NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 KA 1067

STATE OF LOUISIANA

VERSUS

TRACY LEE MCMOOAIN

Judgment Rendered: MAR 06 2015

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 534869

Honorable William J. Burris, Judge

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BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

WELCH, J.

The defendant, Tracy Lee McMooain, was charged by bill of information with possession of a Schedule II controlled dangerous substance (cocaine), a violation of Louisiana Revised Statute section 40:967C. He initially entered a plea of not guilty and filed motions to suppress the evidence and his statement, which the district court denied. He then withdrew his former plea and pled guilty pursuant to **State v. Crosby**, 338 So.2d 584, 588 (La. 1976). The State subsequently filed a multiple offender bill of information, and the defendant was adjudicated a fourth-felony habitual offender.[1] The defendant was then sentenced to twenty-two years imprisonment at hard labor without the benefit of probation or suspension of sentence.[2]

The defendant filed both counseled and pro se motions to reconsider sentence, which were denied. He now appeals, arguing that the sentence imposed by the district court was excessive. For the following reasons, we affirm the defendant's conviction, habitual offender adjudication, and sentence; and remand for correction of the minutes and the commitment order, if necessary.

FACTS

The facts in this case were not fully developed because the defendant entered a plea of guilty. The following information is based on testimony presented at the hearing on the motions to suppress. On April 10, 2013, around 12:50 a.m., St. Tammany Parish Sheriff's Deputy Derrick Torregano was on North Third Street in Alton when he observed a vehicle swerving on the roadway with

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[1] The predicate offenses as listed in the multiple offender bill of information are: (1) November 8, 2004, conviction for possession of a firearm by a convicted felon under 22nd Judicial District Court ("JDC") docket number 378,747; (2) November 8, 2004, conviction for possession of cocaine under 22nd JDC docket number 379,761-1; and (3) February 7, 2011, conviction for possession of cocaine under 22nd JDC docket number 498,233.

[2] Although the minutes indicate that the district court imposed the defendant's sentence without the benefit of parole, the transcript does not. Whenever there is a conflict between the transcript and the minutes, the transcript prevails. See **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

various items hanging on the rearview mirror obstructing the driver's view. He conducted a traffic stop based on his observations. The defendant was the driving the vehicle. The defendant told Deputy Torregano that he had been drinking, that he had an open beer inside the vehicle, and that he had thrown some marijuana out of the window. When Deputy Torregano canvassed the area searching for the marijuana, he came across a clear plastic bag containing crack cocaine. The defendant admitted that he threw the crack cocaine out of the window and was going to retrieve it after he was cleared from the traffic stop. After the defendant was advised of his **Miranda**[3] rights, he wrote a statement admitting that he threw out the crack cocaine.

The defendant testified at the hearing on the motions to suppress. According to the defendant, he was driving down North Third Street when he turned off into Eagle Lake Trailer Park. He drove down the boulevard and stopped at the stop sign. One of his friends stopped near him and they talked to each other for a short time. After his friend drove off, the defendant looked up, and Deputy Torregano had pulled up behind him. According to the defendant, the deputy was not traveling behind him, and he did not notice the deputy until he was already inside the trailer park.

The defendant admitted that he told the deputy that he had been drinking. According to the defendant, the deputy asked whether he had been smoking marijuana and whether there was any inside of the vehicle. The defendant testified that the deputy looked in the truck and around the area. The deputy returned with a bag and asked what it was. The defendant stated that he denied that the bag belonged to him, and he wrote his statement indicating otherwise because he felt threatened.

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[3] **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

EXCESSIVE SENTENCE

In his sole assignment of error, the defendant contends that the sentence imposed by the district court was constitutionally excessive. Specifically, the defendant contends that his twenty-two-year sentence was "akin to a life sentence for him" because he was forty-eight years old at the time of sentencing. He also argues that his sentence is excessive because medical evaluations revealed that he is polysubstance-dependent.

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 light of the harm to society, it is so disproportionate as to shock one's sense of justice. **State v. Reed**, 409 So.2d 266, 267 (La. 1982).

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. A district court 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. Lanclos**, 419 So.2d 475, 478 (La. 1982). On appellate review of a sentence, the relevant question is whether the district court abused its broad sentencing discretion, not whether another sentence might have been more appropriate. **State**

v. Thomas, 98-1144 (La. 10/9/98), 719 So.2d 49, 50 (*per curiam*).

The defendant pled guilty to possession of a schedule II controlled dangerous substance (cocaine) and was adjudicated a fourth-felony habitual offender. For his possession conviction, pursuant to La. R.S. 40:967(C), the defendant was exposed to a term of imprisonment with or without hard labor for not more than five years. As a fourth-felony habitual offender, the defendant was exposed to a sentence "for a determinate term not less than the longest prescribed for a first conviction but in no event less than twenty years and not more than his natural life[.]" See La. R.S. 15:529.1(A)(4)(a). Thus, the defendant was exposed to a minimum term of twenty years and a maximum term of life imprisonment.[4]

The presentence investigation report ("PSI") ordered by the district court prior to sentencing recommended a sentence in accordance with the applicable statutes. The report also noted that the defendant had multiple felony arrests for cocaine possession and that he had been given the benefit of probation and parole on previous convictions. According to the PSI, during each period of supervision, the defendant was offered the benefit of substance abuse treatment and failed to take advantage of it.

At the sentencing hearing, the defendant presented testimony about his polysubstance dependence. Mathew Robert Johnson, III, a licensed clinical social worker specializing in addiction disorders, testified that he assessed the defendant on March 27, 2013, and determined that he had a problem with alcohol, marijuana, and cocaine. Johnson testified that at the time he assessed the defendant, he would have recommended inpatient treatment.

Brent Cordell, a previous employer of the defendant through a work release program, also testified at the hearing. He testified that the defendant was a reliable and trustworthy employee and that although he knew the defendant had a history of

[4] The sentence would also be at hard labor without benefit of probation or suspension of sentence. See La. R.S. 15:529.1G.

addiction, he did not feel uncomfortable employing him. According to Cordell, once the defendant was released from the program, he began to have problems with him and had to let him go. Audra Maxwell, who worked next door to Cordell, testified that the defendant would help out at her place of business. Maxwell stated that the defendant was a prompt and efficient employee and that she did not have any problems with him. Like Cordell, Maxwell was aware of the defendant's addiction issues, but they did not concern her.

The defendant also testified at the hearing. He was forty-eight years old at the time of sentencing and had several convictions for possession of cocaine, beginning in 1995. The defendant testified that he had not been to treatment since 1998.

Before sentencing, the district court reviewed the prior offenses of the defendant. The court noted that the defendant had a possession of cocaine conviction in February 1992 and did not successfully complete probation. The defendant had another conviction for possession of cocaine in 1993, and probation was again revoked. In 2004, the defendant pled guilty to possession of cocaine and served five years of a ten-year sentence. He also had a conviction for possession of a firearm by a convicted felon in 2004. After listing the defendant's prior offenses, the court stated that the defendant had persistently been involved in similar offenses and had the opportunity to get treatment for his addiction, but failed to do so. The court opined that there was an undue risk that during a period of suspended sentence or probation, the defendant would commit another crime. It stated that the defendant was in need of correctional treatment that could be provided most effectively by his commitment to an institution. See La. C.Cr.P. art. 894.1(A)(1) & (2). The court noted the defendant's polysubstance dependence as a mitigating factor. See La. C.Cr.P. art. 894.1(B)(33).

The district court carefully reviewed the information provided in the PSI and

considered mitigating circumstances prior to sentencing the defendant. Considering the circumstances of the case and the defendant's propensity to continue criminal activity, we find no abuse of discretion by the district court. Accordingly, the sentence imposed is not grossly disproportionate to the severity of the offense and, therefore, is not excessive.

This assignment of error lacks merit.

REVIEW FOR ERROR

Pursuant to La. C.Cr.P. art. 920(2), this court routinely reviews all criminal appeals for errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. See **State v. White**, 96-0592 (La. App. 1st Cir. 12/20/96), 686 So.2d 96, 98. Our review in the instant case reveals that the minutes incorrectly reflect that the district court restricted the defendant's parole eligibility in violation of La. R.S. 40:967(C)(2). The transcript correctly notes that the defendant was sentenced to twenty-two years at hard labor without the benefit of probation or suspension of sentence. Accordingly, we remand for correction of the minutes and the commitment order, if necessary, to delete the district court's restriction on the defendant's parole eligibility. The amended minute entry should reflect the defendant's habitual offender sentence, which is twenty-two years at hard labor without benefit of probation or suspension of sentence, with no restriction on parole.

For the foregoing reasons, the defendant's conviction, habitual offender adjudication, and sentence are affirmed, and the case is remanded with instructions.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE ARE AFFIRMED; REMANDED WITH INSTRUCTIONS.