NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 KA 0096

STATE OF LOUISIANA

VERSUS

SAMUEL MARSON DUCRE

Judgment Rendered: OCT 23 2014

* * * * * * * *

Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Case No. 531701

The Honorable August J. Hand, Judge Presiding

* * * * * * * *

Mary E. Roper
Baton Rouge, Louisiana

Counsel for Defendant/Appellant
Samuel Marson Ducre

Walter P. Reed
District Attorney
Covington, Louisiana

Counsel for Plaintiff/Appellee
State of Louisiana

Kathryn W. Landry
Baton Rouge, Louisiana

* * * * * * * *

BEFORE: GUIDRY, THERIOT, AND DRAKE, JJ.

THERIOT, J.

The defendant, Samuel Marson Ducre, was charged by amended bill of information with failure to register as a sex offender, second offense, a violation of Louisiana Revised Statutes section 15:542.1.4.[1] He pled not guilty and, following a jury trial, was found guilty as charged. He was sentenced to ten years at hard labor without the benefit of parole, probation, or suspension of sentence and ordered to pay a $3,000.00 fine. He filed a motion to reconsider sentence, which was denied. He now appeals, alleging two assignments of error. For the following reasons, we affirm the defendant's conviction and sentence.

FACTS

Slidell Police Department Officer Jeff Theriot came into contact with the defendant on January 30, 2013, in Slidell, Louisiana, pursuant to his assignment with the United States Marshal Service fugitive task force. The defendant was placed under arrest and transported to the police station where he was questioned concerning his status as a sex offender. The defendant admitted that he was a sex offender and stated that he had not registered because he was fearful that if he came into contact with law enforcement, he would be arrested for not keeping up with his obligations. He was previously convicted of failing to register on February 8, 2011.

RIGHT TO COUNSEL AT SENTENCING

The defendant argues in his first assignment of error that the sentence was imposed in violation of his right to counsel. Specifically, he contends

[1] The defendant was convicted on March 27, 2008, in Faulkner County, Arkansas, of sexual indecency with a child, and on February 8, 2011, under docket number 494,594 in the 22nd Judicial District Court in St. Tammany Parish, of failing to register as a sex offender.

that an attorney from the public defender's office who did not represent him at trial "did nothing more than stand beside [him] as he was sentenced."

The defendant was represented by Darrell Sims throughout the trial portion of the case. During sentencing, Mr. Sims did not appear in court with his client. Rather, another attorney from the public defender's office, David Anderson, appeared with the defendant. The defendant points to the following exchange between the court, the attorney, and himself in support of his assignment of error:

> District Court: Mr. Ducre, do you have any statements to the Court prior to sentencing?
>
> Defendant: My lawyer didn't never come talk to me or whatever. He don't do nothing. I've been, my people have been calling him. And every time I come to Court he's never here.
>
> Anderson: Mr. Ducre is represented by Daryl Sims.[2]
>
> District Court: All right. Mr. Sims is from the public defender's office. And this gentleman is also from the public defender's office. So you're here for sentencing purposes.
>
> I'm not aware of any other issues in the record of the proceeding. I'm just asking if you have any particular statements to make to the Court prior to sentencing.

Anderson made no further statements during sentencing. The defendant argues on appeal that this exchange and the failure of counsel to advocate on his behalf indicate that the defendant was unaware of the presence of counsel and that the attorney was solely present at the hearing to "give the semblance of [representation]." The defendant notes that the United States and Louisiana Constitutions guarantee the *assistance* of counsel, not merely the *presence* of counsel. See U.S. Const. amend. VI; La. Const. art. I, § 13; see also *United States v. Cronic*, 466 U.S. 648, 654, 104 S.Ct. 2039, 2044, 80 L.Ed.2d 657 (1984). He argues that he was not

[2] Defense counsel's name is alternately spelled "Darrell" and "Daryl" in the record.

truly represented by counsel at sentencing and contends that his constitutional rights were violated by the district court's subsequent imposition of sentence.

An accused has the right to the assistance of counsel at every stage of criminal proceedings, including sentencing, unless this right is intelligently waived. See U.S. Const. amend. VI; La. Const. art. I, § 13; *McConnell v. Rhay*, 393 U.S. 2, 3-4, 89 S.Ct. 32, 33-34, 21 L.Ed.2d 2 (1968) (per curiam); *State v. White*, 325 So.2d 584, 585 (La. 1976). There are some circumstances in which, although counsel is present, "the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided." *Cronic*, 466 U.S. at 654 n.11. Actual or constructive denial of assistance of counsel is presumed as a matter of law to have resulted in prejudice. See *Strickland v. Washington*, 466 U.S. 668, 692, 104 S.Ct. 2052, 2067, 80 L.Ed. 674 (1984). A sentence imposed in the absence of counsel is invalid and must be set aside. See *State v. Austin*, 229 So.2d 717, 719 (La. 1969).

Constructive denial of the right to counsel was found in *Tucker v. Day*, 969 F.2d 155, 159 (5th Cir. 1992). In *Tucker*, the defendant was represented by appointed counsel at his resentencing hearing. *Id.* According to the defendant, appointed counsel acted as a "mere spectator" who even admitted that he was just "standing in" for the proceeding. *Id.* The court in *Tucker* concluded that the defendant was constructively denied the assistance of counsel, articulating three factors important to such a finding: (1) the defendant was unaware of the presence of counsel; (2) the appointed counsel did not confer with the defendant whatsoever prior to the hearing; and (3) the appointed counsel made no attempt to represent his client's interests during the resentencing. *Id.*

Two recent, unpublished opinions by this court also discuss constructive denial of the right to counsel. In *State v. Richardson*, 2006-0250, p. 4 (La. App. 1st Cir. 11/3/06) (unpublished), the defendant argued that he was constructively denied the assistance of counsel due to his counsel's failure to "make an appearance" at a post-trial resentencing hearing. However, the defendant also alleged that his counsel remained silent throughout the hearing. *Id.* The court determined that defense counsel had made an appearance; even though the record reflected that he did not speak during the hearing, the court was unable to conclude that the defendant was constructively denied counsel. *Id.* at 7. Unlike in *Tucker*, the defendant in *Richardson* did not allege that the counsel appointed to represent him at the hearing did not consult with him or was unaware of the facts. *Id.* Additionally, the defendant in *Richardson* conceded that he was aware of the presence of his counsel. *Id.*

Conversely, in *State v. Powell*, 2013-1153, p. 2-3 (La. App. 1st Cir. 2/18/14) (unpublished), this court vacated the defendant's sentence and remanded for resentencing after finding that he had been constructively denied the assistance of counsel. In *Powell*, the defendant had been represented at sentencing by a "stand-in" counsel who was unfamiliar with the case. *Id.* at 2. At the sentencing hearing, the district court judge specifically asked an attorney who was unfamiliar with the case to "stand in for [the defendant's] attorney" who was not present at the hearing. *Id.* at 1. Relying largely on *Tucker*, *supra*, this court found that the provision of a "stand-in" attorney constructively denied the defendant his constitutional right to the assistance of counsel, reasoning that the "facts surrounding the 'stand-in' counsel in *Tucker* do not differ in any significant respect from those in the instant case regarding defendant's 'stand-in' attorney." *Powell*,

2013-1153 at p. 2. Although the defendant in *Powell* was aware of the presence of his newly appointed counsel at sentencing, the counsel appointed by the district court on the day of sentencing had not made any arguments or statements to the district court to advocate on his client's behalf. *Id.* Critically, this court noted that the record showed "no indication that [the appointed attorney] conferred at all with defendant prior to sentencing," or had "any familiarity whatsoever" with the defendant's case. *Id.* at 2, n.1.

On appeal, the defendant does not contend that Anderson, the attorney who represented him at sentencing, never conferred with him or was unfamiliar with the case. Rather, the record reveals that Anderson had previously represented the defendant during the criminal proceedings in this case, as he was the counsel of record at the defendant's arraignment. Likewise, although the defendant argues that the exchange indicates that Anderson "was trying to distance himself from the matter and that he was sending the message to the court that he was not really involved in the case," Anderson's brief statement read in context appears responsive to the defendant's allegation of unprofessionalism. Anderson interjected that the defendant was represented by Sims only after the defendant alleged that his attorney never conferred with him or answered his calls. Anderson's comment thus appears to be an attempt to distance himself from alleged unprofessional conduct, not from the entire matter at hand.

Constructive denial of counsel occurs in only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all. *Richardson*, 2006-0250 at p. 5 (citing *Childress v. Johnson*, 103 F.3d 1221, 1229 (5th Cir. 10/20/97)). Previous cases finding constructive denial

have involved *at least* two of the three articulated factors in *Tucker*—the defendant was unaware of the presence of counsel, the appointed attorney had not conferred with the defendant whatsoever prior to the hearing, and/or the appointed attorney made no attempt to represent his client's interests. See *Tucker* 969 F.2d at 159; see also *Powell*, 2013-1153 at p. 2.

Here, although the attorney who represented the defendant at the sentencing hearing did not say anything on his client's behalf, this alone has previously been held to be insufficient to establish constructive denial of counsel. See *Richardson*, 2006-0250 at p. 7. Furthermore, the defendant in this case cannot convincingly argue that the attorney who represented him at sentencing was unfamiliar with his case, nor can he convincingly argue that he was unaware of the presence of counsel, as this same attorney had previously represented him in open court in this matter. Accordingly, this assignment of error is without merit.

EXCESSIVE SENTENCE

In his second assignment of error, the defendant argues that the sentence of ten years at hard labor is excessive. Specifically, he argues that the district court failed to order a presentence investigation report (PSI) or to consider the seriousness of the defendant's crime, his past criminal history, his personal history, or his potential for rehabilitation.

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 purposeless and needless imposition of pain and

suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm caused 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 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).

Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the district court to consider when imposing sentences. While the entire checklist of Article 894.1 need not be recited, the record must reflect that the district court adequately considered the criteria. *State v. Brown*, 2002-2231 (La. App. 1st Cir. 5/9/03), 849 So.2d 566, 569. In light of the criteria expressed by Article 894.1, a review for individual excessiveness must 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. *State v. Lanclos*, 419 So.2d 475, 478 (La. 1982).

Upon second or subsequent convictions for failing to register and notify as a sex offender, the offender shall be fined three thousand dollars and imprisoned with hard labor for not less than five nor more than twenty years without benefit of parole, probation, or suspension of sentence. See La. R.S. 15:542.1.4A(2). The defendant was sentenced to ten years at hard labor without the benefit of parole, probation, or suspension of sentence and was ordered to pay a $3,000.00 fine.

The defendant filed a motion to reconsider sentence, but did not assert in the motion that the district court failed to follow the sentencing guidelines

of Article 894.1 or that the district court erred in failing to order a PSI.[3] A party is precluded from urging on appeal any ground that was not raised in a motion to reconsider. See La. Code Crim. P. art. 881.1E. Therefore, the defendant is only entitled to a review in this appeal of a bare claim of excessiveness. *State v. Mims*, 619 So.2d 1059, 1060 (La. 1993) (per curiam). On the record before us, we cannot say that the sentence is excessive. The defendant, facing a maximum sentence of twenty years and minimum of five years, was sentenced toward the lower end of the range. The defendant has at least two prior felony convictions. The district court was aware of this information as well as the facts of the instant case when it imposed the sentence of ten years at hard labor. Nothing in the record leads us to conclude that the district court abused its sentencing discretion. This assignment of error is without merit.

AFFIRM CONVICTION AND SENTENCE.

[3] We note with respect to the latter argument that there is no requirement that a PSI be conducted; such an investigation is more in the nature of an aid to the court, and not a right of the accused. See La. Code Crim. P. art. 875A(1); *State v. Howard*, 262 La. 270, 279, 263 So.2d 32, 35 (1972).