NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2001-KA-1994**
VERSUS	*	**COURT OF APPEAL**
GUY FRANK	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 417-061, SECTION "C"
Honorable Sharon K. Hunter, Judge
* * * * * *
Judge David S. Gorbaty
* * * * * *

(Court composed of Judge Michael E. Kirby, Judge Max N. Tobias, Jr., Judge David S. Gorbaty)

Harry F. Connick
District Attorney
Juliet Clark
Assistant District Attorney
619 South White Street
New Orleans, LA 70119
COUNSEL FOR PLAINTIFF/APPELLEE

Karen G. Arena

LOUISIANA APPELLATE PROJECT
PMB 181
9605 Jefferson Hwy., Suite I
River Ridge, LA 70123
COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

On September 29, 2000, the State charged Guy Frank with one count of theft of merchandise valued at over one hundred dollars but less than five hundred dollars, a violation of La. R.S. 14:67.10(2). Frank pled not guilty at his arraignment on October 4, 2000. On October 11, 2000, the trial court denied Frank's motion to suppress the evidence and found probable cause. On October 19, 2000, Frank withdrew his not guilty plea and entered a plea of guilty as charged. That same day, the trial court sentenced Frank to two years, and the State filed a multiple bill of information. The trial court adjudged Frank a fourth felony offender and on February 20, 2001 sentenced him to twenty-three years without benefit of probation or suspension of sentence. The defendant filed a motion to reconsider sentence, which the trial court denied.

FACTS

Because the defendant pled guilty and the case did not proceed to trial, a record of sworn facts is not available, nor is it necessary for the disposition of this appeal.

ERRORS PATENT

A review for errors patent on the face of the record reveals none.

ASSIGNMENT OF ERROR NUMBER ONE

In his first assignment of error, the defendant argues that his guilty plea was unknowingly and involuntarily entered.

The law requires that a guilty plea be free and voluntary on the part of the defendant. B*oykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). In order for there to be a knowing and voluntary waiver of constitutional rights in a guilty plea, the defendant must be informed of his privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers. *Id*.

At the time the defendant in this case entered his plea, La. C.Cr.P. art. 556.1 provided:

Plea of guilty or *nolo contendere* in a criminal case; duty of court

A. In any criminal case, the court shall not accept a plea of guilty or *nolo contendere*, without first addressing the defendant personally in open court and informing him of, and determining that he understands, all of the following:

(1) The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law.

(2) If the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if financially unable to employ counsel, one will be appointed to represent him.

(3) That he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at

that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself.

(4) That if he pleads guilty or *nolo contendere* there will not be a further trial of any kind, so that by pleading guilty or *nolo contendere* he waives the right to a trial.

B. In any criminal case, the court shall not accept a plea of guilty or *nolo contendere* without first addressing the defendant personally in open court and determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement, and that all constitutional and legal rights are knowingly and intelligently waived.

C. The court shall also inquire as to whether the defendant's willingness to plead guilty or *nolo contendere* results from prior discussions between the district attorney and the defendant or his attorney. If a plea agreement has been reached by the parties, the court, on the record, shall require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered.

D. A verbatim record shall be made of the proceedings at which the defendant enters a plea of guilty or *nolo contendere.*

E. In any case where a subsequent offense carries an enhanced penalty, the court shall inform the defendant of the penalties for subsequent offenses.

Where the record establishes that an accused was informed of and waived his rights to trial by jury, to confrontation, and against self-incrimination, the burden shifts to the accused to prove that despite this record, his guilty plea was involuntary. See *State ex rel. LaFleur v. Donnelly,* 416 So.2d 82 (La.1982).

The record in this case indicates the defendant pled guilty to theft of goods valued at over one hundred but less than five hundred dollars on October 19, 2000. The guilty plea transcript reveals that the defendant was represented by counsel, and that all of his *Boykin* rights were thoroughly

explained. The court interrogated the defendant to test his competency and to ensure that the plea was entered into knowingly and voluntarily. The judge verbally advised the defendant of the nature of the charges against him and his constitutional rights, more particularly the right to trial by judge or jury; the right to appeal; the right to confront and cross-examine the witnesses against him; and his privilege against self-incrimination now and at the time of the trial. The court also asked the defendant whether he was satisfied with the work and advice given by his attorney, as well as the manner in which the court handled his case. In response to these questions, the defendant answered, "Yes, ma'am." Further, the trial judge advised the defendant that La. R.S. 14:67.10(B)(2) provides for a penalty of zero to two years imprisonment. The defendant expressed a clear understanding of his rights, and acknowledged that the State would file a multiple bill, charging him as a fourth felony offender. He further understood that if he were adjudicated a fourth offender, he faced an enhanced sentence. The defendant admitted that he had not been threatened or coerced, nor given any promises in exchange for his plea. After his colloquy with the judge, the defendant said he wished to enter a plea of guilty. Under the foregoing facts, it appears the guilty plea was freely and voluntarily given.

Nevertheless, the defendant charges that his guilty plea was rendered

involuntary because the trial judge failed to follow the mandate of La.C.Cr. P. art. 556.1(E) when she incorrectly advised him that the maximum sentence he would receive if adjudicated a fourth felony offender would be twenty years, when in fact, for a non-violent fourth felony offender, La. R.S. 15:529.1A(c)(i) mandates a sentencing range of twenty years to life. The defendant also complains that the trial judge did not inform him that a sentence under the habitual offender law would be imposed without benefit of probation or suspension of sentence.

In *State v. Guzman*, 99-1753, 99-1528, (La.5/16/00), 769 So.2d 1158, the Supreme Court rejected a defendant's argument that a trial court's failure to comply with La.C.Cr.P. art. 556.1(E) prior to accepting a guilty plea is reversible error for the following reasons:

> First, unlike requirements (1)-(4) contained in La.C.Cr.P. art. 556.1(A) which the judge is directed to give prior to accepting a guilty plea, section (E) simply states that "[i]n any case where a subsequent offense carries an enhanced penalty, the court shall inform the defendant of the penalties for subsequent offenses." Therefore, advice regarding the penalties for subsequent offenses is not even required to be given before the plea is taken. Thus, in addition to the reasons stated below, under the plain language of La.C.Cr.P. art. 556.1, clearly the failure of a trial judge to advise the defendant of the penalties for subsequent offenses under La.C.Cr.P. art. 556.1(E) is not reversible error.
>
> Second, Louisiana's Code of Criminal Procedure contains its own harmless error provision. Article 921 provides that "[a] judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused." La.C.Cr.P. art. 921. "This article sets forth the basic concept of appellate review and is the primary legislative

> mandate governing appeals." La.C.Cr.P. art. 921, Official Revision Comment (a).
>
> There is no reason to find that the legislature did not intend for this article to apply to the trial judge's failure to inform defendant Guzman of the mandatory minimum sentences or the enhanced penalties for subsequent offenses. *This Court has never extended the core Boykin constitutional requirements to include advice with respect to sentencing. State v. Nuccio, 454 So.2d 93, 104 (La.1984) (holding that the scope of Boykin has not been expanded to include advising the defendant of the possible consequences of his actions or that his conviction may be used as a basis for the filing of a future multiple offender bill).* (Emphasis supplied; footnote omitted.)

769 So.2d at 1163-64.

In this case, the defendant was represented by counsel. He was advised of his constitutional rights by the judge. He acknowledged that he understood his rights, and that he was aware of, and accepted, the maximum sentencing exposure under La. R.S. 14:67.10(B)(2), prior to entering his plea. According to *Guzman*, the trial judge fulfilled her duties under La C.Cr.P. art. 556.1. Moreover, unlike *Guzman*, the trial judge in this case advised the defendant of the sentencing range for a fourth felony conviction, albeit incorrectly. Even so, her error is of no greater moment than the *Guzman* trial judge's silence as to enhanced penalties for subsequent offenses and would, therefore, like *Guzman*, be subject to the harmless error rule. To that end, this defendant's responses to the judge in the plea colloquy, as well as his acknowledgements in his waiver of rights form, clearly indicate the State made no promises as to sentencing, for the

predicate offense or for future convictions, in exchange for his guilty plea.

As to the defendant's argument concerning his being unaware that any enhanced sentence would necessarily be imposed without benefit of probation or suspension of sentence, his adjudication and resentencing as a fourth felony offender does not render his plea to the underlying offense invalid. The defendant did not plead guilty to the habitual offender bill of information, but rather to the underlying offense of theft of goods. In view of the fact the defendant's underlying sentence was neither probated nor suspended, he had to realize that the sentence for a subsequent offense would be no less stringent. This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER TWO

In a second assignment, the defendant complains his sentence of twenty-three years as a fourth offender is disproportionate to the severity of the crime, considering that the three predicate offenses upon which he was multiple billed are now defined as misdemeanors.

La. Const. art. I, § 20 explicitly prohibits excessive sentences; *State v. Guzman*, *supra*. Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. *State v. Brady*, 97-1095 (La.App. 4 Cir. 2/3/99), 727 So.2d 1264, *rehearing granted on other grounds*, (La.App. 4 Cir. 3/16/99); *State v.*

Francis, 96-2389 (La.App. 4 Cir. 4/15/98), 715 So.2d 457. However, the penalties provided by the legislature reflect the degree to which the criminal conduct is an affront to society. *State v. Baxley*, 94-2982 (La. 5/22/95), 656 So.2d 973, 979, citing *State v. Ryans*, 513 So.2d 386, 387 (La.App. 4 Cir.1987). A sentence is constitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, 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. Johnson*, 97-1906 (La.3/4/98), 709 So.2d 672, 677. 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. *Baxley*, 656 So.2d at 979; *State v. Washington*, 2000-1055 (La.App. 4 Cir. 7/18/01), 793 So.2d 376. The trial court has great discretion in sentencing within statutory limits. *State v. Trahan*, 425 So.2d 1222 (La.1983). A sentence should not be set aside as excessive in the absence of a manifest abuse of discretion. *State v. Washington*, 414 So.2d 313 (La.1982).

In reviewing a claim that a sentence is excessive, an appellate court generally must determine whether the trial judge has adequately complied with the statutory guidelines set forth in La.C.Cr.P. art. 894.1, and whether the sentence is warranted under the facts established by the record. *State v.*

Harris, 2000-1739 (La.App. 4 Cir. 4/18/01), 787 So.2d 420. If adequate compliance with La.C.Cr.P. art. 894.1 is found, the reviewing court must determine whether the sentence imposed is too severe in light of the particular defendant and the circumstances of the case, keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged. *State v. Robichaux*, 2000-1234 (La.App. 4 Cir. 3/14/01), 788 So.2d 458.

The articulation of the factual basis for a sentence is the goal of Art. 894.1, not rigid or mechanical compliance with its provisions. *State v. Major*, 96-1214 (La.App. 4 Cir. 3/4/98), 708 So.2d 813. Where the record clearly shows an adequate factual basis for the sentence imposed, resentencing is unnecessary even when there has not been full compliance with Art. 894.1. *State v. Lanclos*, 419 So.2d 475 (La.1982). The reviewing court shall not set aside a sentence for excessiveness if the record supports the sentence imposed. La.C.Cr.P. art. 881.4(D).

The transcript of the multiple bill hearing in this case reflects that the defendant was forty-six years old at the time of the instant offense. His arrest record dates back to 1975, indicating he was arrested on thirty-six separate occasions. His Interstate Identification Index report contained in the record reflects numerous periods of incarceration in the Department of

Corrections, including periods in which his release on good time parole supervision was revoked. In addition to numerous theft convictions, the defendant also has a conviction for possession of cocaine, for which he received a three-year sentence in 1992.

For twenty-five years the defendant has refused to conform his conduct to society's minimum expectations. The defendant's twenty-three year sentence as a fourth offender is near the bottom of the sentencing range of twenty years to life. The sentence is supported by the record, and is not excessive considering the defendant's lengthy criminal career. This assignment of error is without merit.

CONCLUSION

Accordingly, for the foregoing reasons, the defendant's conviction and sentence are affirmed.

AFFIRMED