Judgment rendered October 28, 2009
Application for rehearing may be filed
within the delay allowed by Art. 922,
La. C.Cr.P.

No. 44,855-KA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

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STATE OF LOUISIANA Appellee

versus

MICHAEL D. KELLY Appellant

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Appealed from the
Fourth Judicial District Court for the
Parish of Ouachita, Louisiana
Trial Court No. 05-F1455

Honorable Marcus R. Clark, Judge

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PEGGY J. SULLIVAN
Louisiana Appellate Project
Counsel for
Appellant

MICHAEL D. KELLY
Pro Se

JERRY L. JONES
District Attorney
Counsel for
Appellee

ELLEN R. EADE
GEORGE D. ROSS
Assistant District Attorneys

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Before BROWN, CARAWAY and PEATROSS, JJ.

CARAWAY, J.

Defendant, a six-time felony offender, was charged by bill of indictment with two counts of aggravated rape and one count of armed robbery, under La. R.S. 14:42 and 14:64, respectively. Although a sanity commission originally found defendant incompetent to stand trial, he was later deemed competent to proceed. Pursuant to a plea agreement, defendant pled guilty to attempted aggravated robbery and was thereafter sentenced to the maximum term available for the offense, 49-1/2 years. Defendant now complains that the sentence imposed was unconstitutionally excessive. For the following reasons, we affirm.

Facts

On November 24, 2004, M.R.H. awoke to the sound of defendant, Michael D. Kelly,[1] breaking into her home. Kelly held a knife to the throat of the 61-year-old victim and despite her resistance, he proceeded to rape her.

On December 26, 2004, Kelly appeared at the home of an 84-year-old, R.L.G, who recognized Kelly's face, but could not readily identify who he was. R.L.G. had a vague recollection of seeing Kelly five or six years prior to the evening. She permitted Kelly to enter her home and the two engaged in conversation. After approximately five minutes of conversing, Kelly excused himself to the bathroom. He returned carrying a pocket knife. He put the knife to R.L.G.'s throat and told her to remove her pants.

[1]Defendant's last name is spelled "Kelly" and "Kelley" throughout the record. We will refer to defendant throughout this opinion as "Kelly."

Kelly then grabbed $2 and change off of the victim's dresser and left the house.

Kelly's pattern of criminal behavior continued when he broke into the home of J.B.O., an 86-year-old woman, bound by a wheelchair. J.B.O., who was startled by a loud noise, awoke to find Kelly standing over her with a pocket knife in his hand. He placed the knife to the victim's throat and raped her. After he raped her, Kelly demanded money from J.B.O., who informed him that she had none. Kelly then proceeded to the kitchen where he scouted the refrigerator and freezer for food before leaving the home.

DNA evidence directly linked Kelly to the rapes of both M.R.H. and J.B.O. and after a positive identification by R.L.G. during a photographic lineup, Kelly was arrested on May 9, 2005. Kelly was then indicted by a Ouachita Parish grand jury on one count of armed robbery and two counts of aggravated rape. Kelly initially waived formal arraignment and entered a plea of not guilty. However, on September 5, 2006, he withdrew his plea of not guilty and pled not guilty by reason of insanity.

The trial court ordered the appointment of a sanity commission, composed of two mental health professionals. On December 12, 2007, in accordance with reports submitted by the sanity commission, the trial court determined Kelly to be unable to proceed or assist in his defense and further ordered that he be committed to the Eastern Louisiana Mental Health System-Forensic Division. Kelly was later reevaluated by the State of Louisiana, Department of Health and Hospitals. On August 14, 2008, upon

a finding that Kelly was attempting to fabricate and exaggerate psychiatric symptoms, the court determined Kelly capable to stand trial.

On December 2, 2008, pursuant to a plea agreement with the State, Kelly pled guilty to attempted armed robbery. In exchange for his guilty plea, the state agreed it would not prosecute the two charges of aggravated rape and further that it would not prosecute Kelly on habitual offender charges. On February 10, 2009, Kelly was sentenced to the maximum sentence for attempted armed robbery, 49-1/2 years without benefit of probation, parole, or suspension of sentence. After an untimely motion to reconsider sentence was filed and denied, this appeal ensued.

Discussion

Kelly's only assignment of error on appeal is that the sentence imposed is unconstitutionally excessive. He contends that the trial court did not adequately consider his long history of substance abuse, nor his mental infirmities and low intellectual functioning. He complains that the trial court erred in presuming that he understood the seriousness of the harm that his actions would cause. He additionally alleges the sentence is unwarranted given that he has accepted responsibility for the crimes by pleading guilty and that the trial court placed an unwarranted emphasis on his criminal history, which did not involve crimes of violence against persons.

The test imposed by the reviewing court in determining the excessiveness of a sentence is two-pronged. First, the record must show that the trial court took cognizance of the criteria set forth in La. C.Cr.P. art.

894.1. The trial judge is not required to list every aggravating or mitigating circumstance so long as the record reflects that he adequately considered the guidelines of the article. *State v. Smith,* 433 So.2d 688 (La. 1983); *State v. Lathan*, 41,855 (La. App. 2d Cir. 2/28/07), 953 So.2d 890, *writ denied*, 07-0805 (La. 3/28/08), 978 So.2d 297. The articulation of the factual basis for a sentence is the goal of La. C.Cr.P. art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary even where there has not been full compliance with La. C.Cr.P. art. 894.1. *State v. Lanclos,* 419 So.2d 475 (La. 1982); *State v. Swayzer*, 43,350 (La. App. 2d Cir. 8/13/08), 989 So.2d 267. The important elements which should be considered are the defendant's personal history (age, family ties, marital status, health, employment record), prior criminal record, seriousness of offense and the likelihood of rehabilitation. *State v. Jones,* 398 So.2d 1049 (La. 1981); *State v. Ates,* 43,327 (La. App. 2d Cir. 8/13/08), 989 So.2d 259.

_____There is no requirement that specific matters be given any particular weight at sentencing. *State v. Swayzer, supra*; *State v. Shumaker*, 41,547 (La. App. 2d Cir. 12/13/06), 945 So.2d 277, *writ denied*, 07-0144 (La. 9/28/07), 964 So.2d 351.

_____Second, a sentence violates La. Const. art. 1, §20 if it is grossly out of proportion to the seriousness of the offense or nothing more than a purposeless and needless infliction of pain and suffering. *State v. Smith*, 01-2574 (La. 1/14/03), 839 So.2d 1; *State v. Dorthey*, 623 So.2d 1276 (La. 1993). A sentence is considered grossly disproportionate if, when the crime

and punishment are viewed in light of the harm done to society, it shocks the sense of justice. *State v. Weaver,* 01-0467 (La. 1/15/02), 805 So.2d 166; *State v. Robinson,* 40,983 (La. App. 2d Cir. 1/24/07), 948 So.2d 379.

A trial court has broad discretion to sentence within the statutory limits. Where a defendant has pled guilty to an offense which does not adequately describe his conduct or has received a significant reduction in potential exposure to confinement through a plea bargain, the trial court has great discretion in imposing even the maximum sentence possible for the pled offense. *State v. Germany*, 43,239 (La. App. 2d Cir. 4/30/08), 981 So.2d 792; *State v. Black*, 28,100 (La. App. 2d Cir. 2/28/96), 669 So.2d 667, *writ denied*, 96-0836 (La. 9/20/96), 679 So.2d 430. Absent a showing of manifest abuse of that discretion we may not set aside a sentence as excessive. *State v. Guzman,* 99-1528, 99-1753 (La. 5/16/00), 769 So.2d 1158; *State v. June*, 38,440 (La. App. 2d Cir. 5/12/04), 873 So.2d 939.

When a defendant fails to file a timely motion to reconsider sentence pursuant to La. C.Cr.P. art. 881.1, the appellate court's review is limited to the bare claim that the sentence is constitutionally excessive. *State v. Mims*, 619 So.2d 1059 (La. 1993); *State v. Duncan*, 30,453 (La. App. 2d Cir. 2/25/98), 707 So.2d 164. Despite the fact that defendant's motion to reconsider was denied as untimely, we nevertheless find adequate 894.1 compliance. Prior to sentencing, the trial judge read from a presentence investigation report, noting the facts of the case as well as Kelly's social background. The trial court took note of Kelly's history of substance abuse and past mental illness. The trial court also reviewed Kelly's criminal

history which encompassed a litany of offenses, including burglary and unauthorized entry of an inhabited dwelling. The trial court indicated its cognizance of the factors enumerated in La. C.Cr.P. art. 894.1 and specifically pointed to several, including the seriousness of the harm caused by the crime and defendant's awareness of the possible harm. In determination of the latter, the court took into consideration Kelly's low level of education and history of mental illness. After weighing the evidence, the trial court, in its discretion, deemed him capable of deciphering right from wrong.

In determining the appropriate sentence, the court considered both aggravating and mitigating factors. Aggravating factors included the leniency shown in the plea agreement, the lengthy criminal history of the defendant, and the fact that these were heinous crimes of violence perpetrated on the elderly. The court gave attention to the mitigating factors as well, including his history of mental illness, his low educational level, and the fact that he owned up to the crime and did not put an elderly victim through trial. This record clearly establishes adequate La. C.Cr.P. art. 894.1 compliance and shows that the trial judge gave due consideration to the appropriate factors in determining the defendant's sentences. The trial court was not required to give any particular weight to the factors pointed out by Kelly such as his history of substance abuse and that Kelly's previous offenses were nonviolent.

Moreover, in reviewing the sentence for constitutional excessiveness, we find no abuse of discretion in the trial court's choice of sentence. Kelly,

a six-time felony offender, received substantial benefit from the plea agreement by the reduction of his sentencing exposure through the dismissal of two pending charges and the absence of multiple offender proceedings. Had Kelly been tried and convicted of the crimes he was charged, he would have been sentenced to mandatory life imprisonment. Kelly has obviously failed to benefit from prior leniency in sentencing and persists in a pattern of criminal deviance. Considering Kelly's history, his continued criminal propensity and the benefit he received through the plea agreement, we find the maximum sentence to be appropriately tailored to this defendant. Thus, the imposed sentence does not shock the sense of justice. For these reasons, Kelly's conviction and sentence are affirmed.

Decree

For the foregoing reasons, defendant's conviction and sentence are affirmed.

AFFIRMED.