STATE OF LOUISIANA	*	**NO. 2001-KA-0264**
VERSUS	*	**COURT OF APPEAL**
KEITH EARLY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 415-830, SECTION "J"
HONORABLE LEON CANNIZZARO, JUDGE
* * * * * *
JAMES F. MCKAY, III
JUDGE
* * * * * *

(Court composed of Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr., Judge David S. Gorbaty)

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AFFIRMED

Keith E. Early, also known as Keith Felts, was charged by bill of information on July 25, 2000, with possession of cocaine with intent to distribute, in violation of La. R.S. 40:967(A), and with possession of cocaine, in violation of La. R.S. 40:967(C). At his arraignment on July 31, 2000, he pleaded not guilty. At trial a twelve-person jury found the defendant guilty of the lesser included offense of possession of cocaine as to count one and guilty as charged as to count two. He was sentenced to five years at hard labor on each count on October 31, 2000. The State filed a multiple bill charging the defendant as a quadruple offender, and after a hearing at which he was found to be a triple offender, the trial court vacated the five year sentence as to count one and sentenced the defendant to serve ten years at hard labor under La. R.S. 15:529.1 on that count; the sentences are to run concurrently. The defendant's motion for an appeal was granted.

At trial Detective Joseph Meisch testified that about 6:30 p.m. on July 13, 2000, he took part in a buy/bust operation at St. Claude Avenue and Columbus Street in which two undercover agents bought cocaine from the defendant. The agents' unmarked car was wired so that the detective could listen via the radio to the transaction. Special Agent Robert Jamison radioed

the detective that as he was driving into the intersection of St. Claude Avenue and Columbus Street, he was flagged down by a man. Shortly thereafter, Detective Calvin Brazley radioed that he had seen a transaction between the undercover officers and the man on the street. When Detective Meisch arrived at the intersection, Detective Brazley radioed him that the suspect had been apprehended in the back of an apartment building. Detective Meisch assisted in the arrest. In a search incident to arrest, the defendant was found to have a matchbox containing several rock-like substances and also the two marked ten-dollar bills used by the special agents in purchasing the drug.

Detective Calvin Brazley testified that he was working in the spotter car on July 13, 2000 when the defendant was arrested. His duty was to protect the undercover agents making the buy and to relay any information to the takedown unit. He was wearing plain clothes and driving an unmarked car. Detective Brazley watched as the undercover team slowed at the intersection. A man with a red hat, white shirt, and blue jean shorts walked to the driver's window where he stayed briefly, and then the car drove away. The man in the red hat began to run, and the detective left his car to give chase. The man ran down Columbus Street and turned down an alley; he was apprehended there.

Agent Robert Jamison, a special agent with the Bureau of Alcohol, Tobacco, and Firearms, testified that he has been doing undercover work in buy/bust situations. On July 13, 2000, he was working with Don Driscoll; they were driving an unmarked car and carrying photocopied money. The agent said he drove down St. Claude Avenue very slowly and turned onto Columbus Street where he saw a man standing in the middle of the street. The driver's window was down, and the man walked over and asked the agent what he needed. Agent Jamison asked for a "twenty," paid with two ten-dollar bills, and received two rocks of crack cocaine. After the transaction, the agent gave via the radio a description of the man who sold the cocaine. In court the agent identified the defendant as that man. After the arrest, when the agent returned to the scene to confirm that the backup team had arrested the right man, he found that they had done so.

The parties stipulated that the rocks from the matchbox and the rocks sold to the agent were tested and proved to be cocaine.

Keith Early testified that he has been addicted to heroin since his mother died in 1986. Early denied having both the matchboxes with rocks in his pocket and the photocopied ten-dollar bills; he also stated that he did not sell drugs to Agent Robert Jamison. Under cross-examination, Early was asked why he gave the name "Keith Felts" when he was arrested, and he

answered that when his mother died he was forced by the social security administration to change his name to Felts to get a check. He gave the officers his social security card when he was arrested, but he testified that he "always come[s] to jail under Keith Early." (Trial transcript, p. 34). Early admitted three prior felony convictions: in 1995 one for being in possession of a gun in a school zone and another for possession of cocaine, and in 1998 for possession of cocaine.

In his assignments of error, defendant claims that his trial counsel rendered ineffective assistance by failing to make a motion for reconsideration of sentence

after his multiple bill sentence, and thus, failing to preserve for appeal a claim for excessiveness of sentence.

Recently in State v. Rodriguez, 00-0519 (La. App. 4 Cir. 2/14/01), 781 So. 2d 640, 647-649, this Court considered a similar argument and set out the following standard:

> "As a general rule, claims of ineffective assistance of counsel are more properly raised by application for post conviction relief in the trial court where a full evidentiary hearing may be conducted if warranted." State v. Howard, 98-0064, p. 15 (La. 4/23/99), 751 So. 2d 783, 802, cert. denied, Howard v. Louisiana, 528 U.S. 974, 120 S.Ct. 420, 145 L. Ed.2d 328 (1999). However, where the record is sufficient, the claims may be addressed on appeal. State v. Wessinger, 98-1234, p. 43 (La. 5/28/99), 736 So. 2d 162, 195, cert. denied,

Wessinger v. Louisiana, 528 U. S. 1050, 120 S.Ct. 589, 145 L. Ed. 2d 489 (1999); State v. Bordes, 98-0086, p. 7 (La. App. 4 Cir. 6/16/99), 738 So. 2d 143, 147. Ineffective assistance of counsel claims are reviewed under the two-part test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 Led. 2d 674 (1984). State v. Brooks, 94-2438, p. 6 (La. 10/16/95), 661 So.2d 1333, 1337 (on rehearing); State v. Robinson, 98-1606, p. 10 (La. App. 4 Cir. 8/11/99), 744 So. 2d 119, 126. In order to prevail, the defendant must show both that: (1) counsel's performance was deficient; and (2) he was prejudiced by the deficiency. Brooks, supra; State v. Jackson, 97-2220, p. 8 (La. App. 4 Cir. 5/12/99), 733 So. 2d 736, 741. Counsel's performance is ineffective when it is shown that he made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland at 686, 104 S.Ct. at 2064; State v. Ash, 97-2061, p. 9 (La. App. 4 Cir. 2/10/99), 729 So. 2d 664, 669, writ denied, 99-0721 (La. 7/2/99), 747 So. 2d 15. 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 deficient performance the result of the proceeding would have been different; "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland at 694, 104 S.Ct. at 2068; State v. Guy, 97-1387, p. 7 (La. App. 4 Cir. 5/19/99), 737 So. 2d 231, 236, writ denied, 99-1982 (La. 1/7/00), 752 So. 2d 175.

Thus, to prevail on this claim defendant must show that there is a reasonable probability that, had defense counsel filed a motion to reconsider sentence and preserved the issue of excessiveness of sentence, this court would have found merit in the assignment of error.

La. Const. art. I, section 20 prohibits excessive sentences. State v. Baxley, 94-2982, p. 4, (La. 5/22/95), 656 So. 2d 973, 977. "'Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment.'" State v. Brady, 97-1095, p. 17 (La. App. 4 Cir. 2/3/99), 727 So. 2d 1264, 1272, rehearing granted on other grounds, (La. App. 4 Cir. 3/16/99) (quoting State v. Francis, 96-2389, p. 6 (La. App. 4 Cir. 4/15/98), 715 So. 2d 457, 461), writ denied, 98-2360 (La. 2/5/99), 737 So. 2d

741). However, the penalties provided by the legislature reflect the degree to which the criminal conduct is an affront to society. Baxley, 94-2984 at p. 10, 656 So. 2d at 979, citing State v. Ryans, 513 So. 2d 386, 387 (La. App. 4 Cir. 1987), writ denied, 516 So. 2d 366 (La. 1988). A sentence is constitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless imposition of pain and suffering, and is grossly out of proportion to the severity of the crime. State v. Johnson, 97-1906, pp. 6-7 (La. 3/4/98), 709 So. 2d 672, 676. "'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.'" Baxley, 94-2984 at p. 9, 656 So. 2d at 979 (quoting State v. Lobato, 603 So. 2d 739, 751 (La. 1992)); State v. Hills, 98-0507, p. 5 (La. App. 4 Cir. 1/20/99), 727 So. 2d 1215, 1217.

In reviewing a claim that a sentence is excessive, an appellate court generally must determine whether the trial judge has adequately complied with statutory guidelines in La. C.Cr.P. art. 894.1, and whether the sentence is warranted under the facts established by the record. State v. Trepagnier, 97-2427, p. 11 (La. App. 4 Cir. 9/15/99), 744 So. 2d 181, 189; State v. Robinson, 98-1606, p. 12 (La. App. 4 Cir. 8/11/99), 744 So. 2d 119, 127. If adequate compliance with La. C.Cr.P. art. 894.1 is found, the reviewing court must determine whether the sentence imposed is too severe in light of the particular defendant and the circumstances of the case, keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged. State v. Ross, 98-0283, p. 8 (La. App. 4 Cir. 9/8/99), 743 So. 2d 757, 762; State v. Bonicard, 98-0665, p. 3 (La. App. 4 Cir. 8/4/99), 752 So. 2d 184, 185, writ denied, 99-2632 (La. 3/17/00), 756 So. 2d 324.

However, in State v. Major, 96-1214 (La. App. 4 Cir. 3/4/98), 708 So. 2d 813, this court stated:

> The articulation of the factual basis for a sentence is the goal of Art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, resentencing is unnecessary even when there has not been full compliance with

> Art. 894.1. State v. Lanclos, 419 So.2d 475 (La.1982). The reviewing court shall not set aside a sentence for excessiveness if the record supports the sentence imposed. La. C.Cr.P. art. 881.4(D).

96-1214 at p. 10, 708 So. 2d at 819.

In State v. Soraparu, 97-1027 (La. 10/13/97), 703 So. 2d 608, the Louisiana Supreme Court stated:

> On appellate review of sentence, the only relevant question is "'whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate.'" State v. Cook, 95-2784, p. 3 (La. 5/31/96), 674 So.2d 957, 959 (quoting State v. Humphrey, 445 So.2d 1155, 1165 (La.1984)), cert. denied, --- U.S. ---, 117 S.Ct. 615, 136 L.Ed.2d 539 (1996). For legal sentences imposed within the range provided by the legislature, a trial court abuses its discretion only when it contravenes the prohibition of excessive punishment in La. Const. art. I, § 20, i.e., when it imposes "punishment disproportionate to the offense." State v. Sepulvado, 367 So.2d 762, 767 (La.1979). In cases in which the trial court has left a less than fully articulated record indicating that it has considered not only aggravating circumstances but also factors militating for a less severe sentence, State v. Franks, 373 So.2d 1307, 1308 (La.1979), a remand for resentencing is appropriate only when "there appear [s] to be a substantial possibility that the defendant's complaints of an excessive sentence ha[ve] merit." State v. Wimberly, 414 So.2d 666, 672 (La.1982).
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> Id.

Under La. R.S. 40:967(C) and La. R.S. 15:529.1(A)(1)(b)(i), the defendant was subject to imprisonment at hard labor from between forty months and ten years, and he received the maximum term. The trial court did not state any reasons when imposing the sentence. However, a pre-

sentencing investigatory report was ordered, and it did not recommend probation for the defendant. Moreover, information about the defendant was brought out at trial. He was twenty-six at the time of trial and acknowledged that he had been a heroin addict for twelve or thirteen years. His criminal record consists of two prior possession of cocaine convictions, one conviction for carrying a firearm in a school zone, as well as juvenile convictions for attempted murder of a policeman and criminal damage to property. Thus, his criminal record consists of at least *four* prior offenses plus the two recent convictions. In the case at bar, he was charged in count one with possession of cocaine with attempt to distribute, and although enough evidence was introduced at trial to support that charge, he was convicted of the lesser offense of possession of cocaine. Additionally, he was sentenced as a third offender under La. R.S. 15:529.1(A)(1)(b)(i) which provides for a maximum term of ten years; if he had been convicted of possession of cocaine with intent to distribute and sentenced as a third offender under La. R.S. 15:529.1(A)(1)(b)(ii), he would have faced life imprisonment. Furthermore, if he had been sentenced as a fourth offender on the possession of cocaine conviction, the minimum sentence would have been thirty years imprisonment.

He was not sentenced as a fourth offender because his trial counsel

raised an issue as to whether he was given his Boykin rights when he pleaded guilty to possession of cocaine in 1995, and trial counsel convinced the court that the minute entry was insufficient proof of Boykinization. Counsel's skill prevented the defendant from receiving at least twenty more years of imprisonment.

Considering defendant's record, and the fact that he benefited from his counsel's efforts at sentencing, we do not find the defendant's sentence unconstitutionally excessive. Therefore, it cannot be said that defense counsel's failure to file a motion to reconsider sentence constituted ineffective assistance of counsel.

Accordingly, for reasons cited above, the defendant's conviction and sentence are affirmed.

AFFIRMED