NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-KA-0622**
VERSUS	*	**COURT OF APPEAL**
AARON LAMPTON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 423-825, SECTION "I"
Honorable Raymond C. Bigelow, Judge
* * * * * *
Judge Miriam G. Waltzer
* * * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge Steven R. Plotkin and Judge Miriam G. Waltzer)

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CONVICTIONS AND SENTENCES AFFIRMED

STATEMENT OF CASE

On 8 August 2001, defendant was charged by bill of information with two counts of armed robbery. He pled not guilty at arraignment. The trial court heard and denied the motion to suppress the identification and the motion to suppress the evidence and found probable cause. On 29 October 2001, the case was tried to a jury, and the defendant was found guilty as charged on both counts. After a hearing on 3 December 2001, defendant was adjudicated a third felony offender. The trial court sentenced defendant to sixty-six years on count one as a third offender and sentenced him fifty years on count two. Both sentences were imposed without benefit of parole. The trial court denied defendant's motion to reconsider sentence. Defendant appeals his convictions and sentences. Having found no error below, we affirm.

STATEMENT OF FACTS

On 1 April 2002, Sean Harris and Kevin Coffil were outside of Coffil's apartment at 6711 Tara Lane. Harris had recently purchased a

motorcycle, and the two men were admiring it when Harris observed two men approach and unveil guns. The taller of the two armed men approached Harris while the shorter subject approached Coffil. Harris unequivocally identified the shorter subject as the defendant. The armed men demanded the victims' possessions and patted their pockets removing money, keys, wallets and cell phones. The taller subject then took the helmet and got on the motorcycle. He relinquished his weapon to the second subject who placed it in his waistband. Before driving off on the motorcycle, he told his accomplice to take the two victims down the street. After the taller subject had gone on the motorcycle, the other subject had the victims remove their shoes and shake them out so he could be sure there was not any money within. After that, Coffil backed away, and the subject told Harris to walk with him towards a car parked at the end of the block. He pointed the gun at Harris' side as they walked. When they were about half way to the car, the subject moved ahead, entered the car and left.

The victims ran to Harris' apartment and telephoned the police. The 911 tape was played for the jury.

Harris described the guns used by the perpetrators as a tech-9 and a large semi-automatic pistol, either a nine-millimeter or something larger. He identified state's exhibit 5 as the gun used in the robbery.

Detective Daniel Wharton testified that he was the case detective assigned to the robbery. He arrived on the scene on the night of the robbery and interviewed the two victims. Approximately one month after the robbery, Detective Wharton had developed a suspect in the case, and he compiled a photographic lineup. Wharton testified that both victims positively identified the defendant and then signed the rear of the photograph. The two lineups were introduced into evidence. Wharton obtained a warrant for the defendant's arrest.

Kevin Coffil could not identify the defendant at trial, saying he was not sure. Coffil also explained that at the time he signed the photographic lineup he thought that the defendant was the perpetrator, but he was not sure. He testified for him it was over and done with and that he was not worrying about the armed robbery.

Officer Bryan Lubrano testified that on 29 June 2001, he was conducting a surveillance of the Guste Housing Development when he observed the defendant exit a breezeway and remove a handgun from his waistband. He observed the defendant place the weapon inside the engine compartment of a vehicle and then enter the vehicle. Officer Lubrano notified additional officers, who were able to retrieve the weapon. The defendant was arrested on the outstanding warrant at that time. The weapon,

a Colt .45 automatic, was introduced as state's exhibit number 5.

Detective Wharton was recalled as a witness in the defense case. He testified that the victims described the gun as being a chrome pistol, not a blue steel pistol like the one recovered.

In Lampton's defense, three witnesses testified that they were all with Lampton at an April Fool's Day party on the night of the robbery. Christy Morgan testified that defendant arrived at party being held at her uncle's house at approximately 5:00 p.m. She related that they stayed at the party until approximately 10:00 p.m. when they drove their friend Willie William's truck to Thibodeaux to visit a club. Morgan was confident that defendant did not leave the party as he and her friends were together throughout the event. Johnell Green testified that defendant had given him a ride to the mall earlier in the day and that he had invited the defendant to the party. He testified that the two arrived at the party together and that defendant did not leave. He described the defendant as a lifelong friend. Green admitted to prior convictions for simple robbery, possession of stolen property and what he referred to as aggravated fighting. Willie Williams arrived at the party at 6:30 or 7:00 that evening. He also went to Thibodaux with the defendant and the others.

ERRORS PATENT

A complete review of the record in its entirety for errors patent reveals none.

FIRST ASSIGNMENT OF ERROR (By Counsel and Pro Se): The state's evidence was insufficient to prove beyond a reasonable doubt that the defendant was correctly identified as the perpetrator.

The standard of appellate review for sufficiency of the evidence is whether, 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 (1979). When identity is disputed, the state must negate any reasonable probability of misidentification in order to satisfy its burden to establish every element of the crime charged beyond a reasonable doubt. *State v. Smith*, 430 So.2d 31, 45 (La.1983).

Defendant contends that the State's evidence was insufficient because even though the defendant was the one who allegedly approached Coffil, Coffil was unable to make a positive identification. Defendant adds that Harris' identification of the blue steel Colt weapon was of little support as he had previously described the weapon as being made of chrome. Defendant,

pro se, notes that Harris did not describe the perpetrator as having gold teeth. Finally, defendant contends that the State failed to impeach the credibility of his three alibi witnesses.

In *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243 (1977), the Supreme Court set forth the standard for identification reliability: (1) the opportunity of the witness to view the assailant at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the assailant; (4) the level of certainty demonstrated by the witness; and, (5) the length of time between the crime and the confrontation.

In considering the first and second factors, the record reflects that this was a close quarters robbery. Upon relinquishing their possessions, the perpetrators patted the victims down. After the first perpetrator left on a motorcycle, the victims were made to remove their shoes and shake them out. Finally, Harris walked side by side with the perpetrator until he fled in the vehicle. Harris testified that the lighting in the area was quite good and that they were near a streetlight. Coffil testified that it was bright. Additionally, under these circumstances, Harris' degree of attention was obviously not that of a casual observer.

As to the third factor, Harris initially described the perpetrator as a man between eighteen and twenty years old, between 5'4" and 5'6", with a

crew cut. It has not been suggested that this description later proved inaccurate. Although Harris did not identify the perpetrator as having gold teeth, it has not been suggested that this would be immediately apparent even to a close observer.

As to the fourth factor, the victim displayed a high degree of certainty in identifying the defendant both at trial and when he viewed the photographic lineup. Detective Wharton testified that Harris immediately identified the defendant when he showed him the lineup. At trial, Harris testified that he had no doubts.

With respect to the fifth factor, slightly more than a month passed the time between the victim's initial observation of the perpetrator and the photo identification. Although one month is somewhat lengthy, weighing the other factors, the identification is reliable.

With respect to the alibi witnesses' testimony, the State notes that there was some discrepancy as to whether the party in question was a birthday party or a block party; however, this does not appear significant. Furthermore, Christy Morgan recalled that Green and Williams had been dancing in the bed of a pickup truck parked in the street. Both Green and Williams denied having danced in the truck. It should be noted that all three witnesses testified that the defendant was a friend, and in the case of

Williams, a life long friend.

Besides weighing the five *Brathwaite* factors, this court must also consider that the jury made a credibility determination and chose to accept Harris's testimony over that of the alibi witnesses. Viewing the evidence in the light most favorable to the prosecution it does not appear that it was unreasonable for the jury to accept Harris' unimpeached testimony. Accordingly, the state met its burden of negating any reasonable possibility of misidentification and of proving beyond a reasonable doubt that the defendant committed this crime.

This assignment of error is without merit.

SECOND ASSIGNMENT OF ERROR: The sentences are constitutionally excessive.

In *State v. Lindsey*, 99-3302 pp. 4-5 (La.10/17/00), 770 So.2d 339, 342-43, the Louisiana Supreme Court held that the habitual offender statute was constitutional and that the mandatory minimum sentences contained therein should be enforced unless unconstitutionally excessive under Article I, Section 20 of the Louisiana Constitution. The standard set forth in *State v. Dorthey*, 623 So. 2d 1276 (La. 1993), requires affirmance of the statutory sentence unless it makes no measurable contribution to acceptable goals of

punishment or is nothing more than the purposeful imposition of pain and suffering and is grossly out of proportion to the severity of the crime. A trial court may depart from the statutory minimum sentence only where there is clear and convincing evidence that would rebut the presumption of constitutionality, and such cases are rare. The burden is on a defendant to rebut the presumption that a mandatory minimum sentence is constitutional. To do so, a defendant must show by clear and convincing evidence that he is exceptional, which, in this context, means that, because of unusual circumstances, this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense and the circumstances of the case. *State v. Johnson,* 97-1906, p. 8 (La.03/04/98), 709 So.2d 672, 676-677.

The multiple bill reflects that the defendant was previously convicted in February of 2000 of possession of stolen property and in November of 1998 of unauthorized use of a motor vehicle. As a third felony offender, the defendant's sentence of sixty-six years was the prescribed minimum under La. R.S. 15:529.1 A (1)(b)(ii).

Defendant argues that his sentences are constitutionally excessive in light of the fact that he is only twenty-one years old and because his two previous convictions were for non-violent offenses. He notes that this was

not a particularly heinous robbery in that the victims, two adult males, were not especially vulnerable victims and that no one was physically injured during the robbery. Nevertheless, it is clear the defendant has progressed to serious, violent offenses with the commission of the instant crimes. Both of defendant's previous convictions involved stolen or misappropriated vehicles, as is the case here. In perpetrating this crime defendant acted in concert with another armed individual to rob two people. Furthermore, he was apprehended in possession of a firearm, which he sought to conceal sometime after the robberies.

At sentencing, defendant failed to offer any evidence that he was exceptional or that he was a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender or the gravity and circumstances of the offense.

Sentences of sixty-five years have been upheld on armed robbery convictions. See *State v. Palmer*, 2000-0216 (La. App. 1 Cir. 12/22/2000), 775 So. 2d 1231, *writ denied* 2001-0211 (La. 1/11/02), 807 So. 2d 224, and *writ denied*, 2001-1043 (La. 1/11/02), 807 So. 2d 229. Furthermore 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*, 477 So. 2d 881 (La. App. 4 Cir. 1985),

and this court has previously upheld maximum sentences of ninety-nine years for armed robbery. *See State v. Collins*, 557 So.2d 269 (La. App. 4th Cir. 1990); *State v. Wilson*, 452 So. 2d 773 (La. App. 4 Cir. 1984).

Defendant's sixty-six year sentence is prescribed by statute and therefore presumed to be constitutional; in light of the defendant's recent previous criminal history and the circumstances of this case, his consecutive fifty-year sentence is not unconstitutionally excessive.

This assignment of error is without merit.

THIRD ASSIGNMENT OF ERROR (Pro se): Trial counsel was ineffective for having failed to oppose the habitual offender bill of information and for having failed to cross-examine the witnesses on their previous inconsistent testimony.

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); *State v. Johnson*, 557 So.2d 1030 (La. App. 4th Cir.1990). 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).

A defendant's claim of ineffective assistance of counsel is to be assessed by a two-part test: the defendant must show that counsel's performance was deficient and that the deficiency prejudiced defendant. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). 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.

Regarding the failure to oppose the habitual offender bill, the record reflects that state presented certified copies of the defendant's previous convictions and called an expert in the identification of latent prints to testify as to the fingerprint evidence linking defendant to the two previous convictions. Defendant presented no evidence or testimony at the hearing.

In order to establish prejudice defendant must demonstrate on what basis his counsel could have challenged the evidence presented at the hearing. Defendant does not allege that he was not the same person previously convicted as alleged or that either of the convictions was constitutionally infirm; accordingly, he cannot demonstrate prejudice.

As to the failure to cross-examine the two victims with their alleged inconsistent testimony at the motion to suppress the identification, defendant does not identify any inconsistency in the victims' testimony. Defendant alludes to a portion of the hearing in which Detective Wharton testified that Sean Harris stated that he did not get a look at the second perpetrator who robbed Coffil. The record is insufficient to address the issue, as that transcript is not in the record. It should be noted, that defense counsel did utilize the transcript during her cross-examination of Sean Harris, as well as of Detective Wharton.

This assignment of error is without merit.

CONCLUSION

For the foregoing reasons, we affirm the sentences and convictions.

CONVICTIONS AND SENTENCES AFFIRMED.