NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-KA-0472**
VERSUS	*	**COURT OF APPEAL**
PAUL E. FIRMIN	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 424-225, SECTION "C"
Honorable Sharon K. Hunter, Judge
* * * * * *
Judge Miriam G. Waltzer
* * * * * *

(Court composed of Judge Miriam G. Waltzer, Judge James F. McKay III, Judge Dennis R. Bagneris, Sr.)

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AFFIRMED

On 24 August 2001, Paul E. Firmin was charged by bill of information with simple burglary of an automobile, in violation of La. R.S. 14:62. He pleaded not guilty at his arraignment on 30 August. The trial court found probable cause to bind the defendant over for trial and denied the motions to suppress the evidence and the confession after a hearing on 7 September. The defendant elected a bench trial after being advised of his right to a jury trial, and on 2 October the court found him guilty as charged. The state filed a multiple bill charging Firmin as a second offender, and after a hearing on 9 November, he was sentenced to serve seven and one-half years under La. R.S. 15:529.1(A)(1)(a). His motion for an appeal was granted.

At trial Stephen J. Carter, an Orleans Parish Sheriff's Deputy, testified that on 7 July 2001, he and his son were preparing to go to their gym in his car which was parked in his driveway. Into the car Mr. Carter put a blue bag containing a 9mm weapon, a weight belt with lift straps, his driver's license, two credit cards, and an ATM card. He walked back into his house

for a few minutes until he heard his car alarm going off. He then went to his car, but he saw nothing wrong; he reset the alarm and went back into his house. A few minutes later the deputy was ready to leave, and as he got into his car, he reached back for his bag and realized it was gone. He had left the rear window down about an inch, and after he missed his bag, he noticed it was down six inches. He called the police department and then called Hibernia Bank to cancel his credit card. He learned that his card had just been used to purchase gasoline at an Exxon Station at the corner of Elysian Fields and North Claiborne Avenue. Mr. Carter got on his bicycle and rode to that location. Once there he saw the defendant walking toward him carrying the blue bag, and Mr. Carter "punched him" and recovered the bag. The defendant got up and began running, but Mr. Carter caught him on the neutral ground and demanded his credit cards and commission. The defendant handed over the credit cards and admitted to throwing the commission in the tall grass at A.P. Tureaud and Johnson Streets. Walking through the grass, the defendant found part of the commission and Carter's driver's license. The police arrived, and the defendant was arrested. The 9mm weapon, brown weight belt and part of the commission were never recovered. Mr. Carter said he never gave the defendant permission to enter his car.

Officer Gregory Torregano, who participated in the arrest of the defendant, testified that he read the defendant his rights when he was arrested. The defendant admitted to the officer that he burglarized the vehicle and used Carter's credit card at the service station, but he claimed that he did not take the weapon.

When Paul Firmin, the defendant, testified he first acknowledged that he had a 1993 burglary conviction. He then described the events of 7 July differently from Mr. Carter. Firmin said that he found the bag in the grass near A.P. Tureaud Street. He took only the credit cards which he returned to Carter. Firmin denied taking the blue bag out of a vehicle. Under cross-examination, Firmin admitted to having a misdemeanor conviction for theft in 1996.

In his assignments of error, defendant claims that his sentence is excessive and that trial counsel rendered ineffective assistance by failing to make a motion for reconsideration of sentence and thus, failing to preserve for appeal a claim for excessiveness of sentence.

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 L.Ed. 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).

Id.

Under La. R.S. 14:62 and La. R.S. 15:529.1(A)(1)(a), the defendant was subject to imprisonment at hard labor from between six and twenty-four years, and he received a sentence of seven and one-half years—just over the minimum term. The trial court did not state any reasons when imposing the sentence. However, the same judge heard the evidence at trial and sentenced the defendant. Furthermore, at trial defendant admitted to having another misdemeanor conviction for theft in 1996.

At his multiple bill hearing, his attorney argued vigorously that the fingerprint evidence was not sufficient to support the conviction. Although that argument was not ultimately successful, his attorney certainly was not deficient in his effort to defend Firmin.

Considering defendant's record, and the fact that he received only eighteen months more than the minimum sentence, we do not find his 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