Judgment rendered December 11, 2013
Application for rehearing may be filed
within the delay allowed by Art. 922,
La. C.Cr.P.

No. 48,514-KA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

STATE OF LOUISIANA — Appellee

versus

LIBERT ROLAND — Appellant

* * * * *

Appealed from the
First Judicial District Court for the
Parish of Caddo, Louisiana
Trial Court No. 263,495

Honorable Craig O. Marcotte, Judge

* * * * *

TERESA CULPEPPER CARROLL — Counsel for Appellant

LIBERT ROLAND — Pro se

CHARLES R. SCOTT II
District Attorney — Counsel for Appellee

JASON T. BROWN
TOMMY J. JOHNSON
Assistant District Attorneys

* * * * *

Before CARAWAY, DREW and PITMAN, JJ.

CARAWAY, J.

The defendant, Libert Roland, pled guilty to two drug offenses. This appeal arises from the habitual offender adjudication as a fourth felony habitual offender and from his sentence for possession of marijuana, third offense. Roland was sentenced to life imprisonment without benefit of parole, probation, or suspension of sentence based upon his adjudication as a fourth felony habitual offender. He also appeals his sentence for possession of marijuana, third offense, for the statutory maximum of 20 years plus a $5,000 fine with one year additional sentence in lieu of the $5,000 fine upon default. Roland appeals these convictions and requests that his sentence as a fourth felony habitual offender be vacated because the state amended its original habitual offender bill from fourth to third felony habitual offender. He also challenges this adjudication and sentence because the pleas to the predicate offenses were constitutionally invalid. He also asserts that his life sentence is constitutionally excessive. Regarding his sentence for possession of marijuana, third offense, Roland argues that it is also constitutionally excessive and that his sentence to an additional year in prison in lieu of payment of the $5,000 is invalid because he is an indigent. Finally, Roland argues that his sentences should be vacated because his counsel was ineffective in assisting him in these criminal proceedings.

Plea and Sentencing

On October 18, 2007, Roland was arrested for possession of a schedule II, controlled dangerous substance, more than 28 grams but less

than 200 grams, and for possession of marijuana, third offense. A bill of information formally charging Roland was filed on November 28, 2007. Roland initially pled not guilty to both charges, but the plea was withdrawn and a plea of guilty to both counts was entered on May 6, 2008. The sentencing for these counts was deferred.

The Caddo Parish District Attorney's Office ("the state") subsequently filed a habitual offender bill of information for Roland as a fourth felony habitual offender on June 30, 2008. For this bill of information, Roland entered a plea of not guilty. A habitual offender hearing was held on March 12, 2009, at which the state had an expert identify and analyze Roland's fingerprints in conjunction with fingerprints of a Libert Roland for four predicate offenses to which he pled guilty. The court found that the four predicate offenses were Roland's. However, at this hearing, the state orally amended the habitual offender bill of information to reflect that Roland was a third felony habitual offender rather than a fourth felony habitual offender because of a problem with the cleansing period between Roland's first and second felony convictions.

At the conclusion of the habitual offender hearing on April 29, 2009, the trial court adjudicated Roland a fourth felony habitual offender, despite the oral amendment to third felony habitual offender, and sentenced Roland to life imprisonment without benefit of parole, probation or suspension of sentence. Further, the trial court sentenced Roland to the statutory maximum of 20 years plus a $5,000 fine for the possession of marijuana, third offense, to be paid through inmate banking, or one year in prison upon

default to run concurrently with the life sentence. The court did not specify whether the one year in lieu of payment would be concurrent with other time to be served or whether it would be consecutive. The trial court did not specify any considerations for the length of the sentence for the possession of marijuana, third offense, conviction. Roland filed a motion to reconsider sentence on July 19, 2013. Through the Louisiana Appellate Project (due to Roland's indigence) and pro se, Roland now appeals the fourth habitual offender adjudication and sentence as well as the sentence for possession of marijuana, third offense.

Applicable Law

The enhanced sentences provided for habitual felony offenders are set forth in La. R.S. 15:529.1. The habitual offender statute in effect at the commission of the offense for which the defendant receives an enhanced sentence is the version of the statute that applies. *See State v. Parker*, 03-0924 (La. 4/14/04), 871 So. 2d 317, *citing State v. Barnes*, 02-2059 (La. 4/4/03), 845 So. 2d 354. In 2007, La. R.S. 15:529.1 provided as follows:

> A. (1) Any person who, after having been convicted within this state of a felony or adjudicated a delinquent under Title VIII of the Louisiana Children's Code for the commission of a felony-grade violation of either the Louisiana Controlled Dangerous Substances Law involving the manufacture, distribution, or possession with intent to distribute a controlled dangerous substance or a crime of violence as listed in Paragraph (2) of this Subsection, or who, after having been convicted under the laws of any other state or of the United States, or any foreign government of a crime which, if committed in this state would be a felony, thereafter commits any subsequent felony within this state, upon conviction of said felony, shall punished as follows:
>
> * * *
>
> (b) If the third felony is such that upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life then:

(i) The person shall be sentenced to imprisonment for a determinate term not less than two-thirds of the longest possible sentence for the conviction and not more than twice the longest possible sentence prescribed for a first conviction; or

(ii) If the third felony and the two prior felonies are felonies defined as a crime of violence under R.S. 14:2(B),[1] a sex offense as defined in R.S. 15:540 et seq. when the victim is under the age of eighteen at the time of commission of the offense, or as a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for ten years or more, or any other crimes punishable by imprisonment for twelve years or more, or any combination of such crimes, the person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation or suspension of sentence.

(c) If the fourth or subsequent felony is such that, upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life then:

(i) The person shall be sentenced to imprisonment for the fourth or subsequent felony for a determinate term not less than the longest prescribed for a first conviction but in no event less than twenty years and not more than his natural life; or

(ii) If the fourth felony and two of the prior felonies are felonies defined as a crime of violence under R.S. 14:2(B), a sex offense as defined in R.S. 15:540 et seq. when the victim is under the age of eighteen at the time of commission of the offense, or as a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for ten years or more, or any other crimes punishable by imprisonment for twelve years or more, or any combination of such crimes, the person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation or suspension of sentence.

* * *

C. The current offense shall not be counted as, respectively, a second, third, fourth, or higher offense if more than ten years have elapsed between the date of the commission of the current offense, or offenses and the expiration of the maximum sentence or sentences of the previous conviction or convictions, or adjudication or adjudications of delinquency, or between the expiration of the maximum sentence or sentences of each preceding conviction or convictions or adjudication or adjudications of delinquency alleged in the multiple offender bill and the date of the commission of the following offense

[1]Attempted simple robbery is defined as a "crime of violence." *See* La. R.S. 14:2(B)(23).

> or offenses. In computing the intervals of time as provided herein, any period of servitude by a person in a penal institution, within or without the state, shall not be included in the computation of any of said ten-year periods between the expiration of the maximum sentence or sentences and the next succeeding offense or offenses.
>
> * * *

The sentence for possession of marijuana, third offense is provided in La. R.S. 40:966. Again, the law in effect at the time of commission of the offense is determinative of the penalty that is to be imposed upon the convicted accused. *Parker*, *supra*, *citing State v. Narcisse*, 426 So. 2d 118 (La. 1983); *State v. Wright*, 384 So. 2d 399 (La. 1980); *State v. Gros*, 205 La. 935, 18 So. 2d 507 (1944). In 2007, La. R.S. 40:966(E) provided as follows:

> E. Possession of marijuana. (1) Except as provided in Subsections E and F of this Section, on a first conviction for violation of Subsection C of this Section with regard to marijuana,[2] tetrahydrocannabinol or chemical derivatives thereof, the offender shall be fined not more than five hundred dollars, imprisoned in the parish jail for not more than six months, or both.
>
> (2) Except as provided in Subsection F or G of this Section, on a second conviction for violation of Subsection C of this Section with regard to marijuana, tetrahydrocannabinol or chemical derivatives thereof, the offender shall be fined not more than two thousand dollars, imprisoned with or without hard labor for not more than five years, or both.

---

[2]La. R.S. 40:966(C) provided:

C. Possession. It is unlawful for any person knowingly or intentionally to possess a controlled dangerous substance classified in Schedule I unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner or as provided in R.S. 40: 978, while acting in the course of his professional practice, or except as otherwise authorized by this Part. Any person who violates this Subsection with respect to:

(1) A substance classified in Schedule I which is a narcotic drug (all substances in Schedule I preceded by an asterisk), shall be imprisoned at hard labor for not less than four years nor more than ten years and may, in addition, be required to pay a fine of not more than five thousand dollars.

(2) Phencyclidine, shall be sentenced to imprisonment with or without hard labor for not less than five nor more than twenty years and may be sentenced to pay a fine of not more than five thousand dollars, or both.

(3) Any other controlled dangerous substance classified in Schedule I, shall be imprisoned at hard labor for not more than ten years, and may in addition, be required to pay a fine of not more than five thousand dollars.

> (3) Except as provided in Subsection F or G of this Section, on a third or subsequent conviction for violation of Subsection C of this Section with regard to marijuana, tetrahydrocannabinol or chemical derivatives thereof, the offender shall be sentenced to imprisonment with or without hard labor for not more than twenty years.
>
> (4) A conviction for the violation of any other statute or ordinance with the same elements as R.S. 40:966(C) prohibiting the possession of marijuana, tetrahydrocannabinol or chemical derivatives thereof, shall be considered as a prior conviction for the purposes of this Subsection relating to penalties for second, third, or subsequent offenders.
>
> (5) A conviction for the violation of any other statute or ordinance with the same elements as R.S. 40:966(B)(3) prohibiting the distributing or dispensing or possession with intent to distribute or dispense marijuana, of marijuana, tetrahydrocannabinol, or chemical derivatives thereof, shall be considered as a prior conviction for the purposes of this Subsection relating to penalties for second, third, or subsequent offenders.

Furthermore, a prior felony conviction for second offense possession of marijuana is not a prerequisite to a prosecution for third offense possession of marijuana, which may rest on two prior misdemeanor convictions for first offense marijuana possession. *State v. Lewis*, 12-1835 (La. 11/30/12), 104 So. 3d 407.

The trial judge is given a wide discretion in imposition of sentences within the statutory limits, and the sentence imposed by him should not be set aside as excessive in the absence of a manifest abuse of his discretion. *State v. Williams*, 03-3514 (La. 12/13/04), 893 So. 2d 7, *citing State v. Thompson*, 02-0333 (La. 4/9/03), 842 So. 2d 330; *State v. Washington*, 414 So. 2d 313 (La. 1982); *State v. Abercrumbia*, 412 So. 2d 1027 (La. 1982).

In felony cases, within 30 days following the imposition of sentence or within such longer period as the trial court may set at sentence, the state or the defendant may make or file a motion to reconsider sentence. La.

C.Cr.P. art. 881.1(A)(1). The motion shall be oral at the time of sentence or shall be in writing thereafter and shall set forth the specific grounds on which the motion is based. La. C.Cr.P. art. 881.1(B). Failure to make or file a motion to reconsider sentence or to include a specific ground upon which a motion to reconsider sentence may be based, including a claim of excessiveness, shall preclude the state or the defendant from raising an objection to the sentence or from urging any ground not raised in the motion on appeal or review. La. C.Cr.P. art. 881.1(E). Article 881.1 precludes a defendant from presenting arguments to the court of appeal that were not presented to the trial court at a point in the proceedings when the trial court was in a position to correct the deficiency. *State v. Felder*, 36,228 (La. App. 2d Cir. 8/14/02), 823 So. 2d 1107, *citing State v. Brantley*, 28,542 (La. App. 2d Cir. 8/21/96), 679 So.2d 472. When a defendant's motion for reconsideration urges merely that the sentence is excessive, he is relegated only to a claim of constitutional excessiveness. *Felder*, *supra*, *citing State v. Mims*, 619 So.2d 1059 (La. 1993).

Regarding a claim for constitutional excessiveness, Louisiana Constitution Article 1, § 20 states, "No law shall subject any person to . . . cruel, excessive, or unusual punishment." 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. Bobo*, 46,225 (La. App. 2d Cir. 06/08/11); *State v. Hodge*, 41,097 (La. App. 2d Cir. 8/23/06), 938 So. 2d 1066. 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 or makes no reasonable contribution to acceptable penal goals. *Hodge*, *supra.* Maximum sentences are appropriately imposed in cases involving the most serious violations of the described offense, and for the worst kind of offender. *State v. Fikes*, 47,091 (La. App. 2d Cir. 6/20/12), 93 So. 3d 827; *State v. Jones*, 398 So. 2d 1049 (La. 1981).

An illegal sentence may be corrected at any time by the court that imposed the sentence or by the appellate court on review. La. C.Cr.P. art. 882(A); *Fikes*, *supra*. The reviewing court may notice sentencing errors as error patent. *Fikes*, *supra*, *citing State v. Williams*, 00-1725 (La. 11/28/01), 800 So. 2d 790.

If a sentence imposed includes a fine or costs, the sentence shall provide that in default of payment thereof the defendant shall be imprisoned for a specified period not to exceed one year. La. C.Cr.P. art. 884. However, an indigent may not be subjected to imprisonment for failure to pay a fine that is part of his sentence. *Fikes*, *supra*, *citing State v. Howard*, 44,434 (La. App. 2d Cir. 6/24/09), 15 So. 3d 344; *see also State v. Payne*, 47,481 (La. App. 2d Cir. 12/12/12), 108 So. 3d 174. A defendant's claim of indigence in such a situation may be discerned from the record. *Fikes*, *supra*; *Payne*, *supra*. Where a defendant is represented by the Indigent Defender's Office, a court-appointed attorney, and the Louisiana Appellate Project, the court may conclude that the defendant is indigent. *Payne*, *supra.*

In *Fikes*, *supra*, the trial court imposed the maximum penalty of 30 years for distribution of cocaine with a $30,000 fine, with default time of one year in the parish jail. This court noted that the trial court also found the defendant to be indigent. This court also recognized that the addition of one year to the sentence for default of paying the fine would cause the sentence to exceed the 30-year maximum. For those reasons, the court of appeal modified the sentence to delete the imposition of default time.

Discussion

Roland argues that the trial court erroneously adjudicated him a fourth felony habitual offender when he should have been at most adjudicated a third felony habitual offender as reflected in the state's oral amendment to the habitual offender bill of information. As a result, he argues that the adjudication should be reversed and that his life sentence as a fourth felony habitual offender be vacated.

First we consider Roland's fourth felony habitual offender adjudication and sentence, which may be quickly and easily resolved. Originally, the state filed a fourth felony habitual offender bill of information in which the first predicate offense the state later dropped from consideration by orally amending the bill of information to only charge that Roland is merely a third felony habitual offender. The state made this amendment because it realized that it could not prove the 10-year cleansing period between the end of Roland's1986 simple burglary sentence and his 2004 conviction for attempted simple robbery. The trial court may not adjudicate and sentence a defendant for something that the state is not

urging against the defendant. The adjudication and sentence is clearly incorrect. Therefore, the fourth felony offender adjudication is reversed, and the life sentence imposed without benefit of parole, probation, or suspension of sentence is vacated. The case will be remanded for further proceedings.

Because we reverse the adjudication and sentence on the clear legal error described above, we need not consider at this time whether the life sentence is constitutionally excessive or whether the pleas to the predicate offenses are invalid.

Next we consider whether Roland's third offense possession of marijuana sentence is excessive or illegal. We find that Roland is limited to a challenge of bare constitutional excessiveness because his motion for reconsideration of sentence was untimely. La. C.Cr.P. art. 881.1(A)(1).

Roland's sentence is not grossly out of proportion to the seriousness of his offense, and it is not a purposeless and needless infliction of pain and suffering. *Bobo*, *supra*; *Hodge*, *supra*. Roland received the maximum sentence allowed by law for his conviction of third offense possession of marijuana, which is 20 years. Maximum sentences are reserved for the most serious violations and worst kind of offenders. *Fikes*, *supra*; *State v. Jones*, *supra*. The trial judge is also given wide discretion in sentencing, and the sentence he imposes may not be disturbed absent an abuse of discretion. *Bobo*, *supra*; *Hodge*, *supra*. Furthermore, the trial court may consider sources normally excluded from trial of guilt or innocence, such as arrest

records. *State v. Cozzetto*, 07-2031 (La. 02/15/08), 974 So. 2d 665, *citing State v. Myles*, 94-0217 (La. 06/03/94), 638 So. 2d 218.

Here, Roland has an extensive criminal record, including 13 total arrests. This was Roland's second third-offense possession of marijuana conviction. Also included in his record are several crimes of violence. Roland apparently has not benefitted from the rehabilitative aspects of the penal system. We therefore cannot say that the trial court abused its discretion in sentencing Roland to the maximum penalty of 20 years for third offense possession of marijuana. His 20-year sentence is affirmed.

However, we find that the portion of the sentence imposing one year of default time in lieu of his $5,000 fine erroneous because of Roland's indigence. Additionally, the one-year default sentence is illegal because it will cause Roland's 20-year sentence to exceed the statutory maximum. The trial court did not specify when it sentenced Roland whether the one-year of default time would run concurrently or consecutively with the 20-year sentence. Because this is unclear and because a consecutive default sentence would be illegal, *see Fikes*, *supra* (where one-year default sentence consecutive to 30-year maximum was an illegal extension of the maximum sentence), we amend the sentence to delete the one-year default time.

Finally, regarding Roland's claim to ineffective assistance of counsel, we find that the record does not contain sufficient evidence for this court to make a determination. This particular claim would be best heard by a trial

court in a PCR hearing where it may take evidence and fully consider the merits of the claim.[3]

Conclusion

For the foregoing reasons, we reverse the fourth felony habitual offender adjudication and vacate the accompanying life sentence without benefit of parole, probation, or suspension of sentence, and we remand to the trial court for further proceedings and resentencing. We affirm the 20-year sentence and $5,000 fine in connection with the possession of marijuana, third offense, conviction. However, we amend the sentence to delete the portion imposing the one-year default sentence in lieu of payment of the $5,000. We decline to reach the issue of ineffective assistance of counsel.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.

[3]As a general rule, a claim of ineffective assistance of counsel is more properly raised in an application for post-conviction relief ("PCR") in the trial court rather than by appeal. This is because PCR creates the opportunity for a full evidentiary hearing under La. C.Cr.P. art. 930. *State v. Robinson*, 45,820 (La. App. 2d Cir. 1/26/11), 57 So. 3d 1107, *citing State ex rel. Bailey v. City of West Monroe*, 418 So. 2d 570 (La. 1982); *State v. Ellis*, 42,520 (La. App. 2d Cir. 9/26/07), 966 So. 2d 139. When the record is sufficient, this issue may be resolved on direct appeal in the interest of judicial economy. *Robinson*, *supra*, *citing State v. Ratcliff*, 416 So. 2d 528 (La. 1982); *State v. Willars*, 27,394 (La. App. 2d Cir. 9/27/95), 661 So. 2d 673.