NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 KA 0709

STATE OF LOUISIANA

VERSUS

SYLVESTER SULLIVAN, JR.

Judgment rendered December 21, 2012.

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Appealed from the
23rd Judicial District Court
in and for the Parish of Ascension, Louisiana
Trial Court No. 22,411
Honorable John L. Peytavin, Judge

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SYLVESTER SULLIVAN, JR.

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BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

PETTIGREW, J.

The defendant, Sylvester Sullivan, Jr., was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1. He pled not guilty. After a jury trial commenced, he changed his plea and pled guilty to the responsive offense of manslaughter, a violation of La. R.S. 14:31. The trial court sentenced him to thirty-five years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The defendant filed a motion to reconsider sentence, which was denied. The defendant now appeals, arguing one assignment of error. We affirm the conviction, amend the sentence, and affirm as amended.

FACTS

After the jury trial commenced, but before any evidence or testimony was presented, the defendant informed the trial court that he wished to accept the district attorney's offer to plead guilty to manslaughter, with a presentence investigation report (PSI) and no multiple offender bill. Though the facts were not fully developed, the following account of the crime was established at the **Boykin** examination[1] and the sentencing hearing, as well as from review of the investigative report prepared by the Assumption Parish Sheriff's Office (APSO), which was included in the record. During the daytime on July 12, 2007, the defendant was seen walking with the victim, Jimmy Ross Phillips, in Donaldsonville, Louisiana. Moments later, people nearby heard gunshots. A witness then observed the defendant placing the victim, who was limp, into the trunk of his blue Chevrolet Caprice before driving away. Soon after the defendant left the area, his mother called the APSO to report that her son's car, which was registered in her name, had been stolen. When APSO detectives examined the area where Phillips had allegedly been shot, they found a spent 9mm casing, blood, human tissue, and a pair of dark slippers that belonged to Phillips. They also observed car tire tracks leaving the area. Phillips's body, wrapped in a blanket, was found two days later near the Mississippi River, by the Sunshine Bridge. Shortly after the shooting, an APSO deputy had observed

[1] **Boykin v. Alabama**, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

a blue Chevrolet Caprice traveling towards the area where the victim's body was found, and the driver was described as having similar features to the defendant. An autopsy indicated that Phillips died from a single gunshot wound to the head.

EXCESSIVE SENTENCE

In his sole assignment of error, the defendant contends that the trial court erred when it imposed a thirty-five-year sentence on him when he had no history of committing violent crimes and led the life of a good father, son, and brother. The defendant contends that he willingly admitted his responsibility for the death of Phillips and that he was deeply remorseful and willing to be punished for his actions. He complains that the trial court did not view him in a favorable light because the PSI was drafted by an officer who never met him but nonetheless portrayed him as harboring disrespect for the judicial system. He also contends that the trial court only saw him through the eyes of the decedent's family and friends, and did not listen to his family and friends who described him as a good father, son, brother, and friend. He asserts that he should have been sentenced to only ten to fifteen years imprisonment.

In the trial court, the defendant filed a motion to reconsider sentence that alleged numerous errors, including: that the sentence was excessive and disproportionate to the seriousness of the offense and the defendant's criminal history; that the trial court considered certain aggravating factors while failing to consider other mitigating factors; that the trial court considered facts in the PSI that were based on invalid conclusions of the officer who prepared the report, as the officer never met with the defendant, through no fault of the defendant; and that the trial court placed undue weight on the defendant's past criminal history. Under La. Code Crim. P. art. 881.1(E), a defendant must file a motion to reconsider sentence setting forth the "specific ground" upon which the motion is based in order to raise an objection to the sentence on appeal. Therefore, since the defendant raised all of these issues in the trial court, we properly consider them on appeal.

Article I, Section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate

a defendant's constitutional right against excessive punishment and is subject to appellate review. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in the light of the harm to society, it is so disproportionate as to shock one's sense of justice. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Hurst**, 99-2868, pp. 10-11 (La. App. 1 Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962.

Louisiana Code of Criminal Procedure article 894.1 sets forth items that must be considered by the trial court before imposing sentence. While the trial court need not recite the entire checklist of Article 894.1, the record must reflect that it adequately considered the guidelines. **State v. Williams**, 521 So.2d 629, 633 (La. App. 1 Cir. 1988). In light of the criteria expressed by Article 894.1, a review for individual excessiveness must consider the circumstances of the crime and the trial court's stated reasons and factual basis for its sentencing decision. **State v. Watkins**, 532 So.2d 1182, 1186 (La. App. 1 Cir. 1988). However, the goal of Article 894.1 is the articulation of the factual basis for a sentence, not rigid or mechanical compliance with its provisions. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982). Even when a trial court assigns no reasons, the sentence will be set aside on appeal and remanded for resentencing only if the record is either inadequate or clearly indicates that the sentence is excessive. See La. Code Crim. P. art. 881.4(D); **State v. Harris**, 601 So.2d 775, 779 (La. App. 1 Cir. 1992).

The defendant was charged with second degree murder, but pled guilty to the responsive offense of manslaughter. For the crime of manslaughter, he was exposed to a term of imprisonment at hard labor for not more than forty years. La. R.S. 14:31(B). Thus, the trial court's sentence of thirty-five years imprisonment at hard labor falls within the statutory guidelines.

At the sentencing hearing, the defendant first requested to withdraw his guilty plea, arguing that he felt pressured to accept a deal and did not have adequate time to consider the offer. The State objected, and the trial court refused to allow it because the defendant was properly **Boykinized** and the plea was voluntary. Thereafter, defense counsel raised objections to the PSI. Counsel argued that the court should ignore the entire PSI because the officer who prepared it concluded that the defendant displayed a "disregard" for the court; however, the defendant was unavailable to make a statement for the PSI because he was incarcerated in a different parish prison.

On appeal, the defendant argues that because of the officer's statement, the PSI "arbitrarily tainted" the court's perception of him and that the sentence is nothing but a result of those prejudicial remarks. We first note that the defendant was offered an opportunity to speak at the sentencing hearing but chose not to, and that the trial court, in articulating its reasons for sentencing, never cited the defendant's attitude towards the court as a reason for the thirty-five-year sentence. Further, a review of the PSI shows that the officer's statement was made in reference to the fact that the defendant was previously afforded the opportunity of parole, but refused to become a productive member of society and continued to engage in criminal activity. In fact, as noted by the trial court, at the time of the instant offense, the defendant was on parole for possession and distribution of a controlled dangerous substance. We do not find that the court erred in considering the PSI or that the sentence is simply the result of the officer's statement.

Besides the PSI, the court considered correspondence from the defendant, letters from the victim's family, and letters from the defendant's family and people in the community. Through these letters on the defendant's behalf, the court surmised that he had a happy and family-oriented childhood, but that he began to experience trouble in the family during his teenage years, quit school in the ninth grade, and began to associate with a quasi-criminal crowd. The court was aware that the defendant had three minor children and acknowledged that his family would likely suffer hardship as a result of his incarceration. The court also recognized that the victim was loved by his family and will always be missed.

Defense counsel argued to the trial court that the defendant had no prior violent criminal history, and that he was not a bad person or the worst of offenders deserving of the maximum sentence. However, we consider, as did the trial court, that the defendant pled guilty to killing the victim and placing his body in the trunk of his car before leaving the body near the Mississippi River where it was found two days later. In addition, the trial court found most troubling of all that the defendant had failed to take any responsibility or display any remorse for his actions. On appeal, the defendant argues that the sentence is excessive because he willingly admitted responsibility and is deeply remorseful for his actions. However, we note that at the sentencing hearing he attempted to withdraw his guilty plea, and the record does not provide any evidence of his purported remorse. He argues that the court only saw him through the eyes of the victim's family, but clearly, the trial court considered the defendant's character, history, and behavior, independent of the opinions expressed by the victim's family.

Examining the factors of Article 894.1, the trial court found there was an undue risk that during a period of a suspended sentence or probation the defendant would commit another crime, that he was in need of correctional treatment or a custodial environment provided most effectively by his commitment to an institution, and that a lesser sentence would deprecate the seriousness of his crime. We find that the trial court's reasons for the sentence adequately demonstrate compliance with Article 894.1.

Furthermore, we consider that the defendant pled guilty to manslaughter but was originally charged with second degree murder, a crime that carries a penalty of mandatory life imprisonment. La. R.S. 14:30.1(B). In a case such as this, where the defendant has pled guilty to an offense that does not adequately describe his conduct, the trial court has great discretion in imposing even the maximum sentence possible for the pled offense. This is particularly true where a significant reduction in potential exposure to imprisonment has been obtained through plea bargaining, and the offense involves violence to the victim. See **State v. Lanclos**, 419 So.2d at 478. See also **State v. Waguespack**, 589 So.2d 1079, 1086 (La. App. 1 Cir. 1991), writ denied, 596 So.2d 209 (La. 1992).

Based on the facts of the case, the reasons articulated at the sentencing hearing, and given the trial court's wide discretion in the imposition of sentences, we cannot say that the trial court manifestly abused its discretion in sentencing the defendant to thirty-five years imprisonment at hard labor. This assignment of error is without merit.

SENTENCING ERRORS

Under La. Code Crim. P. art. 920(2), which limits our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence, we have discovered a sentencing error. In sentencing the defendant, the trial court ordered that the sentence be served without the benefit of probation, parole, or suspension of sentence although the penalty provision of the manslaughter statute did not authorize such a restriction on the defendant's parole eligibility. La. R.S. 14:31(B). Thus, the inclusion of the parole restriction rendered this sentence illegal. We note that neither the defendant nor the State has raised this issue on appeal. Pursuant to La. Code Crim. P. art. 882(A), which provides that an appellate court may correct an illegal sentence at any time on review, we amend the sentence to delete the parole restriction. See **State v. Templet**, 2005-2623, pp. 16-17 (La. App. 1 Cir. 8/16/06), 943 So.2d 412, 422, writ denied, 2006-2203 (La. 4/20/07), 954 So.2d 158.

For the foregoing reasons, the defendant's conviction is affirmed. The sentence is amended and affirmed as amended.

CONVICTION AFFIRMED; SENTENCE AMENDED AND AFFIRMED AS AMENDED.