NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 KA 0514

STATE OF LOUISIANA

VERSUS

THOMAS WATTS MASON, III

Judgment SEP 18 2015

* * * * * * *

APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ST. TAMMANY
STATE OF LOUISIANA
DOCKET NUMBER 496714

HONORABLE WILLIAM J. BURRIS, JUDGE

* * * * * * *

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BEFORE: McDONALD, McCLENDON, AND THERIOT JJ.

McDONALD, J.

Defendant, Thomas W. Mason, III, was charged by bill of information with one count of driving while intoxicated (DWI), fourth offense, a violation of La. R.S. 14:98.[1] He pled not guilty and filed a motion to quash, which the trial court denied. After a jury trial, defendant was found guilty as charged. The trial court denied defendant's motion for new trial and sentenced him to twenty-seven years imprisonment at hard labor, with the first three years to be served without parole. The trial court also denied defendant's motion to reconsider sentence.

In a prior appeal, we pretermitted discussion of defendant's assignments of error, vacated his sentence, and remanded for the trial court to rule on an outstanding motion for postverdict judgment of acquittal. See **State v. Mason**, 2012-0869 (La. App. 1st Cir. 12/21/12), 2012 WL 6675122 (unpublished). On remand, the trial court denied the outstanding motion for postverdict judgment of acquittal. The trial court subsequently resentenced defendant to twenty-seven years at hard labor, with the first three years of that sentence to be served without benefit of parole. Defendant now appeals, alleging two assignments of error – one asserting that the trial court erred in denying his motion to quash and another asserting that his sentence is unconstitutionally excessive. For the following reasons, we affirm defendant's conviction, amend his sentence, and affirm his sentence as amended.

FACTS

On August 31, 2010, Louisiana State Trooper Steven Dan Manning was dispatched to the scene of a single-vehicle accident near mile marker 234.3 on U.S. Hwy. 190, in St. Tammany Parish. At the scene, Trooper Manning briefly made contact with the driver of the vehicle (defendant), who was being transported by

[1] Pursuant to 2014 La. Acts No. 385, § 1, the sentencing for a fourth or subsequent DWI offense (formerly provided by La. R.S. 14:98(E)), has been redirected to an added provision, La. R.S. 14:98.4. Defendant has three prior DWI convictions based on guilty pleas that took place on December 16, 2004 and January 16, 2007. The predicate offenses were committed on October 9, 2002, October 17, 2003, and September 29, 2004.

ambulance to St. Tammany Parish Hospital. In his investigation of defendant's vehicle, Trooper Manning located a Sprite bottle and a wet Styrofoam cup that smelled of Sprite and vodka. Trooper Manning then met defendant at the hospital, where Trooper Manning noticed defendant's speech was slurred, his breath smelled of alcohol, and his eyes were glassy and bloodshot. Having been informed of his **Miranda**[2] rights, defendant told Trooper Manning that he had ingested a Lortab (hydrocodone) and drank Sprite and vodka prior to the accident.

Following defendant's admission to his drug and alcohol consumption, Trooper Manning administered the horizontal and vertical gaze nystagmus tests to defendant. He failed both. Defendant consented to a bodily fluid test. Trooper Manning secured the assistance of Nurse Tracy Magee to collect blood and urine samples from defendant. The blood sample later tested positive for the presence of hydrocodone, dihydrocodeine (a metabolite of hydrocodone), alprazolam (Xanax), and zolpidem (Ambien). The blood sample also indicated that defendant's blood alcohol content measured 0.17 grams percent. Defendant was ultimately arrested for fourth-offense DWI on September 13, 2010.

MOTION TO QUASH

In his first assignment of error, defendant argues that the trial court erred in failing to quash the bill of information. Particularly, defendant alleges that the state failed to show that he expressly and knowingly waived his constitutional rights when he pled guilty to his December 16, 2004 predicate convictions.

When a trial court denies a motion to quash, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion. See **State v. Odom**, 2002–2698 (La. App. 1st Cir. 6/27/03), 861 So.2d 187, 191, writ denied, 2003–2142 (La. 10/17/03), 855 So.2d 765. However,

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

a trial court's legal findings are subject to a de novo standard of review. See **State v. Smith**, 99-0606 (La. 7/6/00), 766 So.2d 501, 504.

In order for a guilty plea to be used as a basis for actual imprisonment, enhancement of actual imprisonment, or conversion of a subsequent misdemeanor into a felony, the trial judge must inform the defendant that by pleading guilty the defendant waives: (a) his privilege against compulsory self-incrimination; (b) his right to trial and jury trial where applicable; and (c) his right to confront (cross-examine) his accusers. See **Boykin v. Alabama**, 395 U.S. 238, 242–43, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969). The judge must also ascertain that the accused understands what the plea connotes and its consequences. **State v. Henry**, 2000-2250 (La. App. 1st Cir. 5/11/01), 788 So.2d 535, 541, writ denied, 2001-2299 (La. 6/21/02), 818 So.2d 791. In Louisiana, this rule has been made applicable to misdemeanor guilty pleas. **State v. Jones**, 404 So.2d 1192, 1198 (La. 1981) (per curiam). In **State v. Carlos**, 98–1366 (La. 7/7/99), 738 So.2d 556, the Louisiana Supreme Court held that the burden-shifting principles of **State v. Shelton**, 621 So.2d 769 (La. 1993), are applicable to multiple-offense DWI cases. **Carlos**, 738 So.2d at 558–59.

Under this burden-shifting scheme, if the defendant denies the allegations of a bill of information, the state has the initial burden to prove the existence of the prior guilty pleas and that the defendant was represented by counsel when the pleas were taken. If the state meets this burden, the defendant has the burden to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. If the defendant is able to do this, then the burden of proving the constitutionality of the plea shifts to the state. The state will meet its burden of proof if it introduces a "perfect" transcript of the taking of the guilty plea, one that reflects a colloquy between the judge and the defendant wherein the defendant was informed of and specifically waived his right to trial by

jury, his privilege against self-incrimination, and his right to confront his accusers. If the state introduces anything less than a "perfect" transcript, for example, a guilty plea form, a minute entry, an "imperfect" transcript, or any combination thereof, the judge then must weigh the evidence submitted by the defendant and by the state to determine whether the state has met its burden of proving that the defendant's prior guilty plea was informed and voluntary, and made with an articulated waiver of the three **Boykin** rights. See **Shelton**, 621 So.2d at 779-80. The purpose of the **Shelton** rule is to demarcate sharply the differences between direct review of a conviction resulting from a guilty plea, in which the appellate court may not presume a valid waiver of rights from a silent record, and a collateral attack on a final conviction used in a subsequent recidivist proceeding, as to which a presumption of regularity attaches to promote the interests of finality. See **State v. Deville**, 2004-1401 (La. 7/2/04), 879 So.2d 689, 691 (per curiam). **Boykin**, furthermore, only requires that a defendant be informed of the three rights enumerated above. **State v. Nuccio**, 454 So.2d 93, 104 (La. 1984).

Defendant's two at-issue predicate convictions were both secured on December 16, 2004, in First Parish Court, Jefferson Parish. The first conviction was for an October 9, 2002 first-offense DWI. As evidence of this conviction, the state submitted a certified copy of the records from First Parish Court docket number F1452909. These records include minute entries, the bill of information, a copy of the citation, a signed waiver of constitutional rights form, and a copy of defendant's fingerprints. The second conviction was for an October 17, 2003 first-offense DWI. As with the other conviction, the state submitted into evidence a certified copy of the records for First Parish Court docket number F1518281. These records also include minute entries, the bill of information, a copy of the citation, a signed waiver of constitutional rights form, and a copy of defendant's fingerprints. In both cases, the signed waiver of rights forms include both

defendant's and his attorney's signatures. Therefore, the state proved the existence of these prior pleas and that defendant was represented by counsel at the time of these pleas. This proof shifted the burden to defendant to produce some affirmative evidence showing some infringement of his rights or a procedural irregularity in the taking of his pleas.

In arguing his motion to quash, defendant contended that while the trial court informed him of his constitutional rights at the time of these two earlier pleas, the trial court failed to secure an express waiver of these rights from defendant. In support of this argument, defendant introduced a copy of the transcript from his December 16, 2004 pleas. The transcript reflects that the following exchange occurred at the time of these pleas:

> Defense counsel: Good morning, Judge, this is the matter I spoke to you about in chambers running the cases concurrent.
>
> The court: Right. How many **[B]oykins** did you do?
>
> Defense counsel: Two.
>
> The court: Okay, Mr. Mason, your attorney has explained to you your rights?
>
> Defendant: Yes, sir.
>
> The court: You understand what you are doing today?
>
> Defendant: Yes, sir.
>
> The court: You understand that you have a right to trial today?
>
> Defendant: Yes, sir.
>
> The court: In case of a conviction you have a right to an appeal. Do you understand that?
>
> Defendant: Yes, sir.
>
> The court: All right, you understand that you have a right to cross[-]examine those witnesses that were going to come in and testify against you? Do you understand that?
>
> Defendant: Yes, sir.
>
> The court: Also[,] do you understand that you have a right not to testify against yourself? Do you understand that?
>
> Defendant: Yes, sir.

The court: You have a right to compel witnesses to come in on your behalf, do you understand that?

Defendant: Yes, sir.

The court: Has anyone threatened you or promised you anything to make these pleas?

Defendant: No, sir.

Thereafter, the court accepted defendant's pleas as voluntarily given and imposed the sentences on each conviction.

Defendant argues that because the trial court did not secure an express waiver of his constitutional rights at the time of his December 16, 2004 convictions, these predicates could not be used as proof of defendant's instant charge of fourth-offense DWI. We disagree. While it may have been a better practice for the trial court to secure an express waiver of these constitutional rights at the time of defendant's earlier pleas, the totality of the evidence indicates that defendant's prior guilty pleas were informed and voluntary, and made with an articulated waiver of the three **Boykin** rights. See **Shelton**, 621 So.2d at 780.

First, we note that defendant was represented by counsel at the time of his pleas. The transcript reflects that defendant stated his counsel informed him of his rights. Furthermore, the trial court informed defendant of his **Boykin** rights: (a) his privilege against compulsory self-incrimination; (b) his right to trial and jury trial where applicable; and (c) his right to confront (cross-examine) his accusers. Although the trial court did not secure an express, vocal waiver of these rights, defendant and his attorney signed two waivers of constitutional rights. These three **Boykin** rights were contained at the beginning of each waiver form. Finally, defendant informed the trial court that he understood what he was doing by pleading guilty and that no one had threatened him or promised him anything in exchange for his pleas. The totality of the evidence indicates that the trial court did not err or abuse its discretion in denying defendant's motion to quash.

This assignment of error is without merit.

EXCESSIVE SENTENCE

In his second assignment of error, defendant maintains that the trial court erred in imposing an unconstitutionally excessive sentence. Defendant argues that given his age and health issues, the sentence is too severe.

Before discussing whether defendant's sentence is excessive, we note a patent error which requires amendment of the sentence. See La. Code Crim. P. art. 920(2). At the time the defendant committed the offense, the penalty for fourth-offense DWI was imprisonment with or without hard labor for not less than ten years nor more than thirty years and a mandatory fine of five-thousand dollars. See La. R.S. 14:98(E)(1)(a) (prior to amendment by 2014 La. Acts No. 385, § 1). Two years of the sentence of imprisonment shall be imposed without benefit of probation, parole, or suspension of sentence. **Id.** At the time of his first appeal, defendant had been sentenced to twenty-seven years imprisonment at hard labor, with three years imposed without parole, but no fine. See **State v. Mason**, 2012-0869 (La. App. 1st Cir. 12/21/12), 2012 WL 6675122 (unpublished). In that earlier opinion, we footnoted this error, but the trial court reinstated the same sentence on remand. Neither the jury nor the trial court made any express finding under La. R.S. 14:98(E)(4)(a) (prior to amendment by 2014 La. Acts No. 385, § 1) (regarding prior substance abuse treatment and home incarceration) that would support this three-year restriction of benefits. Defendant's current sentence is clearly illegal.

An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review. La. Code Crim. P. art. 882(A). In this case, we may correct defendant's illegal sentence because doing so does not involve an exercise of discretion. See **State v. Haynes**, 2004-1893 (La. 12/10/04), 889 So.2d 224 (per curiam). Accordingly, we amend defendant's sentence to

twenty-seven years imprisonment at hard labor, with the first two years of that sentence to be served without benefit of parole, probation, or suspension of sentence, and a fine of five-thousand dollars. It is this amended sentence that we review for excessiveness.[3]

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). A sentence is constitutionally excessive if it is grossly disproportionate to the severity of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. See **State v. Hurst**, 99-2868 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962. A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. See **State v. Hogan**, 480 So.2d 288, 291 (La. 1985). A trial court is given wide discretion in the imposition of a sentence within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of a 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 trial court to consider when imposing sentence. While the entire checklist of Article 894.1 need not be recited, the record must reflect that the trial court adequately considered the criteria. See **State v. Herrin**, 562 So.2d 1, 11 (La. App. 1st Cir.), writ denied, 565 So.2d 942 (La. 1990). 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

[3] We note that, technically, defendant failed to file a new motion to reconsider sentence after remand and resentencing. Therefore, we are entitled not to review defendant's claims of excessiveness. See La. Code Crim. P. art. 881.1(E). However, in the interest of fairness and judicial efficiency, we address this assignment of error.

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).

Prior to sentencing defendant the first time, the trial court ordered a presentence investigation report (PSI). The PSI indicated that defendant has a fairly extensive criminal history dating back to 1973, with convictions for possession of marijuana, possession of cocaine, and at least five DWIs.

At the time of defendant's initial sentencing, the trial court noted this criminal history, defendant's age, and his history of posttraumatic stress disorder. In addressing the Article 894.1 factors, the trial court found an undue risk that defendant would commit another crime during any period of probation or suspension of sentence (as indicated by at least three other instances of probation revocation). See La. Code Crim. P. art. 894.1(A)(1). The court also found that defendant was in need of correctional treatment or a custodial environment that could be provided most effectively by commitment to an institution. See La. Code Crim. P. art. 894.1(A)(2). The court also found that a lesser sentence would deprecate the seriousness of defendant's crime. See La. Code Crim. P. art. 894.1(A)(3). The only mitigating factor the trial court found to be applicable was that defendant suffers from posttraumatic stress disorder. See La. Code Crim. P. art. 894.1(B)(33). In resentencing defendant on remand, the trial court adopted its earlier reasons.

We have reviewed the record and find that it supports the sentence imposed. 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 (La. 10/9/98), 719 So.2d 49, 50 (per curiam). Based on our review, we cannot say that the trial court erred or abused its discretion in imposing the sentence, as it has been amended.

This assignment of error is without merit.

Therefore, for the foregoing reasons, we affirm defendant's conviction, amend defendant's sentence, and affirm defendant's sentence as amended.

CONVICTION AFFIRMED; SENTENCE AMENDED; SENTENCE AFFIRMED AS AMENDED.