NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2016 KA 0902

STATE OF LOUISIANA

VERSUS

BRUCE ALVIN ROBERTSON

Judgment rendered December 22, 2016.

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Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 04-06-0211
Honorable Richard "Chip" Moore, Judge

* * * * * *

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BEFORE: PETTIGREW AND McDONALD, JJ., AND CALLOWAY,[1] J. Pro Tem.

[1] Judge Curtis A. Calloway, retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

PETTIGREW, J.

The defendant, Bruce Alvin Robertson, was charged by bill of information with attempted simple burglary, a violation of La. R.S. 14:62 and 14:27. He pled not guilty and, following a jury trial, was found guilty as charged. The trial court sentenced the defendant to six years imprisonment at hard labor. Thereafter, the defendant filed a motion to reconsider sentence. The trial court granted the motion and resentenced the defendant to five years imprisonment at hard labor. The State filed a habitual offender bill of information and, following a hearing on the matter, the trial court adjudicated defendant a fourth-felony habitual offender. The trial court vacated the previously imposed five-year sentence and resentenced the defendant to twenty-five years imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence.

The defendant appealed, arguing, *inter alia*, that the trial court erred in imposing an unconstitutionally excessive sentence. In **State v. Robertson**, 2011-1147 (La. App. 1 Cir. 12/21/11) (unpublished), writ denied, 2012-0116 (La. 5/4/12), 88 So.3d 461, this court affirmed the conviction and habitual offender adjudication. However, after noting that the trial court imposed the defendant's twenty-five-year sentence without the benefit of parole when neither the penalty provision of the substantive statute nor the habitual offender law authorized such a restriction on the defendant's parole eligibility, this court vacated the habitual offender sentence and remanded for resentencing. As such, we pretermitted consideration of the excessive sentence argument (and the related ineffective assistance of counsel argument) raised by the defendant. **Robertson**, 2011-1147 at 4.

On September 8, 2015, the (same) trial court resentenced the defendant, under the habitual offender statute, to twenty-five years imprisonment at hard labor without the benefit of probation or suspension of sentence; the trial court specifically noted that there was no parole restriction under the new sentence. At the sentencing hearing, the defendant, pro se, informed the trial court that he had filed a motion to quash, regarding

the new sentence. Having just been informed of the new motion, the trial court set the matter for hearing at a future date.

On February 16, 2016, the trial court held the hearing on the motion to quash. The defendant had also filed, within thirty days of his resentencing on September 8, 2015, a motion to reconsider his sentence. After hearing argument regarding the excessiveness of the twenty-five-year sentence, the trial court denied the motion to reconsider sentence. The defendant, pro se, then argued his motion to quash. The defendant noted that after he was sentenced and convicted, but before he was resentenced, he had filed for post-conviction relief (PCR), including a writ of habeas corpus; since his original sentence was vacated, however, these filings were considered premature. Thus, the defendant asserted, his new twenty-five-year sentence should be quashed because he was prejudiced since he would have to make re-filings regarding PCR and habeas corpus.[2] The trial court denied the motion to quash. The defendant, through appellate counsel, now appeals his new sentence, designating four counseled assignments of error and five pro se assignments of error. For the reasons that follow, we affirm the sentence.

FACTS

In 2006, the defendant attempted to gain entry into the Capital City Wholesale warehouse on North Foster Drive in Baton Rouge. For a full recitation of the facts, see **Robertson**, 2011-1147 at 2-3.

COUNSELED ASSIGNMENTS OF ERROR NOS. 1 and 2

In these related assignments of error (argued together), the defendant argues, respectively, that the trial court erred in denying the motion to quash and that the unjustified lengthy delay in sentencing him divested the trial court of jurisdiction.

The defendant was sentenced as a habitual offender on April 15, 2009. On December 21, 2011, this court vacated the habitual offender sentence and remanded for

[2] In this new appeal, the defendant does not make this argument. He argues, instead, that the trial court did not have jurisdiction to resentence him.

resentencing. See **Robertson**, 2011-1147 at 4. The defendant was resentenced as a habitual offender (wherein parole restriction was removed) on September 8, 2015. According to the defendant in brief, this delay of almost three years and nine months between sentences was unreasonable and unjustifiable and, as such, the trial court should have been divested of its jurisdiction to resentence him. The defendant cites to **City of Baton Rouge v. Bourgeois**, 380 So.2d 63, 64 (La. 1980) (per curiam), which provided, "A defendant is statutorily entitled to the imposition of sentence 'without unreasonable delay' and the sanction for noncompliance is divestiture of the trial court's sentencing jurisdiction. [La. Code Crim. P. art.] 874."

The defendant's claim is baseless. Louisiana Code of Criminal Procedure article 874 provides: "Sentence shall be imposed without unreasonable delay. If a defendant claims that the sentence has been unreasonably delayed, he may invoke the supervisory jurisdiction of the appellate court." Moreover, pursuant to La. Code Crim. P. art. 882(A), an illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review. And La. Code Crim. P. art. 916 provides, in pertinent part:

> The jurisdiction of the trial court is divested and that of the appellate court attaches upon the entering of the order of appeal. Thereafter, the trial court has no jurisdiction to take any action except as otherwise provided by law and to:
>
> . . . .
>
> (3) Correct an illegal sentence or take other appropriate action pursuant to a properly made or filed motion to reconsider sentence.

Accordingly, pursuant to Articles 882 and 916, the trial court maintained sentencing jurisdiction and properly resentenced the defendant to correct the original sentence, which contained an illegal parole restriction. In **Bourgeois**, the defendant pled guilty to DWI, first offense (a misdemeanor). Four years later, he was sentenced for the first time. The supreme court found this four-year delay to be extreme and unjustified for this "relatively minor offense" and reversed the lower court's denial of the motion to quash (resulting in the defendant's dismissal). **Bourgeois**, 380 So.2d at 63-64.

The instant matter is readily distinguishable from **Bourgeois**. The defendant in **Bourgeois** was not sentenced until four years after his conviction. The defendant in this case had already been convicted, sentenced, and sent to prison. In fact, the defendant was in the midst of serving his twenty-five-year sentence when he was resentenced. Thus, regardless of the three years and nine months between sentences, the defendant was, is, and will be for quite some time, notwithstanding any resentencing delay, an inmate at Allen Correctional Center serving a twenty-five-year sentence. As suggested by the trial court in its exchange with the defendant at the motion to quash hearing, the defendant's status regarding his imprisonment remained unchanged, regardless of the delay in resentencing:

> Q. So, you're saying the four-month delay --
> A. The four-year delay; nearly four years, Your Honor.
> Q. Okay. How -- but you were going to --
> A. That sentence was vacated --
> Q. I know, but --
> A. -- in 2011 --
> Q. -- you were going to be in jail either way.
> A. All right. That's true. I'm going to be in jail either way, but --
> Q. I mean, it's still 25 years.

In **State v. Sims**, 2009-509, pp. 4-6 (La. App. 5 Cir. 2/12/10), 33 So.3d 340, 343-344, writ denied, 2010-0596 (La. 10/8/10), 46 So.3d 1264, there was a six-year delay before the defendant was resentenced. The defendant had been imprisoned on three concurrently-imposed sentences: a 110-year enhanced sentence and two 99-year sentences. The fifth circuit declined to even address whether a six-year delay was reasonable because the defendant did not suffer any prejudice by the delay. In **State v. Girod**, 2004-854, pp. 2-3 (La. App. 5 Cir. 12/28/04), 892 So.2d 646, 648-649, writ denied, 2005-0597 (La. 6/3/05), 903 So.2d 455, the defendant had been sentenced as a habitual offender to life imprisonment. His life sentence was vacated and, on remand, he was resentenced to thirty-five years imprisonment. The delay between his original sentence and resentence was three years and three months. As such, the defendant argued on appeal that the trial judge's unreasonable delay in resentencing him violated Article 874. In finding no merit to this contention, the fifth circuit stated, in pertinent part:

> Even if defendant's motion to reconsider was timely under the "mailbox rule," we fail to find that the trial judge erred in denying the motion because defendant suffered no prejudice.
>
> [Louisiana Code of Criminal Procedure article] 874 provides that "[s]entence shall be imposed without unreasonable delay. If a defendant claims that the sentence has been unreasonably delayed, he may invoke the supervisory jurisdiction of the appellate court." The sanction for noncompliance is divestiture of the trial court's sentencing jurisdiction. **State v. McQueen**, 308 So.2d 752, 755 (La. 1975).
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> In **State v. Johnson**, 363 So.2d 458, 461 (La. 1978), seven years elapsed between the defendant's conviction and sentence. The **Johnson** court declined to determine the reasonableness of the delay, but held that defendant was not entitled to have his conviction and sentence set aside, since he sustained no prejudice by the delay.
>
> . . . .
>
> In the present case, three years and three months passed between the Louisiana Supreme Court's denial of writs on June 19, 1998 and October 12, 2001, when defendant was resentenced. Although the record does not disclose the cause of the delay, there is no indication that defendant was prejudiced by it. As a fourth felony offender, the sentencing range defendant faced was twenty years to life. Thus, defendant could not reasonably have expected any sentence less than twenty years. Defendant received a thirty-five-year enhanced sentence. As in ... **Johnson**, defendant has demonstrated no prejudice by the delay.

Girod, 2004-854 at 15-16, 892 So.2d at 654-655.

Similarly, in the instant matter, the defendant could not reasonably have expected any sentence less than twenty years. He was, in fact, resentenced to the exact terms of his original twenty-five-year sentence as a fourth-felony habitual offender, except that his parole restriction was removed. Accordingly, the defendant has not demonstrated in any way how he was prejudiced by the delay. The trial court, as such, did not err in denying the motion to quash.

These assignments of error are without merit.

COUNSELED ASSIGNMENTS OF ERROR NOS. 3 and 4

In these related assignments of error, the defendant argues, respectively, that the trial court erred in denying the motion to reconsider sentence and that the sentence is unconstitutionally excessive.

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of 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 court 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) (quoting **State v. Humphrey**, 445 So.2d 1155, 1165 (La. 1984)).

In this case, the trial court sentenced the defendant to twenty-five years at hard labor. As a fourth-felony habitual offender, his sentencing range was twenty years to life imprisonment. See La. R.S. 15:529.1(A)(1)(c)(i) (prior to the 2010 amendment). The

defendant notes that he is fifty-three years old and that, at the time of his original sentence, he was "plagued with addiction to drugs" and had never had the opportunity for drug rehabilitation. According to the defendant, in light of these facts, such a sentence that will result in his confinement for the remainder of his life is excessive.

At sentencing for the underlying conviction of attempted simple burglary (prior to the habitual offender sentencing), the trial court stated, in pertinent part:

> I mean, the man -- your client, sir, you've been in front of courts on numerous different occasions. ...
>
> . . . .
>
> Well, in any event, that period of time in jail, when you got out, should have answered the question as to getting your life on the right track and it never has. If you're telling me that three different occasions you've been incarcerated prior to this arrest and each time you've gotten out you got back in more trouble, what are the courts to do? If a person gets out of jail and they exercise free will and in the exercise of their free will, they decide to get in more trouble instead of doing what's right and get their life straight, I can't follow you 24/7 and no one can.

At the habitual offender hearing, the trial court adjudicated the defendant a fourth-felony habitual offender, sentenced him, and stated, in pertinent part:

> In determining the length of the sentence to be imposed this court considered in addition to the sentencing guidelines the following factors: number one, the defendant has an extremely long criminal history. He's classified as a fourth felony offender; and number two, the defendant is [sic] has failed to show any remorse for any of the offenses and, in fact, denies that he's guilty of the offense despite a verdict of guilty by the jury.

The record before us clearly established an adequate factual basis for the sentence imposed. Considering the trial court's review of the circumstances, the defendant's continued disregard for the law, and the fact the defendant's sentence exposure was life imprisonment, we find no abuse of discretion by the trial court. Accordingly, the sentence imposed by the trial court is not grossly disproportionate to the severity of the offense and, therefore, is not unconstitutionally excessive. The trial court, thus, did not err in denying the motion to reconsider sentence.

These assignments of error are without merit.

PRO SE ASSIGNMENT OF ERROR NO. 1

In his first pro se assignment of error, the defendant "accepts and adopts" as his own the counseled first (and second) assignment of error. The issues raised in the counseled first and second assignments have been found meritless.

Accordingly, this pro se assignment of error is without merit.

PRO SE ASSIGNMENTS OF ERROR NOS. 2, 3, 4, and 5

In these pro se assignments of error, the defendant argues, respectively, the trial court erred by allowing the State to introduce State Exhibit 1 at the first multiple offender hearing based on improper foundation and authentication; the trial court erred in denying his "Motion for Reconsideration" because the State did not prove his identity in the three prior conviction records; the trial court erred in adjudicating him a fourth-felony habitual offender because the State did not prove that he was advised of and knowingly waived his **Boykin** rights in each predicate conviction; and the trial court erred in adjudicating him a fourth-felony habitual offender because the State failed to establish discharge dates on the three predicate convictions for purposes of the cleansing period.

All four of these pro se assignments of error address issues raised or related to the habitual offender hearing in February 2009, wherein the State submitted evidence of the defendant's prior convictions to prove he was a fourth-felony habitual offender. In defendant's first appeal to this court, he argued only that his habitual offender sentence was excessive and that defense counsel's failure to file a motion to reconsider sentence constituted ineffective assistance of counsel. In 2011, we affirmed the conviction and habitual offender adjudication. Having vacated and remanded so the trial court could resentence the defendant without a parole restriction, we pretermitted only the excessive sentence argument (and related ineffective assistance of counsel argument). See **Robertson**, 2011-1147 at 4.

Thus, when the defendant appealed this second time, his conviction and habitual offender adjudication had already been affirmed, and the only issue before this court was the defendant's resentencing to (the same) twenty-five years, but with no parole restriction. Any issues regarding insufficient or improper evidence submitted by the State

at the 2009 habitual offender hearing should have been raised by the defendant in his first appeal with this court. This court reviewed the habitual offender hearing in the original appeal. The defendant has waived the issue of the adequacy of the habitual offender hearing because he did not raise it in his original appeal. See **State v. Freeman**, 565 So.2d 1084, 1085 (La. App. 4 Cir. 1990).

Accordingly, we find that that these four pro se issues not raised in the defendant's original appeal, which could have been raised, are considered waived and are not within this court's jurisdiction on appeal. See **State v. Wise**, 2014-378, pp. 14-15 (La. App. 5 Cir. 10/15/14), 182 So.3d 63, 73-74. See also **State v. Evans**, 2009-477, pp. 17-18 (La. App. 5 Cir. 12/29/09), 30 So.3d 958, 968-969, writ denied, 2010-0363 (La. 3/25/11), 61 So.3d 653.

These four pro se assignments of error are without merit.

SENTENCE AFFIRMED.