STATE OF LOUISIANA	*	**NO. 2001-KA-1063**
VERSUS	*	**COURT OF APPEAL**
KEVIN B. CARTER	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 413-759, SECTION "F"
Honorable Dennis J. Waldron, Judge

* * * * * *

Charles R. Jones
Judge

* * * * * *

(Court composed of Judge Charles R. Jones, Judge Terri F. Love, and Judge Max N. Tobias, Jr.)

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CONVICTIONS AFFIRMED;
SENTENCES AFFIRMED IN PART,
AMENDED IN PART, VACATED IN PART
AND REMANDED

Kevin B. Carter appeals his convictions and sentences for various felonious violations. He was sentenced on one count as a second felony offender to 198 years imprisonment, to run concurrently with his other sentences. We affirm.

Carter was charged by bill of information with six counts: four armed robberies in violation of La. R.S. 14:64; one first-degree robbery in violation

of La. R.S. 14:64.1; and one simple robbery in violation of La. R.S. 14:65. After trial, a twelve-person jury found him guilty of two counts of armed robbery, first-degree robbery (on one of the armed robbery charges), attempted first-degree robbery (on the first degree robbery charge), and simple robbery. He was found not guilty on the remaining count of armed robbery. The State filed a multiple bill and after a hearing at which the State proved Carter's status as a second felony offender, he was sentenced to serve: 198 years at hard labor without benefits under La. R.S. 15:529.1 on count one; ninety-nine years for the other armed robbery conviction and also the same term for the first degree robbery conviction; twenty years on the attempted first degree robbery conviction; and seven years on the simple robbery conviction. The sentences are to run concurrently and to be served without benefits.

At trial, Ms. Desiree Neumeyer testified that on November 2, 1999 at approximately 3:00 p.m. she was with her fiancée, Troy Emmons, while he made his collection rounds; he is an insurance agent. She was waiting in his truck while he was visiting a client at home when she saw a man ride past on a bicycle. He turned around, returned to the truck, and entered the driver's side. The man demanded her purse or money, and when she was slow to give it to him, he opened his jacket to show her his gun. She handed over

her purse. Mr. Emmons, on observing the incident, walked toward the truck, and the gunman said to him, "[I]f you don't back up, I'll kill her." Ms. Neumeyer warned Mr. Emmons not to come near because her assailant had a gun. As the gunman backed out of the truck, he demanded Mr. Emmons' wallet. Mr. Emmons gave him the currency from the wallet, and the man got on a bicycle and left. The couple called 911 and followed the gunman until he turned around toward them; they then went the other way. When asked to select her assailant's picture from a photographic lineup, Ms. Neumeyer pointed to two pictures that resembled the man, but she could not decide between them.

Mr. Emmons testified, at trial that he was very upset at seeing someone in his truck with Ms. Neumeyer. He ran to the truck and saw that she had tears running down her cheeks; she told him not to do anything because the man had a gun. Then the gunman said, "Don't come any closer. I'll kill her. I swear, I'll kill her." Mr. Emmons backed up, and the gunman took Ms. Neumeyer's purse. The gunman asked for Mr. Emmons' money and was given everything in Mr. Emmons' wallet. Under cross-examination, Mr. Emmons testified that he never saw the gun.

Alan Howland testified at trial that on November 5, 1999 at approximately 11:45 a.m., he visited a customer at 2500 Tupelo Street. As

he walked back to his car, he saw a man on a bicycle coming toward him. The man stopped near Mr. Howland and said, “Be quiet. Give me your wallet, or I’ll kill you.” Surprised, Mr. Howland asked the man to repeat himself, and again the demand and the threat were made. Mr. Howland said, “You’ve got to be kidding me. It’s the middle of the daytime.” At that the man took out a knife and swung it toward Mr. Howland, who handed over his wallet. As the man got on his bicycle to leave, Mr. Howland called out, “Drop the wallet. Take the money.” The gunman did so as he peddled off down South Dorgenois Street. When Mr. Howland was shown a photographic lineup, he selected Carter’s picture and named him as the man who robbed him.

Reverend Calvin J. Young testified at trial that he was filling his car with gasoline on November 7, 1999 at approximately 6:00 p.m., when a man—who had his hand in his pocket as though he had a gun—put his finger in Reverend Young’s side. He said, “Give me your money…Don’t holler. I’ll kill you.” Reverend Young did not believe that the man had a gun, and grabbed at his hand. A scuffle began, and the young man pushed Reverend Young to the ground and got on top of him. At that time, a third person came to the Reverend’s aid and pulled the young man off of him. The police arrived, and the man was arrested.

Ms. Bertha Bryant testified at trial that she was leaving her job at the Dr. Martin Luther King Elementary School for Science and Technology on the evening of October 26, 1999, when she noticed a man on the other side of the street. He turned around so that he approached her from her back and "jerked her purse" away from her and ran with it. Her purse contained her credit cards, driver's license, cellular telephone, and beeper. She did not know Carter and did not give him permission to take her purse. Sometime later, after viewing a photographic lineup, she selected Carter's photo and named him as the man who took her purse. When asked on cross-examination why she had not signed the back of Carter's picture when she identified him, Ms. Bryant replied that she was "so nervous and upset—it was devastating, really."

Ms. Juanita Grant, who works with Ms. Bryant, testified that she was locking the back gate to the school after Ms. Bryant walked out. Ms. Grant saw the man who took Ms. Bryant's purse. She too was shown a photographic lineup and selected Carter's photograph.

Detective Kenneth Quetant testified that he investigated several robberies occurring in the Fifth District. The detective interviewed Carter and took a statement from him. The statement was played for the jury. (The audiotape is part of the record, and on it Carter describes the robberies of

Ms. Neumeyer, Mr. Emmons, Mr. Howland, Reverend Young and Ms. Bryant, but he denied robbing James Temple.)

Before addressing the assignments of error, we note two errors patent in the sentences. Carter was convicted of first-degree robbery of Mr. Emmons in violation of La. R.S. 14:64.1. The penalty range for that offense is three to forty years without benefits, and he received a sentence of ninety-nine years without benefits. Thus, the sentence is illegal. Accordingly, as to count two, the sentence must be vacated and the case remanded for resentencing.

As to count six, Carter was convicted of simple robbery which, according to La. R.S. 14:65, is punished by payment of a fine of not more than three thousand dollars and imprisonment with or without hard labor for not more than seven years or both. Carter received a seven-year sentence, but the sentence was imposed without benefits of parole, probation, or suspension of sentence. This sentence too is illegal, but under La. C.Cr.P. art. 882, this Court may correct a sentence where the correction does not require the exercise of discretion. Accordingly, we delete the prohibition on eligibility of benefits as to the seven-year simple robbery conviction.

Carter raises two assignments of error: that the district court erred in adjudicating him a second felony offender, and that his maximum sentences

are excessive.

In his first assignment, Carter maintains that the district court should have granted his Motion to Quash the multiple bill because the State's documentation does not indicate that he knowingly and voluntarily pleaded guilty to his prior offense.

In State v. Alexander, 98-1377 (La. App. 4 Cir. 2/16/00), 753 So.2d 933, writ denied, 2000-1101 (La. 4/12/01), 790 So.2d 2, this Court considered the State's burden of proof at a multiple offender hearing and stated:

> LSA-R.S. 15:529.1 D (1)(b) states that the district attorney has the burden of proving beyond a reasonable doubt any issue of fact and that the presumption of regularity of judgment shall be sufficient to meet the original burden of proof. In State v. Shelton, 621 So.2d 769, 779-780 (La.1993), the Supreme Court stated:
>
> If the defendant denies the allegations of the bill of information, the burden is on the State to prove the existence of the prior guilty pleas and that defendant was represented by counsel when they were taken. If the State meets this burden, the defendant has the burden to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. If the defendant is able to do this, then the burden of proving the constitutionality of the plea shifts to the State. The State will meet its burden of proof if it introduces a "perfect" transcript of the taking of the guilty plea, one which reflects a colloquy between judge and defendant wherein the defendant was informed of and specifically waived his right to trial by jury,

> his privilege against self-incrimination, and his right to confront his accusers. If the State introduces anything less than the "perfect" transcript, for example, a guilty plea form, a minute entry, an "imperfect" transcript, or any combination thereof, the judge then must weigh the evidence submitted by the defendant and by the State to determine whether the State has met its burden of proving that the defendant's prior guilty plea was informed and voluntary, and made with an articulated waiver of the three Boykin rights. (footnotes omitted).

98-1377 at pp. 5-6, 753 So.2d at 937.

In the case at bar, Carter has one prior guilty plea from 1991, and he does not contest the issue of identity. However, he does argue that he was not given his Boykin rights. In case number 350-498, where he pleaded guilty to three counts of armed robbery, one count of first degree robbery, and one count of attempted armed robbery, the State presented the bill of information, the arrest register, the waiver of constitutional rights/plea of guilty form, the docket master, and the minute entry. The waiver of rights document is initialed in the appropriate places indicating that Carter was given his Boykin rights, understood the nature of the charge against him, and was freely and voluntarily waiving those rights and pleading guilty as charged; it is also signed by Carter, his attorney, and the judge. The minute entry simply states that the district court interrogated the defendant, found factual basis, and ordered the plea recorded as to each count.

At the multiple bill hearing, after the documents were introduced, the district court considered each entry and found that the judge in the 1991 case

> "…did indeed properly identify the rights that she had to explain to this gentleman, and having identified those and listing them on the plea of guilty form, that she thereafter explained them. More particularly, the right to trial by judge or jury at no cost to the gentleman, the right to have his testimony taken or to remain silent and not have his silence held against him, the right to confront or cross examine the witnesses who accuse him of the crime, the right to have compulsory process on his part, and more particularly to require witnesses to testify on his behalf. The gentleman further indicated on this plea form that in no way had he been forced, threatened or intimidated into making this plea, and so indicated to Her Honor the Judge, by placing his initials on the form as well. That he indeed was in fact guilty of the crime or crimes for which he was pleading guilty."

Although the defense attorney filed a Motion to Quash claiming that Carter was denied his Boykin rights at the prior guilty plea, he made no specific argument or objection at the hearing as to the inadequacy of the State's documentation.

In support of his argument on appeal that the minute entry does not indicate which rights the defendant waived, Carter cites State v. Everett, 98-2156 (La. App. 4 Cir. 4/12/00), 761 So. 2d 58. In Everett there was no discussion of the evidence presented by the State. Furthermore, the State did not offer a waiver of rights form, and the minute entry failed to specify

which rights the defendant waived. The case at bar is distinguished from Everett in that here the State presented a waiver of rights form listing the rights waived, and Carter initialed and signed the document in the appropriate places indicating that he knew his rights. Also in this matter, the district court carefully examined the documents on the record, and the defense counsel made no specific objection to them. Thus, the district court followed the procedure set out in State v. Shelton, 621 So.2d 769, 779-780 (La. 1993). The evidence supporting the multiple bill was weighed by the judge who then determined that the State had met its burden of proof.

We find that the district court correctly held that Carter's plea of guilty was informed and voluntary on the basis of a review of the record. The record indicates that the October 8, 1991, minute entry when read with the waiver of rights form indicates that Carter was represented by counsel at the plea, and that the plea/waiver of rights form was signed by Carter, his attorney, and the judge. Accordingly, there is no merit to this assignment of error.

In his second assignment of error, Carter maintains that the district court erred in imposing excessive sentences. He received a sentence of 198 years as a second felony offender on count one; two ninety-nine year terms on counts two and four; a twenty year sentence on count five, and a seven

year sentence on count six. All the sentences are to run concurrently and are imposed without benefits of parole, probation, or suspension of sentence. Each sentence is the maximum term for the conviction. All the offenses are crimes of violence under La. R.S. 14:2(13).

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 within the statutory limit is constitutionally excessive if it is "grossly out of proportion to the severity of the crime" or is "nothing more than the purposeless imposition of pain and suffering." State v. Caston, 477 So.2d 868 (La. App. 4 Cir. 1985). 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. Soco, 441 So. 2d 719 (La. 1983); State v. Quebedeaux, 424 So. 2d 1009 (La. 1982).

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, keeping 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 (La.

1982); State v. Guajardo, 428 So.2d 468 (La. 1983).

At the sentencing hearing, the district court addressed Carter at length concerning his prior offenses as well as his current crimes. The district court noted that Carter had been released from the penitentiary only thirty-five days before he committed the five offenses at issue here. The district court found similarity in the prior and current offenses in that Carter targeted elderly people and women as his victims. The district court, quoting Justice Dennis, called armed robbery a "pernicious offense." In conclusion, the court stated:

> The law of this state says that maximum sentences are appropriately imposed in cases involving the most serious violations of the described offense and for the worst kind of offender. This offense is clearly—short of homicide or perhaps rape—the most violent and potentially deadly crime that there is. The emotional scars—even if there aren't physical scars—are perhaps present forever in the balance of the lives of those who have been the victims, especially the elderly, who are somewhat reluctant to take to the streets of this community to begin with.

We find the district court justified imposition of maximum sentences, and the sentences are not unconstitutionally excessive in light of Carter's criminal history. Maximum sentences of 198 years have been upheld on second felony offenders convicted of armed robbery. See State v. Donahue, 408 So. 2d 1262 (La. 1982); State v. Gordon, 447 So. 2d 881 (La. App. 4

Cir. 1985). Furthermore, this Court has previously upheld maximum sentences of 99 years for armed robbery. See State v. Collins, 557 So.2d 269 (La. App. 4 Cir. 1990); State v. Wilson, 452 So. 2d 773 (La. App. 4 Cir. 1985).

Considering the facts of the case, Carter's criminal history and the absence of mitigating factors, the district court did not abuse its sentencing discretion in imposing the maximum sentences in this case. There is no merit to this assignment.

Accordingly, Kevin B. Carter's convictions are affirmed. His sentence as to count two is vacated, and the case is remanded on that count alone for resentencing. His sentence as to count six is corrected so as to delete the prohibition of benefits of parole, probation, or suspension of sentence. His sentences on counts one, four, and five are affirmed; his sentence on count six is affirmed as corrected.

CONVICTIONS AFFIRMED;
SENTENCES AFFIRMED IN PART,
AMENDED IN PART AND VACATED IN PART
AND REMANDED