**NOT DESIGNATED FOR PUBLICATION**

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| **STATE OF LOUISIANA** | * | **NO. 2001-KA-0731** |
| **VERSUS** | * | **COURT OF APPEAL** |
| **GERALD W. COLE** | * | **FOURTH CIRCUIT** |
| | * | **STATE OF LOUISIANA** |
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 397-358, SECTION "E"
Honorable Calvin Johnson, Judge
* * * * * *
**Judge Dennis R. Bagneris, Sr.**
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Miriam G. Waltzer, and Judge Dennis R. Bagneris, Sr.)

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**CONVICTION AFFIRMED; SENTENCE AMENDED, AND AFFIRMED AS AMENDED**

The defendant, Gerald Cole, was convicted of manslaughter. He was sentenced to twenty-five years, without benefit of parole. The issues on appeal are (1) whether defendant's confession should have been suppressed; (2) whether the evidence was insufficient to support the conviction; (3) and whether the sentence was excessive.

On February 22, 1998, Detective David J. Adams investigated a homicide at 1212-1214 Esplanade Avenue. When he arrived at the location, Detective Adams found the victim, Don Kegley, sprawled facedown on the sidewalk. Pursuant to Detective Adams' direction, crime scene technicians photographed the scene and the victim, and retrieved a .25 caliber handgun, two live rounds of ammunition and three spent bullet casings. Detective Adams arrested the defendant on the scene and transported him to police headquarters where he elected to give a videotaped statement.

In his confession, the defendant states that he and the victim had been friends for a couple of years and that during that time, the defendant knew the victim to be mentally unstable and on a regime of medication to manage his condition. On the day of the shooting, the victim telephoned the defendant, threatening to kill him and two of the defendant's female friends. The defendant was able to calm the victim and suggested that the two of them settle their differences without any violence. However, the victim told the defendant that he wanted to speak with the defendant in person and would be coming over to the Esplanade residence. The defendant feared the victim because the victim was a much larger man than he was, and the defendant claimed the victim had a violent past. When the victim arrived, he and the defendant stood on the front porch where they argued intermittently for about ten to fifteen minutes, with the victim cursing and threatening to kill the defendant. At one point, the victim turned, walked down off the porch, exited the gate onto the sidewalk and began to walk away. All of a sudden, the victim made a U-turn, grabbed the fence and appeared to try to pull it down. The defendant described the victim as being in a rage with his eyes bulging, all the while threatening to kill the defendant. When the victim re-entered the yard and approached the defendant, the defendant shot him four times. The defendant reiterated that he fired the gun to protect

himself. He also said that he and the victim were friends and he did not intend to harm him.

Dr. William B. Newman, III, who testified by stipulation as an expert in forensic pathology, performed the autopsy on the victim's body. Dr. Newman determined that the victim suffered multiple .25 caliber gunshot wounds, one to his arm, another to the left buttock and a fatal left anterior chest wound, which pierced the victim's heart, liver and one kidney, causing massive bleeding. Testing of the victim's blood proved positive for the presence of marijuana and cocaine.

Officer Byron Winbush was qualified as a firearms and ballistics expert. He testified that he test fired the .25 caliber weapon confiscated at the homicide scene. He then compared the bullet from the test firing to bullets collected during the autopsy and concluded that the weapon in question fired the bullet that killed the victim.

Ms. Norma Kegley, the victim's mother, testified she received a telephone call from the defendant in early February, 1998. The defendant was angry. He was trying to locate the victim because he believed the victim had stolen merchandise from him. The defendant told Ms. Kegley that he could not be responsible for the victim's safety when the defendant's friends learned what the victim had done. Approximately one hour after the

initial phone call, the defendant called again and told Ms. Kegley that he and the victim had resolved their differences.

John Hansen testified that at about 4:45 p.m. on February 22, 1998, as he walked on Esplanade Avenue, he witnessed a loud, profanity-laced argument between the defendant and the victim on the porch of the 1212-1214 Esplanade Avenue residence. As Hansen watched, the victim walked down from the porch, exited the fence gate to the sidewalk and began to walk away. The defendant called the victim's name. The victim said, "Nobody treats me like that", made a U-turn and walked back to the fence. As the victim did so, the defendant walked down the porch steps toward the victim. The pair met at the fence. Hansen heard two shots and saw the victim back up about two steps. Another shot rang out and the victim staggered backward three steps, wobbled and turned away from the fence. As the victim turned away, the defendant stepped out of the gate, and shot him in the back. The victim stumbled down the sidewalk, and fell onto his back. Hansen stated that the victim was not armed at the time of the shooting. Further, Hansen denied that the victim threatened the defendant in any manner.

Lindy Stephens testified for the defense. She explained that she was the defendant's girlfriend and that she met the victim through her

relationship with the defendant. At the time of the shooting, she was renting a room for business purposes at 1212-1214 Esplanade Avenue, and the defendant was assisting her with her business interest. At around noon on the day of the shooting, the victim called the defendant at the Esplanade Avenue residence, with complaints about Ms. Stephens and the defendant's ex-girlfriend, Melanie Smith, trying to break up the defendant's and victim's friendship. The victim told the defendant he was coming over to discuss the matter. Ms. Stephens felt threatened, and feared for her safety, so she retrieved her .25 caliber handgun, and placed it in the hallway. The defendant met the victim at the front door where they argued intermittently for about fifteen minutes. From her vantage point behind the sofa, Ms. Stephens could not see either man but only heard their argument. When the voices quieted down, and she heard the front gate squeak closed, she assumed the victim had left, so she went to the front of the house. As she peeked out the front window, Ms. Stephens saw the victim turn around "like a raging bull" and return to the front gate. The victim was angry and "almost frothing at the mouth." Ms. Stephens returned to her position behind the sofa, and armed herself. The defendant and the victim exchanged more words. She did not see the shooting but heard four gunshots. After the shooting, the defendant came in the house and told Ms. Stephens to call 911

because he had just shot the victim. When the police arrived, the defendant was arrested, and Ms. Stephens was transported to the station to give a statement. Before Ms. Stephens left the residence, she made arrangements for her attorney to meet her at the police station.

## ERRORS PATENT

A review of the record for errors patent reveals that defendant's sentence is illegal. The defendant was sentenced to twenty-five years without benefit of parole. However, pursuant to C.Cr.P. art. 893.3, as it existed in February 1999, there was no requirement that the entire sentence imposed for manslaughter be served without benefit of parole. In fact, parole restriction for manslaughter could only be restricted "for a specified period of time not to exceed five years." Accordingly, defendant's sentence will be amended to deny parole only on the first five years of the twenty-five year sentence. La. C.Cr.P. art. 882.

## ASSIGNMENT OF ERROR NUMBER 1

In the first of three assignments, the defendant contends the trial court erred in denying his motion to suppress the confession, as it was not knowing and voluntary. He maintains he invoked his right to counsel but that the police refused to honor his request.

The State has the burden of proving that a defendant's statement was

freely and voluntarily given, not the product of threats, promises, coercion, intimidation, or physical abuse. La. R.S. 15:452*; State v. Seward*, 509 So.2d 413 (La.1987); *State v. Brooks*, 505 So.2d 714 (La.1987), *cert. den. Brooks v. Louisiana*, 484 U.S. 947, 108 S.Ct. 337, 98 L.Ed.2d 363 (1987); *State v. Daliet*, 557 So.2d 283 (La.App. 4 Cir. 1/16/90).

To establish the admissibility of a statement made by an accused person during custodial interrogation, the State must prove that the accused was advised of his/her *Miranda* rights and voluntarily waived those rights. *State v. Labostrie*, 96-2003, p.5 (La.App. 4 Cir. 11/19/97), 702 So.2d 1194, 1197. An express written or oral waiver of rights is strong proof of the validity of the waiver. *Id.* Whether a statement is voluntary is a fact question; thus, the trial judge's ruling, based on conclusions of credibility and the weight of the testimony, is entitled to great deference and will not be disturbed on appeal unless there is no evidence to support the ruling. *Id.*

At the hearing on the motion to suppress, the defense offered the testimony of Lindy Stephens, who told the court that as the defendant was arrested, he asked her to contact his attorney. Ms. Stephens attempted to do so; however, the defendant’s attorney was out of town, so she contacted her attorney, Paul Massa, to meet them at the police station. When Mr. Massa arrived, Ms. Stephens advised Detective Adams that the defendant had

requested assistance of counsel. Detective Adams, however, refused to allow Mr. Massa to speak with the defendant.

Paul Massa also testified at the hearing reiterating Ms. Stephens' testimony that she requested he meet her and the defendant at the police station because they had been asked to give a statement regarding a shooting. He further stated that when he arrived at the station, he met with Ms. Stephens and Detective Adams. Mr. Massa advised the detective that he was there to consult with Ms. Stephens and the defendant. He asked to speak to the defendant at least three times, and on each occasion, Detective Adams refused his request.

The defendant testified and confirmed that he asked Ms. Stephens to contact an attorney for him when he was arrested, and that despite his repeated requests to be allowed to confer with Mr. Massa, Detective Adams refused to allow the two to meet.

Detective David Adams testified that when Mr. Massa arrived at the police station, he told Detective Adams he was there to see the defendant. Detective Adams proceeded to the room in which the defendant was being held and told him that Paul Massa, an attorney, was at the station to speak with him. The defendant told Detective Adams he did not wish to speak to an attorney. Detective Adams relayed the defendant's response to Massa.

Thereafter, Massa made no further requests to speak with the defendant. Detective Adams refuted Ms. Stephens' assertion that she contacted Massa for the defendant's benefit. Rather, Ms. Stephens said she contacted Massa on her own behalf because she was scared.

The videotape of the defendant's confession was admitted into evidence for the court's consideration. On the tape, Detective Adams reads the preliminary information from the "RIGHTS OF AN ARRESTEE OR SUSPECT" form, and reads the numbered *Miranda* rights. Detective Adams then asks the defendant whether he understands his rights. The defendant responds affirmatively. Detective Adams next asks the defendant whether he is making the statement voluntarily and free of duress or coercion. Once again, the defendant responds in the affirmative. There is no indication from the videotaped statement that the defendant requested an attorney prior to, or during his confession. The RIGHTS form, also entered into evidence at the suppression hearing, indicates that the defendant understood his rights. Under cross-examination, the defendant identified his signature attesting that he waived his rights. Moreover, he stated that he understood the English language, completed the eleventh grade and knows what "waiving rights" means.

Based on the foregoing evidence, we do not find that the trial court

erred in denying the defendant's motion to suppress the confession. This assignment is without merit.

**ASSIGNMENT OF ERROR NUMBER 2**

In his next assignment, the defendant argues that there is insufficient evidence to support the conviction. He maintains that the State failed to prove beyond a reasonable doubt that he did not act in self-defense.

The standard of appellate review for sufficiency of the evidence is whether, when viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State proved the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A credibility determination is within the discretion of the trier of fact and will not be disturbed unless clearly contrary to the evidence. *State v. Vessell*, 450 So.2d 938, 943 (La.1984).

Although the defendant was charged with second degree murder, the jury convicted him of the responsive verdict of manslaughter, which is defined in La. R.S. 14:31A(1) as a homicide which would be either first or second degree murder, "but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection." "Sudden passion"

and “heat of blood” are not separate elements of the offense but are mitigating factors, which the defendant must establish by a preponderance of the evidence. *State v. McClain*, 95-2546 (La.App. 4 Cir. 12/11/96) 685 So.2d 590.

The defendant does not dispute that he killed the victim. He insists, however, that his conviction cannot stand because he acted in self-defense.

A homicide is justifiable if committed by one in defense of himself when he reasonably believes that he is in imminent danger of being killed or receiving great bodily harm and that the homicide is necessary to save himself from that danger. La.R.S. 14:20(1). When a defendant claims self-defense, the State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense. *State v. Lynch*, 436 So.2d 567 (La.1983); *State v. Brumfield*, 93-2404 (La.App. 4 Cir. 6/15/94), 639 So.2d 312. Regarding self-defense, it is necessary to consider whether the defendant had a reasonable belief that he was in imminent danger of losing his life or receiving great bodily harm and whether the killing was necessary, under the circumstances, to save the defendant from that danger. *McClain*, 685 So.2d at 594. Although there is no unqualified duty to retreat, the possibility of escape is a factor in determining whether or not the defendant had a reasonable belief that deadly force was necessary to avoid the danger.

*Id.*

The defendant argues that the facts showed that: 1) the victim was a very disturbed and miserable man, who told his psychiatrist that he liked cutting people with his knife and wanted to kill or be killed; 2) the victim advertised his misery publicly, in the form of tattoos saying "My God can Slay your God", "Snitches is a Dying Breed", "KKK", and pictures of two skeletons, a grim reaper, and a guillotine; 3) the victim was on cocaine the afternoon he was shot; and 4) he told the defendant he was going to kill him. For these reasons, the defendant argues it is clear that he had a reasonable belief that he was in imminent danger of death or great bodily harm when he shot the victim.

Looking at the evidence in the light most favorable to the prosecution, we find that the State carried its burden of proving that the defendant in this case did not kill the victim in self-defense. Although the defendant claimed the victim threatened his life, the State's witness, John Hansen, who was standing less then fifteen feet from the victim during the confrontation, refuted that assertion. Ms. Stephens, the only defense witness, also denied hearing the victim threaten the defendant. Mr. Hansen further testified that the victim was unarmed at the time of the shooting, and that he appeared to be abandoning the confrontation after the first shot. Dr. Newman's

testimony verified that one of the four shots fired by the defendant hit the victim in the back. Thus, the record contains sufficient evidence to support the jury's conclusion that the defendant was not acting in self-defense when he shot the victim. This assignment is without merit.

**ASSIGNMENT OF ERROR NUMBER 3**

In a final assignment, the defendant claims the court imposed an excessive sentence.

Article 1, Section 20 of the Louisiana Constitution of 1974 provides that "No law shall subject any person ... to cruel, excessive or unusual punishment." A sentence, although within the statutory limits, is constitutionally excessive if it is "grossly out of proportion to the severity of the crime" or is "nothing more than the purposeless and needless imposition of pain and suffering." *State v. Caston*, 477 So.2d 868, 871 (La.App. 4 Cir.10/11/85). Generally, a reviewing court must determine whether the trial judge adequately complied with the sentencing guidelines set forth in La. C. Cr. P. art. 894.1 and whether the sentence is warranted in light of the particular circumstances of the case. *State v. Black*, 98-0457 (La. App. 4 Cir. 3/22/00), 757 So.2d 887, *writ den*. 2000-1540 (La. 5/25/01), 792 So.2d 751.

If adequate compliance with Article 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 his case. *State v. Caston,* 477 So.2d at 871. The reviewing court must also keep in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged. *State v. Quebedeaux*, 424 So.2d 1009, 1014 (La.1982).

At the defendant's sentencing, the trial judge noted:

> Mr. Cole, I was present at the trial. And what really struck me was the testimony that you were on your porch with your door open. And the [defendant] was outside the gate. And I just couldn't understand why it is that you couldn't go inside of your door and close your door and call the police. I didn't understand that. Now I heard the entire trial. I heard all of what was said in the trial. But I just could not understand why it is that you couldn't go inside your door and call the police and not shoot [the victim]. I couldn't understand that.
>
> I heard no answer and I don't think the jury did either. Now the jury, for whatever the reason, found you guilty of manslaughter. Hearing that testimony, had it been tried before me, the verdict would have been guilty as charged. Because I saw and heard nothing there that would make me believe that an individual was just -you –was just so out of control that your only course was to take your gun and shoot [the victim], who was on the sidewalk, outside your fence, on the sidewalk. That's where his body was. Now you're saying no to that. He wasn't on your porch, regardless. He wasn't on your porch.
>
> There was someone else inside who also could have called the police. That's why we have a police force. You surely could have gone inside. And I would think even if he was a crazed man, it would have taken him at least sometime to break your door down to get inside of the house where you would have been. And so he would be alive and we wouldn't be holding this discussion, had you simply gone inside. And that's – he had no gun, that I know of. No gun was mentioned during the trial, that I know of. No gun was found. You had a gun.

> You could have gone inside. And you didn't. And so, Mr. Cole, again, regardless of who or what [the victim] was, he's now dead. And that's a fact. And he's dead, Mr. Cole, because of you. . .

Thereafter, the judge imposed a sentence of twenty-five years, which is slightly above the mid-range of sentencing for manslaughter. La. C.Cr.P. art. 14:31(B).

In this case, the trial judge considered the sentencing guidelines under La.C.Cr.P. 894.1 in his reasons for the sentence. Obviously, his primary reason for imposing the sentence was a sense of shock and outrage that the defendant shot the unarmed victim as he stood a distance from the defendant outside the defendant's yard, when the defendant could easily have retreated to the safety of his residence, and called the police to defuse the situation.

The next inquiry is whether the sentence is excessive in light of sentences imposed by other courts in similar circumstances. In light of the jurisprudence, we do not find that this sentence is excessive. In *State v. Bowman*, 95-0667 (La.App. 4 Cir. 7/10/96), 677 So.2d 1094, this Court affirmed a thirty-three year manslaughter sentence for a first offender who drove the car but did not pull the trigger in a drive-by shooting. In *State v. Barrois*, 2000-1425 (La. App. 4 Cir. 1/31/01), 778 So.2d 1273, this Court affirmed the twenty-five year manslaughter sentence of a fifty-year-old defendant with no prior history of violence. In *State v. Black*, 28,100

(La.App. 2 Cir. 2/28/96), 669 So.2d 667, the Second Circuit affirmed a forty year sentence for a twenty year old defendant who kidnapped the victim and killed him during a robbery attempt and then pled guilty to a reduced charge of manslaughter. In *State v. Cushman*, 94-336 (La. App. 3 Cir. 11/2/94), 649 So.2d 639, the Third Circuit affirmed a thirty-year sentence of a twenty-one year old, who pled guilty to manslaughter and had no prior criminal history.

The trial court has great discretion in sentencing within statutory limits. *State v. Trahan*, 425 So.2d 1222 (La.1983). A sentence should not be set aside as excessive in the absence of a manifest abuse of discretion. *State v. Washington*, 414 So.2d 313 (La.1982). On sentence review the only pertinent query 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. 4 (La.5/31/96), 674 So.2d 957, 959 (quoting *State v. Humphrey*, 445 So.2d 1155, 1165 (La.1984)). See *State v. Soraparu*, 97-1027 (La.10/13/97), 703 So.2d 608.

For support, the defendant in this case cites *State v. McBride*, 99-2904 (La.App. 4 Cir. 11/29/00), 776 So.2d 546 in which this Court reduced, from thirty to fifteen years, the sentence of the defendant who had been convicted of manslaughter. However, the Supreme Court granted the State's writ in

*McBride*, vacated this Court's judgment and reinstated the thirty-year sentence. *State v. McBride*, 2001-0588 (La. 2/8/02), 807 So.2d 836. Hence, the defendant's reliance on *McBride* is misplaced.

The defendant in this case was charged with second-degree murder, but the jury found that the facts supported a conviction for manslaughter, to the defendant's advantage. The trial judge supported the imposition of the sentence with a strong statement. In light of the facts of this case, the punishment is neither disproportionate to the offense nor the infliction of needless pain and suffering. This assignment is without merit.

Accordingly, we affirm the conviction of Mr. Gerald Cole. Further, we amend Mr. Cole's sentence to provide that only the first five years are to be served without benefit of parole, and we affirm the sentence as amended.

**CONVICTION AFFIRMED; SENTENCE AMENDED, AND AFFIRMED AS AMENDED**