NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 KA 1653

STATE OF LOUISIANA

VERSUS

PAUL NAQUIN, JR.

On Appeal from the 23rd Judicial District Court
Parish of Ascension, Louisiana
Docket No. 26,796, Division "E"
Honorable Alvin Turner, Jr., Judge Presiding

Ricky L. Babin
District Attorney
Donald D. Candell
Assistant District Attorney
Gonzales, LA

Attorneys for Appellee
State of Louisiana

Lieu T. Vo Clark
Louisiana Appellate Project
Mandeville, LA

Attorney for
Defendant-Appellant
Paul Naquin, Jr.

BEFORE: PARRO, McDONALD, AND CRAIN, JJ.

Judgment rendered DEC 23 2014

Crain, J agrees - part, ct dissents - part ct will assign reasons.

PARRO, J.

The defendant, Paul Naquin, Jr., was charged by bill of information with driving while intoxicated (DWI), fourth offense, a violation of LSA-R.S. 14:98.[1] He initially entered a plea of not guilty, but he later withdrew this plea and pled guilty. The district court sentenced the defendant to eighteen years of imprisonment at hard labor and ordered that the first seventy-five days be served without the benefit of parole, probation, or suspension of sentence. The court also imposed a $5,000 fine. Thereafter, the defendant filed a motion to set aside his guilty plea, which the district court granted.

Following a jury trial, the defendant was found guilty as charged. The district court sentenced the defendant to fifteen years of imprisonment at hard labor, with credit for time served from May 10, 2010, and ordered that the first two years of the sentence be served without the benefit of parole, probation, or suspension of sentence. The court also ordered the defendant to pay a fine of $5,000 within two years or, in default thereof, serve an additional year in prison. The defendant filed a motion for new trial and a motion to reconsider sentence, both of which the district court denied. The defendant now appeals, arguing that the district court erred in denying his motion to reconsider sentence, because his sentence is excessive. For the following reasons, we affirm the defendant's conviction, amend the sentence, and affirm the sentence as amended.

FACTS

On May 9, 2010, Lieutenant Joey Mayeaux of the Ascension Parish Sheriff's Office, was standing near a residence on South Sammy Street in Ascension Parish, investigating a complaint, when he was almost hit by a vehicle driven by the defendant. He shouted for the vehicle to stop, jumped into his police unit, and put it in reverse. As he was backing up, he saw the vehicle turn into a driveway, so he backed his unit up to

[1] The defendant stipulated that he pled guilty to three prior DWI convictions in Ascension Parish, including: (1) a January 26, 2005 conviction under 23rd Judicial District Court (23rd JDC) docket number 339,813; (2) a July 2, 2008 conviction under 23rd JDC docket number 402,806; and (3) an April 13, 2009 conviction under 23rd JDC docket number 23,638.

that driveway. Lieutenant Mayeaux ordered the defendant to come towards his unit. The defendant complied. Lieutenant Mayeaux then turned the investigation over to Deputy Terry Richard, who administered field sobriety tests to the defendant. Deputy Richard detected a strong odor of alcohol from the defendant's body, and he noticed that the defendant spoke with a heavy slur and swayed when standing. The defendant also exhibited extreme signs of nystagmus, could not complete the walk-and-turn test, and performed poorly on the one-leg stand test. Based on his performance on the sobriety tests, Deputy Richard took the defendant into custody for suspicion of DWI.

At trial, the defendant testified that he was not driving at the time of the incident. He stated that he allowed his neighbor to drive his truck because he was on parole for DWI and was on home incarceration. However, he decided to ride with his neighbor to the store to buy beer. Upon their return, as soon as the neighbor pulled into the defendant's driveway, the neighbor jumped out of the truck and went through a back field to his house. The defendant exited the vehicle and proceeded to close his gate at the end of his driveway. He testified that although he had four or five sixteen-ounce beers over an approximate two-hour period that night, he was not driving his truck.

DISCUSSION

In related assignments of error, the defendant challenges the sentence imposed by the district court, arguing that the court erred in imposing an excessive sentence and in denying the motion to reconsider sentence. Specifically, the defendant contends that he has no criminal convictions other than his DWI convictions and that the facts from his instant conviction do not involve any harm to persons or property.

Article I, Section 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. Even a sentence within statutory limits 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 purposeless and needless imposition of pain and suffering. A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it is so disproportionate as to shock one's sense of justice. **State v. Reed**, 409 So.2d 266, 267 (La. 1982). A district court is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed by it should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Lobato**, 603 So.2d 739, 751 (La. 1992).

The Louisiana Code of Criminal Procedure sets forth the items that must be considered by the district court before imposing sentence. LSA-C.Cr.P. art. 894.1. The district court need not cite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the criteria. **State v. Herrin**, 562 So.2d 1, 11 (La. App. 1st Cir.), writ denied, 565 So.2d 942 (La. 1990). In light of the criteria expressed by Article 894.1, a review for individual excessiveness should consider the circumstances of the crime and the district court's stated reasons and factual basis for its sentencing decision. **State v. Watkins**, 532 So.2d 1182, 1186 (La. App. 1st Cir. 1988). Remand for full compliance with Article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. See **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982).

Louisiana Revised Statute 14:98(E)(4)(a) provides that punishment for a DWI, fourth offense conviction shall be imprisonment at hard labor for not less than ten nor more than thirty years, and at least three years of the sentence shall be imposed without benefit of suspension of sentence, probation, or parole. The district court sentenced the defendant to fifteen years of imprisonment at hard labor.

At sentencing, the district court stated that it had ordered a presentence investigation report and considered the sentencing guidelines of Article 894.1. Including the instant DWI offense and the three predicate DWI convictions, the defendant has been arrested and charged with driving while intoxicated six times, and has pled guilty to five of those charges. Prior to sentencing the defendant, the court

pointed out that the defendant was on probation for another DWI offense at the time of the instant offense.

The defendant received a sentence that was five years more than the minimum and fifteen years less than the maximum he could have received. Based on the entire record, it is clear that the sentence was appropriate, given the circumstances of the offense. There is no indication that the district court abused its vast discretion in sentencing. Accordingly, the sentence imposed is not grossly disproportionate to the severity of the offense and, therefore, is not unconstitutionally excessive. Therefore, the district court correctly denied the motion to reconsider sentence. We find no merit in these assignments of error.

SENTENCING ERROR

We have conducted our routine review of the record for errors discoverable by a mere inspection of the pleadings and proceedings pursuant to Louisiana Code of Criminal Procedure article 920(2), and we have found two errors. In this case, the sentencing minutes and transcript reflect that the district court imposed a $5,000 fine. However, LSA-R.S. 14:98(E)(4)(a) does not authorize imposition of a fine. Correction of this defect does not involve exercise of the sentencing judge's discretion, and this court is authorized to correct the sentence by amendment, rather than by remand of the case for resentencing. See LSA-C.Cr.P. art. 882(A); **State v. Miller**, 96-2040 (La. App. 1st Cir. 11/7/97), 703 So.2d 698, 701, writ denied, 98-0039 (La. 5/15/98), 719 So.2d 459. Accordingly, the sentence imposed in this case is amended to delete the fine of $5,000.

The district court also ordered that the first two years of the defendant's sentence be served without the benefit of parole, probation, or suspension of sentence. Louisiana Revised Statute 14:98(E)(4)(a) requires that, if the offender has previously been required to participate in substance abuse treatment and home incarceration, at least three years of the sentence shall be imposed without benefit of suspension of sentence, probation, or parole. The minute entry from the defendant's conviction for DWI, third offense, under 23rd JDC docket number 23,638, indicates that substance

abuse treatment was a special condition of his sentence and that he was placed on home incarceration. Thus, at least three years of the defendant's sentence should have been imposed without the benefit of suspension of sentence, probation, or parole. Although the failure to impose the correct restrictions is error under LSA-C.Cr.P. art. 920(2), this error is certainly not inherently prejudicial to the defendant. Because the district court's failure to impose the correct parole restrictions was not raised by the state in either the district court or on appeal, we are not required to take any action. As such, we decline to correct the illegally lenient sentence. See **State v. Price**, 05-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 07-0130 (La. 2/22/08), 976 So.2d 1277.

For the foregoing reasons, the conviction is affirmed, the sentence imposed is amended to delete the fine of $5,000, and, as amended, the sentence is affirmed.

CONVICTION AFFIRMED; SENTENCE AMENDED, AND AFFIRMED AS AMENDED.

STATE OF LOUISIANA

VERSUS

PAUL NAQUIN, JR.

FIRST CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

2013 KA 1653

CRAIN, J., dissents in part.

I agree with the majority affirming the defendant's conviction and amending the sentence to remove the fine. However, I disagree with declining to correct, and affirming as amended, the illegally lenient sentence. I believe that allowing an illegally lenient sentence to remain uncorrected violates the Louisiana Constitution and statutory law, and results in the judicial usurpation of legislative authority. *See State v. Odom*, 12-1163 (La. App. 1 Cir. 3/22/13), 2013WL1189404 (Crain dissenting); *State v. Hollingsworth*, 12-1035 (La. App. 1 Cir. 2/15/13), 2013WL595926 (Crain dissenting). The Louisiana Supreme Court has stated that it will not ignore patent errors favorable to a defendant when the State does not complain about them. *See State v. Campbell,* 03–3035 (La. 7/6/04), 877 So. 2d 112, 116. Recently, in *State v. Kondylis*, 14-0196 (La. 10/3/14), ___ So. 3d ___, 2014WL4957972, a case in which the State did not object to an illegally lenient sentence that was not prejudicial to the defendant, the supreme court remanded the matter to the trial court, ordering that it impose the statutorily mandated life sentence unless it determined that the sentence had been imposed pursuant to Louisiana Code of Criminal Procedure article 890.1. Accordingly, I would amend the defendant's sentence and impose the mandatory minimum sentence. *Cf. State v. Gregoire*, 13-0751 (La. App. 1 Cir. 3/21/14), 143 So. 3d 503, 510, *writ denied*, 14-0686 (La. 10/31/14); *State v. Passow*, 13-0341 (La. App. 1 Cir. 11/1/13), 136 So. 3d 12, 15.