NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 KA 1030

STATE OF LOUISIANA

VERSUS

RUDOLPH JOSEPH

Judgment rendered MAR 2 1 2014

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Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 06-10-0329
Honorable Louis Daniel, Judge

* * * * * *

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RUDOLPH JOSEPH

* * * * * *

BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

PETTIGREW, J.

The defendant, Rudolph Joseph, was charged by bill of information with forcible rape, a violation of La. R.S. 14:42.1 (count 1), and second degree kidnapping, a violation of La. R.S. 14:44.1 (count 2). He pled not guilty to the charges and, following a jury trial, was found guilty as charged on both counts. For the forcible rape conviction, the defendant was sentenced to forty years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence; for the second degree kidnapping conviction, he was sentenced to forty years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The sentences were ordered to run concurrently. The defendant now appeals, designating two assignments of error (and several abandoned pro se assignments of error). For the following reasons, we affirm the convictions and sentences.

FACTS

On the Saturday evening of March 6, 2010, G.C. met some friends at The Maison, a nightclub on Frenchmen Street in New Orleans. During this time, G.C. was attending LSU, but almost every weekend she drove back to New Orleans to stay with her parents, who lived uptown near Audubon Park. At about 3:30 a.m. (March 7), G.C. got tired and left the club to go home. She had not driven to the club, so she hailed a cab to get home. The defendant picked up G.C. He was driving a white minivan-type taxi cab with a phone number and the word "taxi" on the side of the vehicle. G.C. got in the backseat and asked the defendant to take her to uptown New Orleans by Audubon Park. A woman was sitting in the front passenger seat. The defendant dropped off the woman in the Lakefront area. When the defendant got out of the cab to let the woman out, G.C. slid between the front two seats to the front passenger seat.

G.C. repeated the address to the defendant, and he said he was going to take her home. The defendant got on the interstate, but instead of taking any of the exits that would have gotten him to G.C.'s address -- namely, Metairie Road, Clearview, and Veterans -- he passed them up and remained on the interstate. As the defendant drove past Metairie, and then Kenner, ignoring G.C.'s requests to take any of the exits, G.C.

became panicked. As they approached the Bonnet Carre Spillway, G.C. told the defendant that was not the way to her house and implored him to take her home. When the defendant got on the Spillway, G.C. picked up her cell phone to make a call. The defendant snatched the phone from G.C. and slapped her across the face. G.C. was 5'5" and 136 pounds and, according to G.C., the defendant was 6'5" and weighed 275 pounds. G.C. tried to open her door, but realized there were no door handles on the inside. The defendant eventually exited the Spillway and drove toward Baton Rouge. When G.C. realized she was in familiar surroundings, she pleaded for the defendant to take any exit and just let her out. The defendant ignored her pleas. The defendant then took the I-110 exit north and began heading toward the Lafayette exit. Overcome with fear at the prospect of driving through Lafayette and possibly beyond, G.C. leaned back against her door and began kicking the defendant. One of her kicks hit the windshield, cracking it. The defendant veered toward the right and took the Government Street exit.

The defendant drove around a bit, then stopped his vehicle in front of an abandoned building on the corner of S. 17th Street and America Street. The defendant opened his door slightly and told G.C. to lift up her shirt. G.C. complied. The defendant pulled off her bra, then began masturbating. With the defendant's door still ajar, G.C. realized she could make her escape. As G.C. crossed over the defendant to get to the door, the defendant grabbed the back of her head and forced her mouth on his penis. He ejaculated in her mouth. G.C. bit his penis. The defendant pushed G.C. out of the vehicle onto the ground. He threw her phone at her and drove away. G.C. called one of her friends in Baton Rouge, who picked her up. G.C. also called her parents and told them what happened. They drove to the police station where G.C. gave a statement. G.C. then went to Woman's Hospital and underwent a rape kit examination. The defendant's semen was identified on the jeans G.C. was wearing that night. G.C. identified the defendant in a photographic lineup. An arrest warrant was issued, and the defendant was subsequently arrested. The "taxi" the defendant drove G.C. in was not recovered.

COUNSELED ASSIGNMENTS OF ERROR NOS. 1 and 2

In these related assignments of error, the defendant argues, respectively, that the sentences imposed are excessive and that defense counsel's failure to file a motion to reconsider sentence constitutes ineffective assistance of counsel.

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, pursuant to the provisions of this article and the holding of **State v. Duncan**, 94-1563, p. 2 (La. App. 1 Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam), we would not consider an excessive sentence argument. However, in the interest of judicial economy, we will 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. 1 Cir. 2/18/00), 754 So.2d 301, 303, writ denied, 2000-2336 (La. 4/20/01), 790 So.2d 631.

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. 1 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. 1 Cir.), writ denied, 476 So.2d 350 (La. 1985).

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. See **State v. Felder**, 2000-2887, p. 11 (La. App. 1 Cir. 9/28/01), 809 So.2d 360, 370, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173.

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of cruel or 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 the sense of justice. **State v. Andrews**, 94-0842, pp. 8-9 (La. App. 1 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. 1 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 Article 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. **State v. Brown**, 2002-2231, p. 4 (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). The trial judge should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than

confinement. See **State v. Jones**, 398 So.2d 1049, 1051-1052 (La. 1981). On appellate review of a sentence, the relevant question is whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate. **State v. Thomas**, 98-1144, pp. 1-2 (La. 10/9/98), 719 So.2d 49, 50 (per curiam).

For each of his convictions, the defendant received the maximum sentence of forty years at hard labor. See La. R.S. 14:42.1(B) & 44.1(C). The defendant argues that the facts of this case reveal "that it was not the worst crime of its type and [he] is not the worst to commit them." He further asserts that the circumstances surrounding this incident "demonstrate the many questions surrounding this case, all of which should have been taken into consideration by the trial court in determining the appropriate sentence." In arriving at appropriate sentences, the trial court considered many factors, including Article 894.1, the facts of the case, the defendant's refusal to accept responsibility, and his extensive criminal history:

> I have ordered a presentence investigation done in this case. It has now been completed, the presentence -- Probation and Parole had asked for an extension because they were trying to get your prior convictions straight for me included in the presentence report.
>
> I have considered the statement made by you in the presentence report, and I've also considered the statement made by you today. You still deny responsibility in this case. I have considered the statement, a brief statement made by the victim to the presentence investigative officer from Probation and Parole that's contained in the presentence report. I have considered your prior criminal history that is outlined for me in the presentence report, and it is voluminous.
>
> I show in -- it shows in 1990 you were arrested for sexual battery, but you pled guilty to what they call an accompanying charge of illegal possession of stolen property, which is obviously a felony, which you were sentenced to four years in the Department of Probation [sic]. That was suspended and you were placed on two years active supervised probation. You apparently did not show to that court that you were amenable to probation because that probation was revoked in 1991.
>
> I also show that you were arrested in 1990 for armed robbery. On June 24th of 1991 you pled guilty to armed robbery and were sentenced to five years in the Department of Corrections. I do note that being a crime of violence.
>
> You were again arrested for a serious offense. It says the Tangipahoa Sheriff's Office arrested you for, it appears to be second-degree battery which the victim was a police officer in 1996. You pled guilty to lesser charge of battery of a police officer and received probation in that case.
>
> You were arrested in 1997 for attempted first-degree murder. You pled guilty to what they, again, call an accompanying charge of unauthorized use of a movable, felony, and were sentenced to five years in the Department of Corrections.

In 2003 you were arrested for simple battery and simple assault. Those charges were, it appears, not prosecuted.

You were arrested on the instant offense in 2010. A jury in this court found you guilty of both forcible rape and second-degree kidnapping, both crimes of violence.

You were arrested in 2010 on a charge of indecent behavior with a juvenile. That charge was *nolle prossed* [sic] according to the presentence report.

Also, of great concern to the Court, is that you have two pending cases in Orleans Parish, both for aggravated kidnapping and aggravated rape with two separate victims and two offenses that appear -- other charges to be similar to the crimes for which you were convicted, sir, in this court.

That record -- and I haven't gone over everything in your rap sheet, sir. I've gone over what has been outlined in the presentence report, but I have looked at your rap sheet and it is atrocious.

You have had the benefit of probation before; did not take advantage of that. I considered the social history contained in the presentence report. You were raised initially in New Orleans until the age of 11, then you resided in Florida for a while then returned to New Orleans. Your father is deceased. Your mother, it says, still resides in New Orleans. You have no siblings.

You do state that you have -- you are single and have two children. You have worked as a cook in New Orleans. You say that you were in [sic] enrolled in Dillard University for about a year and a half, transferred to Southern University studying business. You say you've opened a retail store on Rampart Street in New Orleans, worked for that until Hurricane Katrina then you moved to Florida.

After you moved to Florida for a while, several years, you decided to move back to New Orleans to, you said, be with your family. Your -- to be closer to your children and their mother. You state that you did work while you were in New Orleans -- after you had returned from New Orleans, that is.

I've considered what you have said about your problems with drugs that is contained in the presentence report, including alcohol. I have considered the recommendation of the Office of Probation and Parole. I have considered the sentencing guidelines of Code of Criminal Procedure Article 894.1. I do find that you are in need of a custodial or correctional environment best served by commitment to an institution.

I have, again, considered the facts of this case. And I'm not going to review all of the facts of this case, sir. It was clear what the jury found in this case. It was clear what the facts were that were testified to, but you obviously, by your actions, showed an absolute and total disregard for the safety and well-being of the victim, that you were concerned with satisfying your own sexual-prurient interest, that you created a situation that lasted for an incredibly long period of time from a drive from New Orleans to Baton Rouge where the victim was imprisoned. I can't imagine the terror that you caused in the mind and heart of the victim, sir. And that went on for some time before the sexual assault which occurred here in this parish in East Baton Rouge. After that terrorizing ride ended, then it ended with your sexual assault on the victim.

You played a major role in the commission of these offenses. I've taken into account your age, educational level, social history, work history that I've gone over. You do appear to be a violent person. You are a danger to the public. I don't believe the harm that you did to the victim can be measured, but it is great. You are a career criminal, and you need to serve a lengthy period of jail time for the protection of the public.

This court has stated that maximum sentences permitted under statute may be imposed only for the most serious offenses and the worst offenders, or when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. **State v. Hilton**, 99-1239, p. 16 (La. App. 1 Cir. 3/31/00), 764 So.2d 1027, 1037, writ denied, 2000-0958 (La. 3/9/01), 786 So.2d 113. In its reasons for sentencing, the trial court made it clear the defendant posed an unusual risk to the public safety because of his criminal history -- "You are a danger to the public. ... You are a career criminal, and you need to serve a lengthy period of jail time for the protection of the public." Accordingly, the trial court provided ample justification in imposing maximum sentences. See **State v. Mickey**, 604 So.2d 675, 679 (La. App. 1 Cir. 1992), writ denied, 610 So.2d 795 (La. 1993).

Considering the trial court's careful review of the circumstances, the horrific nature of the crimes, and the defendant's habitual criminal behavior, we find no abuse of discretion in the trial court's imposition of maximum sentences. Accordingly, the sentences imposed by the trial court are not grossly disproportionate to the severity of the offenses and, therefore, are not unconstitutionally excessive.

Because we find the sentences are not excessive, defense counsel's failure to file or make a motion to reconsider sentence, even if constituting deficient performance, did not prejudice the defendant. See **Wilkinson**, 99-0803 at 3, 754 So.2d at 303; **Robinson**, 471 So.2d at 1038-1039. His claim of ineffective assistance of counsel, therefore, must fail. These assignments of error are without merit.

PRO SE ASSIGNMENTS OF ERROR

In his pro se assignments of error, the defendant lists eight assignments of error, including insufficient evidence, failure of the trial court to recuse the District Attorney's Office, ineffective assistance of counsel, and excessive sentence. The defendant only lists these assignments of error and provides no timely argument for any of them. Accordingly, they are considered abandoned. See Uniform Rules -- Courts of Appeal, Rule 2-12.4.

CONVICTIONS AND SENTENCES AFFIRMED.