarking on a bright employment future when he made this "foolish mistake." The defendant testified at the hearing also noting that he had never been in trouble before and characterizing his conduct as a foolish mistake. He said he hoped his younger brother learned from his mistake and apologized to the victims.

During the sentencing hearing, the trial judge noted:

> . . . you committed another crime here today. You . . .

> committed the crime of aggravated anguish, aggravated heartbreak. It's not in the Code but it would be defined, if it were, as the intentional infliction of anguish and heartache and heartbreak on those who are nearest and dearest to [you]. Sisters, brothers, uncles, mothers of children, grandparents. Those elderly ladies who were forced to the ground could have been . . . I find it hard to believe that you have the respect for others, having put people through what you put them through, especially elderly ladies. . . When that shotgun went off not once, but twice, can you imagine as they lay on that floor, prostrating themselves, how they must have felt to feel that possibly in raising their heads and looking up whenever they could actually do that, were they going to find one or more of the other persons in a pool of blood. Those bullets could have ricocheted, those bullets could have literally taken the lives of more than one individual in that room. This was pre-meditated.

In *State v. Davis*, 596 So.2d 358 (La.App. 4 Cir.1992), a first-time offender received three consecutive twenty-year sentences on each of three armed robbery convictions. In *State v. Dunns*, 441 So.2d 745 (La.1983), the Louisiana Supreme Court upheld a forty-year sentence imposed upon a first-time felony offender for armed robbery.

Considering the sentencing range, it appears the trial court adequately considered all relevant factors before sentencing the defendant, especially in light of the defendant's statement in the PSI that he was the shooter during the robbery. This assignment is without merit.

<u>THIRD ASSIGNMENT OF ERROR:</u> Defendant's guilty plea was not

knowingly and intelligently made because defense counsel was absent for portions of the hearing on motions to suppress the evidence and statement and, therefore, could not properly advise the defendant as to the risks of pleading guilty or going to trial.

Generally, the issue of ineffective assistance of counsel is a matter more properly addressed in an application for post conviction relief, filed in the trial court where a full evidentiary hearing can be conducted. *State v. Prudholm*, 446 So.2d 729 (La.1984). Only if the record discloses sufficient evidence to rule on the merits of the claim do the interests of judicial economy justify consideration of the issues on appeal. *State v. Seiss*, 428 So.2d 444 (La.1983).

The defendant's claim of ineffective assistance of counsel is to be assessed by the two part test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *State v. Fuller*, 454 So.2d 119 (La.1984). The defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defendant. Counsel's performance is ineffective when it can be shown that he made errors so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. *Strickland*, 104 S.Ct. at 2064. Counsel's deficient performance will have prejudiced the defendant if he

shows that the errors were so serious as to deprive him of a fair trial. To carry his burden, 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,* 104 S.Ct. at 2068. The defendant must make both showings to prove that counsel was so ineffective as to require reversal. *State v. Sparrow*, 612 So.2d 191, 199 (La.App. 4 Cir.1992). It is not enough for the accused to make allegations of ineffectiveness; the accused must couple these allegations with a specific showing of prejudice. *State v. Brown*, 99-172 (La.App. 5 Cir. 9/28/99), 742 So.2d 1051, *writ denied* 99-3148 (La.4/20/00), 760 So.2d 340.

In this case, the defendant has failed to state or specify the information that defense counsel allegedly missed or how the information impacted his guilty plea. Thus, he fails to demonstrate prejudice. This assignment is without merit.

CONCLUSION AND DECREE

For the foregoing reasons, defendant's conviction and sentence are

affirmed.

CONVICTION AND SENTENCE AFFIRMED.