STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2018 KA 1735

STATE OF LOUISIANA

VERSUS

DARRION O. BURKS

Judgment Rendered: MAY 3 1 2019

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Appealed from the
Eighteenth Judicial District Court
In and for the Parish of Pointe Coupee
State of Louisiana
Docket Number 79,931F
Honorable Kevin Kimball, Judge Presiding

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Richard J. Ward, Jr. District Attorney Terri Russo Lacy Chad A. Aguillard Assistant District Attorneys Port Allen, Louisiana	Counsel for Appellee State of Louisiana
Gwendolyn K. Brown Baton Rouge, Louisiana	Counsel for Defendant/Appellant Darrion O. Burks

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BEFORE: GUIDRY, THERIOT, AND PENZATO, JJ.

Penzato, J., agrees in part, dissents in part and assigns reasons

GUIDRY, J.

The defendant, Darrion O. Burks, was charged by bill of information with one count of attempted second degree murder (count I), a violation of La. R.S. 14:27 and La. R.S. 14:30.1, and one count of aggravated criminal damage to property (count II), a violation of La. R.S. 14:55. He pled not guilty to both counts. Following a trial by jury, the defendant was found guilty as charged on both counts. On count I, the trial court sentenced the defendant to fifteen years at hard labor without the benefit of probation, parole, or suspension of sentence. On count II, the trial court sentenced the defendant to five years at hard labor and a $2,500 fine, but suspended the sentence, placed the defendant on supervised probation for a period of five years subject to certain conditions, including paying the fine, and ordered this sentence to run consecutively with the sentence for count I. The defendant now appeals, raising four assignments of error. For the following reasons, we affirm the conviction and sentence on count I, affirm the conviction, amend the sentence, and affirm as amended on count II, and remand to the Eighteenth Judicial District Court with instructions.

STATEMENT OF FACTS

On the morning of September 28, 2014, Stanley Brue and Jonathan Nelson drove up to Brue's trailer in New Roads. The defendant's grandmother lived across the street, and as Brue and Nelson approached Brue's trailer, Brue noticed the gold Chevrolet Trailblazer the defendant usually drove parked on the side of his grandmother's house. Brue exited the vehicle and leaned back into the vehicle to continue talking to Nelson. He then heard someone approach him and say, "Come off it. Come off it. Let me get it. Let me get it," and a gun went off, and he began "scuffling" with the defendant. The defendant fired about seven times and shot Brue twice before running away. By the time Brue was placed into Nelson's vehicle to go to the hospital, the Trailblazer was gone. Dr. Admir

Seferobic, Brue's treating physician in the emergency room, testified that Brue's injuries were life-threatening.

Felicia Powell, Brue's fiancée, saw the fight and saw the defendant flee into a gold Trailblazer after the last shot was fired. Another witness, Desarell Lacour, testified that she saw the fight and stated it "looked like a drug deal gone bad." Powell later saw the gold Trailblazer on the adjacent street and informed police that the defendant had gotten into that vehicle after the shooting. The police traced the vehicle in question to Brittany Hill, the defendant's cousin. Police then located the defendant and arrested him only several streets away from the crime scene.

Phondal Guyton, Brue and Powell's neighbor, reported to police that two bullets "whip[ped] through her trailer" while she was sleeping; police also observed bullet holes from the fight between Brue and the defendant in Guyton's trailer, in addition to finding bullets on Guyton's bed. Although police did not find any DNA evidence from the shell casings found at the crime scene, police found evidence of only one gun for the shots recovered from Brue's body and the shots fired into Guyton's trailer. Shell casings recovered at the scene indicated they were from a forty caliber gun. The State and the defense also stipulated that the casings came from the same gun.

ASSIGNMENTS OF ERROR

In his first assignment of error, the defendant claims the trial court "erred by considering improper factors when tailoring a sentence for this young defendant." In his second assignment of error, the defendant claims the trial court erred by imposing an excessive sentence. In his third assignment of error, the defendant claims the trial court erred by imposing the sentences consecutively. In his fourth assignment of error, the defendant claims he was denied effective assistance of counsel because his counsel failed to file timely a motion to reconsider sentence.

EXCESSIVE SENTENCE

We will address the defendant's excessive sentence claim, even though no timely motion to reconsider the sentence imposed or contemporaneous objection was made before the trial court, since it would be a necessary part of his assigned error as to ineffective assistance of counsel, and to do so is in the interest of judicial economy. See State v. Rounds, 12-0669 (La. App. 1st Cir. 2/25/13), 2013 WL 690612, at *1 (unpublished).

We address the defendant's first three assignments of error together because they are closely related. The defendant contends that the trial court ignored his youth—he was seventeen at the time of the offenses and nineteen at the time of sentencing—and multiple mitigating factors, including significant mental health issues and deficits such as ADHD and bipolar disorder, witnessing his father's suicide at a young age, and being hospitalized twice for mental health issues as a child. The defendant also points out that at the time of the offenses, he was not taking his medication and was not otherwise receiving mental health treatment. Finally, he states that at the time of the offenses, he was a good student and a junior in high school, playing football and running track, and preparing to go to prom.

The defendant also claims the trial court improperly considered the defendant's rejection of the State's plea agreement in making the following comments:

- "You turned down a ten year plea agreement. I'd make some eye contact with you; you smiled. I smiled at you. It was kind of like the Prosecutor is—is slam dunking every witness. He's going—just like flushing that commode every time somebody took the witness stand."
- "Now, the first thing, because it was brought up, I'm gonna talk about plea bargains. . . . He was offered a plea bargain; I didn't know exactly what it was, but we talked about it, and we all agreed, was offered ten years at the Department of Corrections if he would have pled to this. Ten years."
- "That just kind of blows my mind that you are technically looking at fifty, plus fifteen, is sixty-five years. That's a long, long time,

> and you turned down ten. You turned it down. Your lawyer didn't turn it down; you turned it down. So I don't believe that when you go to trial that you need to penalize someone for exercising their constitutional rights, but I get to sentence you to what I think is appropriate . . ."

- "He rolled the dice, he went to trial."
- In recalling a prior offense that Darrion had committed when he was a juvenile, the judge said: "He pled guilty, so I cut him some slack. When you plead guilty, it's a mitigating factor. I could have given him six months in at OJJ; I only gave him four 'cause he admitted to it."

The defendant acknowledges that the trial court showed "some leniency" by suspending the sentence for count II, but claims that this leniency was "inadequate under the circumstances" and that the defendant's conduct was a result of his mental health condition.

The defendant also claims that the trial court erred by sentencing the defendant to consecutive terms without articulating a basis for doing so because the two crimes were "inexorably interconnected." Finally, the defendant contends that the trial court erred by imposing the $2,500 fine on count II. The defendant argues that because he is indigent, he cannot pay the fine, which will cause him to serve the five years in prison, and requests that this court amend the sentence to delete the fine.

Article I, Section 20 of the Louisiana Constitution prohibits the imposition of cruel or 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. 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. 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. 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. Forrest, 16-1678, pp. 9-10 (La. App. 1st Cir. 9/21/17), 231 So. 3d 865, 872, writ denied, 17-1683 (La. 6/15/18), 257 So. 3d 687.

The Louisiana Code of Criminal Procedure sets forth items that must be considered by the district court before imposing sentence. See La. C.Cr.P. art. 894.1. The district court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the guidelines. Forrest, 16-1678 at 10, 231 So. 3d at 872.

The articulation of the factual basis for a sentence is the goal of La. C.Cr.P. art. 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 La. C.Cr.P. art. 894.1. The trial judge 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. State v. Dufrene, 17-1496, p. 16 (La. App. 1st Cir. 6/4/18), 251 So. 3d 1114, 1125.

If the defendant is convicted of two or more offenses based on the same act or transaction, or constituting parts of a common scheme or plan, the terms of imprisonment shall be served concurrently unless the court expressly directs that some or all be served consecutively. La. C.Cr.P. art. 883. Thus, La. C.Cr.P. art. 883 specifically excludes from its scope sentences that the court expressly directs to be served consecutively. Furthermore, although the imposition of consecutive sentences requires particular justification when the crimes arise from a single course of conduct, consecutive sentences are not necessarily excessive. State v. Letell, 12-0180, pp. 9-10 (La. App. 1st Cir. 10/25/12), 103 So. 3d 1129, 1138, writ denied, 12-2533 (La. 4/26/13), 112 So. 3d 838.

If a trial judge has agreed to impose a particular sentence pursuant to a plea bargain, this does not restrict him from imposing a more severe sentence if the defendant elects to go to trial and is convicted. The sentencing judge must nonetheless comply with constitutional standards, and the sentence should not be increased due to vindictiveness arising from the exercise of the defendant's right to stand trial. However, as the Louisiana Supreme Court has recognized, "[a] judge's disposition to impose a lenient sentence during plea discussions should not be understood as setting a limit for the justifiable sentence under accepted principles of criminal justice. The better view . . . is that the plea proposal is a concession from the greatest justifiable sentence, the concession being made because of circumstances surrounding the plea." State v. Douglas, 10-2039, p. 14 (La. App. 1st Cir. 7/26/11), 72 So. 3d 392, 401-402, writs denied, 11-2307 (La. 5/25/12), 92 So. 3d 406, & 12-2508 (La. 5/3/13), 115 So. 3d 474.

Whoever commits attempted second degree murder shall be imprisoned at hard labor for not less than ten nor more than fifty years without benefit of parole, probation, or suspension of sentence. See La. R.S. 14:27(D)(1)(a) & La. R.S. 14:30.1(B).

Whoever commits the crime of aggravated criminal damage to property shall be fined not more than ten thousand dollars, imprisoned with or without hard labor for not less than one nor more than fifteen years, or both. La. R.S. 14:55(B).

At the sentencing hearing, the defendant's mother, Pamela Denise Smith Davis, testified. She stated that at the time of the defendant's arrest, he was a junior in high school and a good student. After seeing his father commit suicide, the defendant was hospitalized at the ages of seven and nine and was diagnosed with "Manic Depression." She added the defendant also has ADHD and was in "Special Ed" at school after proficiency tests showed he was below grade level. His last proficiency test showed that in the tenth grade, he was reading at a fifth-

grade level. Although he had received treatment for his mental health problems in the past, at the time of his arrest, the defendant was not receiving any treatment and refused to take his medication because he "didn't like the way it made him feel."

In sentencing the defendant, the trial court noted the defendant had been arrested during the time he was out of jail on bond while waiting for this matter to go to trial. The trial court also discussed La. C.Cr.P. art. 894.1(A)(3), "A lessor [sic] sentence will deprecate . . . the seriousness of the defendant's crime," and noted that the "only thing worse than Attempted Murder is Murder itself." The trial court further noted that as a juvenile, the defendant pled guilty to resisting an officer and disturbing the peace, and that his probation was revoked because he was arrested for and pled guilty to a battery. The trial court also noted the seriousness of the victim's injuries and that the trial court did not know how the victim did not die as a result of being the victim of "this heinous crime." Finally, the trial court stated that the imposition of the consecutive sentences was "consistent of the seriousness of this."

In light of these considerations, there was no manifest abuse of discretion in the trial judge's finding that the aggravating circumstances outweighed any mitigating circumstances in this case. A thorough review of the record reveals that the trial court adequately considered the criteria of Article 894.1 and did not manifestly abuse its discretion in imposing the sentences herein. See La. C.Cr.P. arts. 894.1(A)(1), (A)(3), (B)(6), (B)(9), (B)(10), (B)(18), & (B)(19). Given the circumstances of this case, including the seriousness of the injuries he inflicted upon the victim, the record provides ample justification for the sentences that the trial court imposed. Additionally, we note that the defendant's random firing placed not only the victim in danger, but also the occupant of a nearby trailer. See La. C.Cr.P. art. 894.1(B)(5); State v. Toups, 13-1371 (La. App. 1st Cir. 4/3/14), 144 So. 3d 1052, 1058-59 ("Remand for full compliance with Article 894.1 is

unnecessary when a sufficient factual basis for the sentence is shown."). Therefore, the sentences imposed on both counts were not grossly disproportionate to the severity of the offenses or shocking to the sense of justice, and were not unconstitutionally excessive.

With regard to the defendant's claim that the trial court impermissibly considered his rejection of the State's plea agreement in sentencing him, we note that the trial court judge specifically stated he did not believe that he needed to penalize someone for exercising his constitutional rights, but that "I get to sentence you to what I think is appropriate[.]" The defendant herein chose not to accept the State's plea agreement and thereby took the risk of a greater penalty upon conviction by a jury. The record does not indicate that the defendant's sentence is the product of vindictiveness by the trial judge. As previously noted, the sentence is not unconstitutionally excessive, and it is fully supported by the record. This assignment of error is without merit.

With regard to the $2,500 fine on count II, although the defendant was originally represented by a private attorney, he explained to the trial court that his family had hired the attorney. Because they could not afford to pay for another private attorney and because the defendant, a high school student, had no savings, the trial court then appointed the Public Defender's Office to represent the defendant. Additionally, the defendant is currently represented by the Louisiana Appellate Project.

The defendant claims State v. Bohanna, 491 So. 2d 756 (La. App. 1st Cir. 1986), controls, and therefore, the $2,500 fine should be deleted. In Bohanna, this court noted the Louisiana Supreme Court had broadened the general rule that an indigent defendant cannot be imprisoned, in lieu of payment of a fine or costs, if that would result in the defendant serving a longer term than the statutory maximum for the offense, so that an indigent defendant can never be subjected to

confinement in lieu of payment of a fine. Id. at 759-60. Bohanna, however, is distinguishable from the instant case. The indigent defendant in Bohanna was convicted of one count of distribution of marijuana and one count of distribution of cocaine, and sentenced to five years at hard labor on each of the counts. Id. at 756-57. He was also fined $3,000 on each count, with an additional sentence of twelve months at hard labor if he defaulted on the payment of the fines. Id. at 757.

The circumstances in the instant case are factually distinguishable from Bohanna because on count II, the defendant was sentenced to five years at hard labor and a $2,500 fine; the five-year sentence was suspended subject to certain conditions, one of which is paying the fine. The language in Bohanna would suggest, however, that its holding would apply in circumstances under which an indigent defendant, like the instant defendant, is subject to a suspended sentence under certain conditions, one of which is paying a fine, and the failure to pay the fine results in the defendant's additional incarceration. Specifically, the Bohanna court stated: "[t]he Louisiana Supreme Court has evidently determined that indigent defendants may never be subjected to confinement in lieu of payment of a fine." Bohanna, 491 So. 2d at 759. See also State v. Seal, 581 So. 2d 735, 737-38; State v. Coleman, 04-0758 (La. App. 1st Cir. 12/21/07), 2007 WL 4465646, at *5 (unpublished); State v. Adams, 17-0419 (La. App. 1st Cir. 4/26/18), 2018 WL 2017527, at *1-2 (unpublished), writ denied, 18-0873 (La. 2/18/19), 265 So.3d 775, 2019 WL 927990. We extend Bohanna to apply to this situation. This assignment of error has merit.

Therefore, the portion of the count II sentence imposing the remainder of the suspended sentence on count II if the defendant does not pay the fine and costs is hereby deleted based on the defendant's indigent status. This matter is remanded to the trial court with instructions to correct the minutes and commitment order, if necessary, to reflect this amendment to the sentence.

INEFFECTIVE ASSISTANCE OF COUNSEL

A claim of ineffectiveness of counsel is analyzed under the two-pronged test developed by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish that his trial attorney was ineffective, the defendant must first show that the attorney's performance was deficient, which requires a showing that counsel made errors so serious that he was not functioning as counsel guaranteed by the Sixth Amendment. Second, the defendant must prove that the deficient performance prejudiced the defense. This element requires a showing that the errors were so serious that the defendant was deprived of a fair trial; the defendant must prove actual prejudice before relief will be granted. It is not sufficient for defendant to show that the error had some conceivable effect on the outcome of the proceeding. Rather, he must show that but for the counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different. Further, it is unnecessary to address the issues of both counsel's performance and prejudice to the defendant if the defendant makes an inadequate showing on one of the components. Rounds, 2013 WL 690612, at *3.

In the instant case, although the defendant's counsel performed deficiently by failing to file a motion for reconsideration, the defendant has suffered no prejudice from the deficient performance because this court has considered the defendant's excessive sentence argument in connection with the ineffective assistance of counsel claim.

This assignment of error is without merit.

CONVICTION AND SENTENCE ON COUNT I AFFIRMED; CONVICTION ON COUNT II AFFIRMED; SENTENCE ON COUNT II AMENDED AND AFFIRMED AS AMENDED; REMANDED TO THE EIGHTEENTH JUDICIAL DISTRICT COURT WITH INSTRUCTIONS.

STATE OF LOUISIANA
COURT OF APPEAL
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STATE OF LOUISIANA

VERSUS

DARRION O. BURKS

akp **PENZATO, J., dissenting in part.**

I respectfully dissent from that portion of the majority opinion extending *State v. Bohanna*, 491 So.2d 756 (La. App. 1st Cir. 1986) to amend the sentence as to count II. In *Bohanna*, the defendant was sentenced to five years on each of two counts of distribution, and also fined $3,000.00 on each count, with an additional twelve-month sentence in the event he defaulted on payment of the fines. Louisiana Code of Criminal Procedure art. 884 authorizes a trial court to include in a sentence a fine or costs, in default of payment of which the defendant may be imprisoned for a specified period not to exceed one year. Nevertheless, the Louisiana Supreme Court has determined that an indigent defendant may never be subjected to confinement in lieu of payment of a fine. See *Bohanna*, 491 So. 2d at 759.

In the instant case, the trial court sentenced the defendant to five years at hard labor and imposed a fine of $2,500.00. The trial court suspended the sentence and imposed the fine, as allowed by La. C.Cr.P. art. 893(C). This sentence was imposed consecutively to the sentence imposed on count I, and the defendant was placed on probation for five years with conditions that he pay the $2,500.00 fine, refrain from criminal conduct, find full-time employment, obtain a GED, and pay a monthly supervision fee. The trial court did **not** impose a term of imprisonment in lieu of the payment of the fine. While the majority opinion concludes that the defendant is currently indigent, there is no finding that during the period of his

probation he will be unable to find full-time employment, a condition of probation. Moreover, in a revocation proceeding based on the defendant's failure to pay a fine or restitution, the trial court must inquire into the reasons for failure to pay. *Bearden v. Georgia,* 461 U.S. 660, 672, 103 S.Ct. 2064, 2073, 76 L.Ed.2d 221 (1983); *State v. Burke*, 623 So. 2d 1360, 1363 (La. App. 5 Cir. 1993). If the defendant willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment. *Bearden*, 461 U.S. at 672, 103 S.Ct. at 2073. If the defendant cannot pay, yet has made bona fide efforts to acquire the means to do so, the court must consider alternative methods of punishment before revoking the probation and sentencing defendant to jail. *Bearden*, 461 U.S. at 672, 103 S.Ct. at 2073; *Burke*, 623 So. 2d at 1363.

Thus, I do not believe that the portion of the defendant's sentence as to count II that imposes the remainder of the suspended sentence if the defendant does not pay the fine and costs, but does **not** impose an additional term of imprisonment for nonpayment, should be deleted. See *State v. Huggins*, 2012-0735 (La. App. 1 Cir. 1/8/13), 2013 WL 85293 (unpublished).

In all other aspects of the opinion, I agree with the majority decision.