

STATE OF LOUISIANA

*

NO. 2001-KA-0263

VERSUS

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COURT OF APPEAL

JOSEPH FIRMIN

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 414-730, SECTION "J"
Honorable Leon Cannizzaro, Judge

Judge David S. Gorbaty

(Court composed of Judge Charles R. Jones, Judge Max N. Tobias, Jr.,
Judge David S. Gorbaty)

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AFFIRMED

Defendant Joseph Firmin appeals his sentence of ten years at hard labor, claiming that the trial court failed to inform him of the prescriptive period for filing an application for post-conviction relief, and that his sentence is excessive. For the following reasons, we affirm.

STATEMENT OF THE CASE:

Joseph Firmin was found guilty as charged of aggravated battery by a six-member jury on July 10, 2000. He was sentenced on October 18, 2000, to serve ten years at hard labor. Firmin's motion for reconsideration of sentence was denied, and his motion for an appeal was granted.

STATEMENT OF THE FACTS:

Joann Winston of 1724 Spain Street testified that about 4 a.m. on April 21, 2000, she and her husband, having just had an argument, were sitting on the front porch talking. She observed her next door neighbor, Freddie Desalle, walk toward his gate as Joseph Firmin, the defendant, came by picking up cans. Desalle asked him, "How you been," and "How is your wife." Firmin responded, "Why you always asking me about my wife?," and began walking toward Desalle. The men began to argue, and Firmin said, "A n - - - - r like you makes me want to kill." Desalle answered, "Oh,

man, I'm just asking you how you and your wife doing. I don't care F-ing-F nothing about her," to which Firmin responded, "You ain't got no business questioning me about my wife." At that point, Firmin raised his armed and pushed against Desalle who was standing just within his gate. Ms. Winston glimpsed Firmin closing a knife. Desalle closed the gate and said he was going to call 911, but as he turned toward his home, he called Ms. Winston's husband for help. Meanwhile, Ms. Winston heard another neighbor state that Desalle had been stabbed. Firmin walked away.

Mr. Ronald Winston, husband of Joann Winston, testified to the same facts as his wife. Additionally, he stated that after Firmin stabbed Desalle, Firmin said, "Well, damn, you done made me mess up my little pocket knife." Then Mr. Winston noticed the pocketknife with blood on it; the blade was about three inches long. He testified that Desalle threw a "car part" at Firmin, but it did not hit him. After Desalle fell, Mr. Winston walked over to him and saw that he was in a pool of blood and that his wound was very near the jugular vein. Mr. Winston identified a picture of the gate and walkway leading to Desalle's house, and noted the trail of blood.

Freddie Desalle, the fifty-nine year old victim, testified that he lived on Spain Street, and had known Joseph Firmin, whom he called "Mr. Joe," all his life. On the day in question, Desalle was returning home when he

noticed the defendant and spoke to him, asking about his wife. Firmin answered, "Ya'll must want my wife." Desalle denied the suggestion and walked toward his gate. Words were exchanged between the two men. As Desalle opened the pad lock on his gate, Firmin "punched" or "jugged" him. Desalle reached for a power steering box that was on the ground in the alley, and at that moment he became aware that he was bleeding. Desalle threw the power steering box at Firmin. He remembered very little of what happened after that, but he knew that the police arrived and that he was transported to the hospital. Desalle denied ever threatening Firmin. Under cross-examination, Desalle acknowledged he had a 1996 conviction for aggravated battery, and admitted that he had been drinking on the night he was stabbed.

Officer Neville Payne testified that he was called to the 1700 block of Spain Street on April 21, 2000. Upon arrival he found that the victim of an aggravated battery had been transported to the hospital. He learned the nickname, "Big Head Joe," but not the true name of the assailant. Two blocks from the site of the offense, the officer found Joseph Firman who was collecting cans. In a pat-down incident to arrest, Officer Payne found a knife stained with dried blood in Firmin's right front pocket.

Officer Nathan Penton testified that when he arrived in the 1700 block

of Spain Street, he found the victim and ascertained that an ambulance had been called. After learning the assailant's nickname and address, the officer proceeded to the 1400 block of Spain Street to speak to someone at his residence. Officer Penton then learned Firmin's name. At that time the officer heard via the radio that Officer Payne had detained the defendant nearby, and went to that site.

Officer Jeardine Daniels also testified to the same facts as Officers Payne and Penton. Additionally, she said that in order to complete the police report, she determined that the defendant was sober. She also reported that the victim appeared to be in pain while waiting for the ambulance.

Joseph Firmin, the sixty-year old defendant, testified that he has convictions for manslaughter, possession of a firearm by a convicted felon, and aggravated battery; he was released from jail on his last offense in 1987 and has had no offenses since that time. He receives a disability check and also collects cans to support himself. Firmin claimed he had not had a drink in eleven years. Firmin stated that he saw Freddie Desalle every day as he made his collections. On the morning in question, Firmin was making his rounds when he met Desalle and was asked about his wife. Firmin asked why Desalle was interested in his wife, and the conversation escalated until

finally Desalle said, “F__k you and your old lady and your maw too.” At that, Firmin started toward Desalle, who threw a brick and hit Firmin in the chest; Firmin then “jugged him” with his pocketknife. Firmin stated that he did not mean to kill Desalle who was “drunk as a skunk.” After the incident, Firmin went on with his collections.

DISCUSSION:

Firman labels his first complaint an error patent, arguing that the trial court failed to advise him of the prescriptive period for filing any applications for post-conviction relief under La. Code Crim. Proc. art. 930.8. However, this failure is not considered an error patent by this Court. Furthermore, the Louisiana Supreme Court has held that this article contains merely precatory language and does not bestow an enforceable right upon an individual defendant. *State ex rel. Glover v. State*, 93-2330, 94-2101, 94-2197, p. 21 (La. 9/5/95), 660 So.2d 1189, 1201.

In his next assignment of error, Firmin contends that the trial court imposed an unconstitutionally excessive sentence of ten years at hard labor. La. Rev. Stat. 14:34, the aggravated battery statute, requires imposition of a sentence -- with or without a fine and with or without hard labor -- for not more than ten years. Thus, Firmin received the maximum term of incarceration.

Article I, Section 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. A sentence is constitutionally excessive if it makes no measurable contribution to acceptable goals of punishment and is nothing more than the purposeless imposition of pain and suffering and is grossly out of proportion to the severity of the crime. *State v. Dorthey*, 623 So.2d 1276, 1280 (La. 1993). Because the trial court has broad discretion in imposing a sentence within statutory limits, a reviewing court can set it aside only if it is clearly excessive, rather than because another sentence might have been appropriate. *State v. Cook*, 95-2784, p. 3 (La. 5/31/96), 674 So.2d 957, 959.

In reviewing a claim of excessive sentence, the appellate court generally must determine whether the trial judge has adequately complied with statutory guidelines and that the sentence is warranted under the facts established by the record. *State v. Soco*, 441 So.2d 719 (La.1983). Because a sentence could be excessive even though it falls within the statutory limit, the trial court's statement regarding the factors considered under Article 894.1 of the Code of Criminal Procedure is an important aid in reviewing an alleged excessive sentence. *State v. Cann*, 471 So.2d 701, 703 (La. 1985).

Prior to sentencing in this case, the judge ordered a pre-sentencing investigatory report. At sentencing the judge noted that, according to the

report, Firmin had many prior felony offenses. The current offense in which the victim was stabbed in the upper chest near the neck could have proved very serious. The probation department did not recommend a suspended sentence or probation. Furthermore, the victim in this case reported that he was fearful of another attack if the defendant were not incarcerated.

The trial court addressed Firmin, saying:

You're sixty years old but it's very, very difficult to have any sympathy for you because your entire history of criminal activity has involved violence. The entire history has been violence. Aggravated battery, murder, guns, again, aggravated battery and a few thefts mixed in there. It just seems to me that you . . . did not try to do . . . the correct things. It is sometimes difficult to impose severe sentences on people at your age but I believe that if you are allowed to be returned back into society, you will commit another crime. I do believe you will commit another crime of violence. That is my opinion based upon the track record that I see here in this pre-sentence report.

The judge noted Firmin's serious criminal history and the fact that he was likely to commit another violent felony if not incarcerated. The judge's thoughtful review of the defendant's criminal history, when considered with the facts established in the record, provides this Court with a record of the considerations taken into account and an adequate factual basis for the sentence. La. Code Crim. Proc. art. 894.1 C. We find there was no justification for this offense that could have resulted in a very serious injury.

Furthermore, we do not find the challenged sentence to be excessive or grossly disproportionate to the seriousness of the crime under the circumstances established in the record. *See, State v. Williams*, 33,581 (La.App. 2 Cir. 6/21/00), 764 So.2d 1164, 1168; *State v. Johnson*, 30,078 (La.App. 2 Cir. 12/10/97), 704 So.2d 1269, 1275.

Given Firmin's history and the nature of the crime, we find no abuse of discretion in the sentence imposed by the trial court.

Accordingly, for reasons stated above, the conviction and sentence of Joseph Firmin are affirmed.

AFFIRMED