NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 0879

STATE OF LOUISIANA

VS.

EMANUEL HOWARD

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JUDGMENT RENDERED: NOV - 7 2007

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ON APPEAL FROM THE
TWENTY-THIRD JUDICIAL DISTRICT COURT
DOCKET NUMBER 18,082, DIVISION D
PARISH OFASCENSION, STATE OF LOUISIANA

HONORABLE PEGRAM J. MIRE, JR., JUDGE

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GWENDOLYN K. BROWN BATON ROUGE, LA	ATTORNEY FOR DEFENDANT/APPELLANT EMANUEL HOWARD
EMANUEL HOWARD ANGOLA, LA	DEFENDANT/APPELLANT IN PROPER PERSON

BEFORE: GAIDRY, MCDONALD AND MCCLENDON, JJ.

MCDONALD, J.

The defendant, Emanuel Howard, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1.[1] He pled not guilty. Following a jury trial, the defendant was found guilty as charged. The defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The defendant now appeals, designating three assignments of error. We affirm the conviction and sentence.

FACTS

On the evening of November 28, 2004, Montreal Veal's 1971 Oldsmobile Cutlass was stolen from the Fina gas station on Highland Road while Veal was inside making a purchase. Veal went to a nearby police station to report his car as stolen. Veal then met with the defendant, and they began searching south Baton Rouge for Veal's car while riding in the defendant's car. The defendant armed himself with a Glock 40 handgun that he kept under his car seat. The defendant called Joseph Thomas and Joshua Weatherspoon, Veal's cousin, for help in finding Veal's car. Another cousin, Cornell Cummins, called Veal after spotting the stolen car at a Shell gas station on North 22nd Street and Plank Road. Veal and the defendant met Thomas and Weatherspoon at the Shell station. An attendant informed them that someone left in a vehicle matching the description of Veal's car after asking for directions to New Orleans.

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[1] Joseph Thomas, Joshua Weatherspoon, and Montreal Veal were codefendants also charged with second degree murder. Thomas was found guilty as charged. Weatherspoon and Veal pled guilty to conspiracy to commit second degree murder and testified at trial. Thomas's appeal is pending before this court in docket number 2007-0709. Weatherspoon's conviction and sentence were affirmed in an unpublished opinion, **State v. Weatherspoon**, 07-0723 (La. App. 1 Cir. 9/14/07).

The four men, in two cars, traveled toward New Orleans. When they approached Gonzales near the Tanger Outlet Mall, the oil warning light came on in the defendant's car. The defendant parked his car at a Jet 24 store, then Veal and the defendant got into Thomas's car with Thomas and Weatherspoon. The four continued south until they saw Veal's car at a rest area in Sorrento. Jerron Gasper was near Veal's car. Veal recognized Gasper as the person he saw at the Fina gas station just prior to when his car was stolen. Thomas pulled in front of Veal's car and parked. Thomas exited his vehicle and spoke to Gasper. As Thomas and Gasper walked toward the cars, the other three men jumped out of Thomas's car. Gasper turned and ran. The defendant chased Gasper. Thomas, who was armed, pulled out a gun and shot at Gasper. The defendant then pulled out his gun and also shot at Gasper. Gasper was struck by two bullets in his back, fell to the ground and died. The four men left the scene in Thomas's car without recovering Veal's car.

ASSIGNMENTS OF ERROR NUMBERS 1, 2 AND 3

The defendant's three assignments of error address the issue of excessive sentence. The defendant argues the trial court erred in imposing an excessive sentence; the trial court erred in failing to comply with the sentencing guidelines of La. C.Cr.P. art. 894.1; and he was denied the effective assistance of counsel because of defense counsel's failure to file a motion to reconsider sentence.

The record does not contain an oral or written motion to reconsider sentence. Louisiana Code of Criminal Procedure article 881.1(E) provides that the failure to file or make a motion to reconsider sentence precludes the defendant from raising an excessive sentence argument on appeal. Ordinarily, we are constrained by the provisions of this article and the

holding of **State v. Duncan**, 94-1563 (La. App. 1st Cir.12/15/95), 667 So.2d 1141, 1143 (en banc per curiam), and we would not consider an excessive sentence argument. However, in the interest of judicial economy, we choose to consider the defendant's argument that his sentence is excessive, even in the absence of a motion to reconsider sentence, in order to address the defendant's claim of ineffective counsel. See **State v. Wilkinson**, 99-0803, p. 3 (La. App. 1st Cir. 2/18/00), 754 So.2d 301, 303, writ denied, 00-2336 (La. 4/20/01), 790 So.2d 631.

Failure to file a motion to reconsider sentence in itself does not constitute ineffective assistance of counsel. However, if the defendant can show a reasonable probability that, but for counsel's error, his sentence would have been different, a basis for an ineffective assistance claim may be found. **State v. Felder**, 00-2887, p. 11 (La. App. 1st Cir. 9/28/01), 809 So.2d 360, 370, writ denied, 01-3027 (La. 10/25/02), 827 So.2d 1173.

The Eighth Amendment to the United States Constitution and Article I, section 20, of the Louisiana Constitution prohibit the imposition of excessive punishment. Although a sentence falls within statutory limits, it may be excessive. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks one's sense of justice. **State v. Andrews**, 94-0842, pp. 8-9 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 454. The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as

excessive in the absence of a manifest abuse of discretion. See **State v. Holts**, 525 So.2d 1241, 1245 (La. App. 1st Cir. 1988).

Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the trial court to consider when imposing sentence. While the entire checklist of La. C.Cr.P. art. 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. **State v. Brown**, 02-2231, p. 4 (La. App. 1st Cir. 5/9/03), 849 So.2d 566, 569. The factors guiding the decision of the trial court are necessary for an appellate court to adequately review a sentence for excessiveness and, therefore, should be in the record. Otherwise, a sentence may appear to be arbitrary or excessive and not individualized to the particular defendant. The failure to articulate reasons for the sentence as set forth in Article 894.1 when imposing a mandatory life sentence is not an error; however, articulating reasons or factors would be an exercise in futility since the court has no discretion. **Felder**, 00-2887 at pp. 12-13, 809 So.2d at 371.

The defendant contends that the dubious nature of the facts of this case and the circumstances surrounding his background do not support the imposition of a life sentence. According to the defendant, the trial court should have exercised its authority to deviate from the mandatory sentence and imposed a sentence "more appropriate for this unique defendant."

Under La. R.S. 14:30.1(B), a person convicted of second degree murder shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. Courts are charged with applying a statutorily mandated punishment unless it is unconstitutional. To rebut the presumption that the mandatory minimum sentence is constitutional, the defendant must clearly and convincingly show that he is exceptional, which 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. See **Felder**, 00-2887 at pp. 11-12, 809 So.2d at 370.

In the instant matter, the defendant complains that it is not possible to know which of the four co-defendants were the actual shooters. The defendant suggests that each person present at the shooting told the police and prosecutors different versions of the events, minimizing his own culpability while "pointing the finger" at the others. According to the defendant, "the jury's verdict does not necessarily support the trial court's conclusion that he was a shooter because the State argued to the jury that all four men were potentially guilty as principals." While the prosecutor discussed the law on principals in his closing arguments, the State's theory, as evidenced by the prosecutor's opening statement and closing arguments, as well as by the entirety of the case presented by the State, was that the defendant was one of the shooters. Moreover, for purposes of these assignments of error pertaining to excessiveness of sentence, it is not the role of this court to divine the intent of the jury in its determination of a guilty verdict.

As to the defendant's background, he notes that at the time of sentencing, he was only twenty-three years old, and he was classified as a first felony offender. At sentencing, the trial court noted the defendant's age. It considered, albeit unnecessarily, the factors under La. C.Cr.P. art. 894.1 and found that there was an undue risk that during the period of a suspended sentence or probation, the defendant would commit another crime; the defendant was in need of correctional treatment or a custodial environment that could be provided most effectively by his commitment to

an institution; and any lesser sentence would deprecate the seriousness of the offense. The trial court also recognized that, although the defendant was classified as a first felony offender, he had not led a law-abiding life for a substantial period of time before the commission of the instant offense. According to the presentence investigation report, the defendant's criminal record dated back to 2001, and included arrests for attempted armed robbery, criminal conspiracy, attempted first degree murder, and resisting an officer. The trial court further noted that the loss to the victim (his life) and to his family caused by this offense was "a significant and permanent loss of the highest magnitude." The trial court found a total lack of provocation for the offense, and no grounds which excused or justified the defendant's conduct.

The defendant has not proven by clear and convincing evidence that he is exceptional. He has not shown that because of unusual circumstances he was a victim of the Legislature's failure to assign a sentence that was meaningfully tailored to his culpability, the gravity of the offense, and the circumstances of the case. Accordingly, there was no reason for the trial court to deviate from the mandatory sentence provided for the instant offense by La. R.S. 14:30.1. See **State v. Henderson**, 99-1945, pp. 19-20 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 760-61, writ denied, 00-2223 (La. 6/15/01), 793 So.2d 1235.

Because we find the sentence is not excessive, defense counsel's failure to file a motion to reconsider sentence, even if constituting deficient performance, did not prejudice the defendant. See **Wilkinson**, 99-0803 at p. 3, 754 So.2d at 303; **State v. Robinson**, 471 So.2d 1035, 1038-1039 (La. App. 1st Cir.), writ denied, 476 So.2d 350 (La. 1985). His claim of ineffective assistance of counsel, therefore, must fall.

These assignments of error are without merit.

PRO SE ASSIGNMENT OF ERROR

In this pro se assignment of error, the defendant argues ineffective assistance of counsel. The defendant contends that defense counsel was ineffective for failing to file a motion to suppress his confession, or make an independent investigation regarding the taped confession. Specifically, the defendant claims that the voice on his taped confession was not his voice.

In **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the United States Supreme Court enunciated the test for evaluating the competence of trial counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

In evaluating the performance of counsel, the inquiry must be whether counsel's assistance was reasonable considering all the circumstances. **State v. Morgan**, 472 So.2d 934, 937 (La. App. 1st Cir. 1985). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. **State v. Robinson**, 471 So.2d 1035, 1038-1039 (La. App. 1st Cir.), writ denied, 476 So.2d 350 (La. 1985).

A claim of ineffective assistance of counsel is more properly raised by an application for postconviction relief in the district court, where a full evidentiary hearing may be conducted. However, where the record discloses sufficient evidence to decide the issue of ineffective assistance of counsel when raised by assignment of error on appeal, it may be addressed in the

interest of judicial economy. **State v. Carter**, 96-0337, p. 10 (La. App. 1st Cir. 11/8/96), 684 So.2d 432, 438.

In the instant matter, the allegations of ineffective assistance of counsel cannot be sufficiently investigated from an inspection of the record alone. Decisions relating to investigation, preparation, and strategy cannot possibly be reviewed on appeal. Only in an evidentiary hearing in the district court, where the defendant could present evidence beyond what is contained in the instant record, could these allegations be sufficiently investigated.[2] Accordingly, these allegations are not subject to appellate review. See **State v. Albert**, 96-1991, p. 11 (La. App. 1st Cir. 6/20/97), 697 So.2d 1355, 1363-1364. See also **State v. Johnson**, 06-1235, p. 15 (La. App. 1st Cir. 12/28/06), 951 So.2d 294, 304.

DECREE

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

CONVICTION AND SENTENCE AFFIRMED.

[2] The defendant would have to satisfy the requirements of La. C.Cr.P. art. 924, et seq., in order to receive such a hearing.