

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

2013 KA 0342

STATE OF LOUISIANA

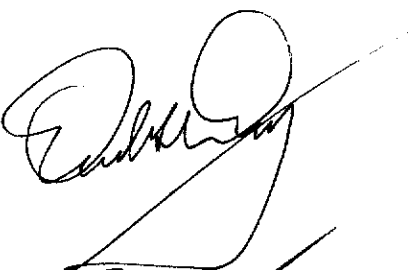
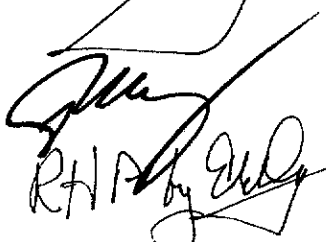
VERSUS

DEONDRA DEJOHN JOHNSON

Judgment Rendered: NOV 01 2013

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On Appeal from the
32nd Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
No. 572,670, Section B



RH by [Signature]
The Honorable John R. Walker, Judge Presiding

* * * * *

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* * * * *

BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

DRAKE, J.

The defendant, Deondra Dejohn Johnson, was charged by bill of information with armed robbery, a violation of Louisiana Revised Statutes 14:64. The defendant pled not guilty and was found guilty as charged after a trial by jury. The trial court imposed twenty-five years of imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The trial court denied the defendant's motion to reconsider sentence. The defendant now appeals, challenging the constitutionality of the sentence in a counseled brief. The defendant also filed a *pro se* brief in which he raises a claim of ineffective assistance of counsel. For the following reasons, we affirm the conviction and sentence.

FACTS

On February 6, 2010, Rene Hebert, his teenage sister Emily Hebert, and a few of their friends went to a Mardi Gras parade in their hometown of Houma, Louisiana. After the parade, the group went to the Hebert's residence, where there was no parental supervision, since their father, with whom they lived, was out of town. Through the early morning hours of February 7th, there were numerous guests at the Hebert residence. Two of the guests, brothers Josh and Jeremy Duthu, arranged for an acquaintance, Brett Hebert, to bring two females to the residence to join the rest of the group.¹ A verbal altercation took place outside when the Duthu brothers began arguing with Brett Hebert and Jeremy Dardar (who arrived with Brett Hebert and the two female invitees) over who should pay for gas used to bring the female guests to the residence. Rene asked Brett and Dardar to leave, and they did so, but returned with a black male, later identified as the defendant, and the altercation resumed outside of the residence.

¹ We note that there was no indication that Brett was related to the other Heberts.

Emily heard the commotion, looked outside, and observed the defendant as he partially exposed a gun that was in his pocket. Emily retrieved her father's rifle from his bedroom and walked toward the door with it, and Rene, who was standing in the doorway at the time and had not yet seen the defendant's gun, stopped her and told her to put the rifle back. Emily put the rifle back in her father's bedroom, and Rene continued to attempt to diffuse the situation. The defendant pulled out his gun, pointed it at Rene, instructed him to step back into his residence, and he, Brett, and Dardar followed Rene into the house as he complied. Once the defendant, Brett, and Dardar were in the residence, the defendant brandished the gun at the other occupants, and they scattered. The defendant made several demands of the occupants, including ordering Rene to retrieve his father's rifle, who then indicated to the defendant that he did not know where the rifle was located. The defendant sat his gun on an entertainment center when he attempted to remove a television. Rene testified that the defendant picked his gun back up and struck him in the jaw with it when he tried to grab it. The defendant, Brett, and Dardar took items, including a laptop computer and Sony PlayStation console, before leaving the residence.

COUNSELED ASSIGNMENT OF ERROR

In the counseled assignment of error, the defendant argues that the trial court erred in imposing a constitutionally excessive sentence. The defendant specifically contends that the trial court failed to consider, as mitigating factors, his lack of a prior criminal history and the fact that he was only seventeen years old at the time of his arrest. The defendant further contends that adequate consideration was not given to the sentencing guidelines in particularizing the sentence, specifically arguing that several aggravating circumstances listed in Louisiana Code of Criminal Procedure article 894.1 are inapplicable to this case. The defendant acknowledges that the sentence is within the sentencing range, but

argues that, based on the facts of this case and insufficient aggravating circumstances, the sentence is grossly out of proportion to the severity of the offense.

The Eighth Amendment to the United States Constitution and Article I, Section 20, of the Louisiana Constitution prohibit the imposition of excessive or cruel punishment. Although a sentence falls within statutory limits, it may be excessive. *State v. Sepulvado*, 367 So. 2d 762, 767 (La. 1979); *State v. Lanieu*, 98-1260 (La. App. 1 Cir. 4/1/99), 734 So. 2d 89, 97, writ denied, 99-1259 (La. 10/8/99), 750 So. 2d 962. 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. The sentence imposed will not be set aside absent a showing of manifest abuse of the trial court's wide discretion to sentence within the statutory limits. *State v. Andrews*, 94-0842 (La. App. 1 Cir. 5/5/95), 655 So. 2d 448, 454.

Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the trial court to consider when imposing a sentence. The trial court need not cite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the criteria. *State v. Brown*, 2002-2231 (La. App. 1 Cir. 5/9/03), 849 So. 2d 566, 569. The articulation of the factual basis for a sentence is the goal of Article 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 Article 894.1. *State v. Lanclos*, 419 So. 2d 475, 478 (La. 1982).

We note that although the defendant faced the potential of ninety-nine years of imprisonment, the imposed sentence is at the lower end of the spectrum. Before

the sentence was imposed, the State noted that it was dismissing a charge for second degree battery. In imposing the sentence, the trial court noted its consideration of the sentencing guidelines. The trial court noted the use of a dangerous weapon, the fact that the victim, Rene Hebert, was struck during the offense, and the fact that multiple other individuals were in the home at the time of the offense. The trial court noted that the individuals were put at the risk of death or great bodily harm. In accordance with our review of the trial testimony, we note that there was testimony that the female victims were crying and distraught during the offense, as they tried to hide from the defendant and the other intruders. Before the sentence was imposed, the defense attorney noted that the defendant did not have a criminal history. We find that the record demonstrates compliance with Article 894.1 and adequate support for the sentence imposed. Considering the circumstances, we find no abuse of discretion by the trial court. This court will not set aside a sentence on the ground of excessiveness if the record supports the sentence imposed. La. C.Cr.P. art. 881.4(D). The imposed sentence is not grossly disproportionate to the severity of the offense or shocking to the sense of justice and, therefore, is not unconstitutionally excessive. Thus, the counseled assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR

In his *pro se* assignment of error, the defendant contends that his trial counsel was ineffective in failing to properly advise him regarding his rejection of a six-year plea bargain. The defendant specifically contends that his trial counsel did not inform him of the strength of the State's case and the correct elements of the offense. The defendant argues that, but for his counsel's failure to properly advise him, he would have accepted the six years, which is less than the twenty-five years imposed after the finding of guilt by the jury. The defendant, in part,

prays that this court vacate his guilty verdict and that he be allowed to plead guilty with the imposition of a six-year sentence.²

A defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, Section 13 of the Louisiana Constitution. In assessing a claim of ineffectiveness, a two-pronged test is employed. The defendant must show that (1) his attorney's performance was deficient; and (2) the deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The error is prejudicial if it was so serious as to deprive the defendant of a fair trial or "a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. In order to show prejudice, the defendant must demonstrate that, but for counsel's unprofessional conduct, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *State v. Felder*, 2000-2887 (La. App. 1 Cir. 9/28/01), 809 So. 2d 360, 369-70, writ denied, 2001-3027 (La. 10/25/02), 827 So. 2d 1173. Further, it is unnecessary to address the issues of both counsel's performance and prejudice to the defendant if the defendant makes an inadequate showing on one of the components. See *State v. Serigny*, 610 So. 2d 857, 860 (La. App. 1st Cir. 1992), writ denied, 614 So. 2d 1263 (La. 1993). A claim of ineffectiveness is generally relegated to post-conviction proceedings, where an evidentiary hearing may be conducted, unless the record permits definitive resolution on appeal. *State v. Miller*, 99-0192 (La. 9/6/00), 776 So. 2d 396, 411, cert. denied, 531 U.S. 1194, 121 S.Ct. 1196, 149 L.Ed.2d 111 (2001).³

In support of his claim that his attorney was ineffective during the plea bargaining

² The defendant also prays that "[c]onflict-free counsel be appointed on direct appeal to perfect this issue," and to have his claim "remanded for an evidentiary hearing with conflict-free counsel as indigent reserving my right to appeal any adverse judgment." We note that not only is the defendant not entitled to a remand (as will be further discussed herein), he has not identified, nor does the record reveal, any conflict of interest regarding his appellate counsel.

³ The defendant would have to satisfy the requirements of Louisiana Code of Criminal Procedure article 924 *et seq.*, to receive such a hearing.

process, the defendant cites two United States Supreme Court cases, *Lafler v. Cooper*, ___ U.S. ___, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012), and *Glover v. United States*, 531 U.S. 198, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001).

In *Lafler*, the defendant was charged under Michigan law with assault with intent to murder and three other offenses. The prosecution offered to dismiss two of the charges and to recommend a fifty-one to eighty-five month sentence on the other two in exchange for a guilty plea. The defendant admitted his guilt before the court and expressed a willingness to accept the offer; however, he later rejected the offer after his attorney convinced him that the prosecution would not be able to establish intent to murder, as the victim had been shot below the waist. The defendant proceeded to trial and was convicted on all counts, receiving a mandatory minimum 185 to 360 month sentence. The defendant subsequently urged that his attorney's advice to reject the plea constituted ineffective assistance of counsel, and after his state appeals were exhausted, he sought relief in a federal habeas proceeding. After noting that the parties stipulated that counsel's performance was deficient, the Court found that the Michigan appellate court erred because it applied the wrong standard; the Michigan appellate court's inquiry was whether the rejection of the plea was knowing and voluntary. The proper standard under *Strickland* is the prejudice test, namely, whether there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The Court held that when the prejudice alleged is having to go to trial, a defendant must show that, but for the ineffective advice, there is a reasonable probability that the plea offer would have been presented to the court; that the court would have accepted the terms; and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the actual judgment and sentence imposed. *Lafler*, 132 S.Ct. at 1383-88. The requisite showing was made in that case.

In *Glover*, the petitioner's attorneys did not submit papers or offer extensive oral arguments contesting a supposed error in a Sentencing Guidelines determination that allegedly increased the petitioner's sentence by six to twenty-one months. The Court elaborated on the requisite showing that deficient performance prejudiced the defense in noting that "any amount of actual jail time has Sixth Amendment significance." *Glover*, 531 U.S. at 203, 121 S.Ct. at 700. Nonetheless, the Court further noted that while "the amount by which a defendant's sentence is increased by a particular decision may be a factor to consider in determining whether counsel's performance in failing to argue the point constitutes ineffective assistance, under a determinate system of constrained discretion such as the Sentencing Guidelines it cannot serve as a bar to a showing of prejudice." *Glover*, 531 U.S. at 204, 121 S.Ct. at 701. In *Glover*, the Court considered a sentencing calculation resulting from a ruling which, if it had been error, would have been correctable on appeal. In remanding, the Court did not express an opinion on the ultimate merits of Glover's claim because the question of deficient performance was not before the Court.

In the instant case, the record reveals that prior to the trial, the defendant was advised regarding a plea bargain offer, and the offer was presented to the court. In explaining the terms of the plea offer, the State noted, "Judge, I want to make sure that Mr. Johnson understands what the plea is in front of him and what it means. And, likewise, Mr. Johnson also understands the ramifications if he is found guilty of the armed robbery in this case." The State proceeded to explain that the plea bargain offer on the table would result in the reduction of the charge to simple robbery, the dismissal of the second degree battery charge, an agreement to *nolle-pros* any charges as a result of an April 23, 2010 arrest, and the recommendation of a six-year sentence on the instant offense. The defendant was specifically reminded of the fact that he was facing the potential of ninety-nine

years imprisonment if found guilty of the instant offense. After the terms of the plea bargain offer were fully disclosed, the following colloquy took place between the defendant and the defense counsel.

Mr. Pastor: Besides the things the district attorney just said, you and I discussed those things, right?

Mr. Johnson: Yes, sir.

Mr. Pastor: All the facts of what they were willing to nol pros [sic] and not charge you with at all?

Mr. Johnson: Yes, sir.

Mr. Pastor: And reduce the charge to a simple robbery.

Mr. Johnson: Yes, sir.

Mr. Pastor: And with a six year recommendation to the Judge. You understand that?

Mr. Johnson: Yes, sir.

Mr. Pastor: Right? And your decision to me was that you wanted to go to trial.

Mr. Johnson: Yes, sir.

Mr. Pastor: That you're not guilty; is that correct?

Mr. Johnson: Yes, sir.

The record also discloses that the defendant's decision was made in spite of the fact that the defense was having difficulty contacting a potential defense witness. Thus, in this case, the defendant has failed to make an adequate showing of deficient performance. The record shows that the defendant made the decision to maintain his not guilty plea and go to trial despite, and not as a result of, his counsel's advice. After making a decision to reject a plea bargain offer and to go to trial, the defendant is not entitled to have the guilty verdict vacated, nor is he entitled to another opportunity to accept the plea bargain, simply because the verdict and sentence are not to his liking. *Cf. State v. Parker*, 2012-1550 (La. App. 1 Cir. 4/26/13), 116 So. 3d 744, 750 (where, in reviewing the trial court's denial of

the defendant's motion to withdraw guilty plea, this court stated, "It is not unreasonable for a trial court to deny a defendant the luxury of gambling on his sentence, then being able to withdraw his plea if and when he discovers the sentence is not to his liking."). We find that the defendant's *pro se* assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.