NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-KA-0202**
VERSUS	*	**COURT OF APPEAL**
GEORGE TOBIAS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 416-860, SECTION "K"
HONORABLE ARTHUR HUNTER, JUDGE
* * * * * *
JUDGE MAX N. TOBIAS, JR.
* * * * * *

(COURT COMPOSED OF CHIEF JUDGE WILLIAM H. BYRNES III, JUDGE TERRI F. LOVE, AND JUDGE MAX N. TOBIAS, JR.)

HARRY F. CONNICK
DISTRICT ATTORNEY
JULIET CLARK
ASSISTANT DISTRICT ATTORNEY
619 SOUTH WHITE STREET
NEW ORLEANS, LA 70119
COUNSEL FOR PLAINTIFF/APPELLEE

SHERRY WATTERS
LOUISIANA APPELLATE PROJECT
P. O. BOX 58769

NEW ORLEANS, LA 70158-8769
COUNSEL FOR DEFENDANT/APPELLANT

CONVICTIONS AFFIRMED; SENTENCES AMENDED AND AS AMENDED, AFFIRMED.

STATEMENT OF CASE

On 21 August 2000, the defendant, George Tobias ("Tobias"), was charged by bill of information with four counts of armed robbery and two counts of attempted armed robbery, respectively violations of La. R.S. 14:64 and 14:(27)64. The defendant pleaded not guilty at his 27 September 2000 arraignment. On 15 February 2001, the defendant filed an oral motion for severance from his co-defendant, Christopher Causey, which the trial court granted. On that same date at the hearing on the defendant's motions, the trial court found no probable cause, granting the defendant's motions to suppress identification in the four armed robbery charges against him. On 21 June 2001, the State filed an oral motion for severance of two of the armed robbery charges against the defendant, which the trial court granted. On that same date a twelve-person jury found Tobias guilty of two counts of armed robbery and two counts of attempted armed robbery. On 5 November 2001, the defendant filed an oral motion for new trial, which the trial court denied. The defendant orally waived all delays and the trial court sentenced

him to serve 20 years for each armed robbery count, 20 years for one count of attempted armed robbery, and 10 years for the remaining attempted armed robbery count. All of the sentences were to be served concurrently with the defendant receiving credit for time served. On 14 November 2001, the defendant filed a motion to reconsider sentence and a notice of intent to take an appeal. On 26 November 2001, after a hearing on the defendant's motion to reconsider sentence, which the trial court granted, the trial court vacated its previous sentences in part and re-sentenced the defendant to 15 years on the two armed robbery charges and one of the attempted armed robbery charges. Again the sentences were to run concurrently, and the defendant received credit for time served.

On 17 July 2000, as Deegan McClung and Gabriel Valdez were walking up Seventh Street in New Orleans, a Ford Explorer sport utility vehicle approached them and a young man with dreadlocks got out of the passenger side of the vehicle with a gun in his hand. The man demanded that the couple kneel on the ground and give up their belongings. Mr. McClung complied, but Ms. Valdez remained standing. While on the ground Mr. McClung gave the man his wallet and his cell phone, but the man took nothing from Ms. Valdez. The New Orleans Police Department used Mr. McClung's cell phone records to develop the defendant as a

suspect. Some time later the police showed Mr. McClung and Ms. Valdez two separate photo line-ups from which Ms. Valdez identified the defendant; Mr. McClung was unable to identify anyone.

On 18 July 2000, Charles Smith, his wife, his daughter, Tiffany, and a neighbor were on the front porch of the Smith home when a van parked nearby and a young man exited the passenger side of the vehicle with a gun. The young man approached the group of people demanding that they "give it up." Mr. Smith quickly gave the man some cash from his shirt pocket hoping he would take the money and leave them quickly. The young man reacted just as Mr. Smith hoped, and returned to the vehicle he arrived in. When getting into the vehicle the group was able to get a look at both the passenger and the driver of the vehicle because of the overhead light inside of the vehicle. Once the men were gone Tiffany Smith entered her home to call the police and give them a partial license plate number of the vehicle. At the same time Mr. Smith got into his own vehicle to follow the men to get the remaining numbers of the license plate. However, Mr. Smith was unsuccessful in keeping up with the men in the van. Shortly after Mr. Smith returned to his home the police arrived to take Mr. Smith and his daughter, Tiffany, to a nearby Popeye's restaurant to identify two men apprehended in the store. The owner of the vehicle being driven by the two young men had

spotted his vehicle in the restaurant parking lot and called the police. On the scene at the restaurant Mr. Smith and his daughter identified the two men as the individuals who robbed them.

Tobias asserted that on the days of the robberies for which he was charged he spent the majority of his time at the home of a friend. Tobias also asserted that he left his friend's home on the evening of 18 July 2000 to play basketball. Once his basketball game was over he said he decided to visit a second friend and headed for the bus stop. While walking to the bus stop, the defendant claimed Christopher Causey approached him and offered him a ride. Tobias asserted he was in the vehicle driven by Mr. Causey very briefly. The two drove to a gas station and then decided to go to the Popeye's restaurant when the police arrived while the defendant was inside purchasing some food.

ERRORS PATENT

An error patent on the face of the record exists in the defendant's sentence. We discuss it in assignment of error number two.

ASSIGNMENT OF ERROR NUMBER 1

The defendant complains that the trial court erred in denying his motion for new trial where the record clearly shows that he received

ineffective assistance of counsel and was deprived of his right to compulsory process to subpoena witnesses favorable to his defense, specifically his co-defendant, Christopher Causey.

La. C.Cr.P. art. 851 provides in part:

> The motion for new trial is based on the supposition that an injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.

The decision on a motion for new trial rests within the sound discretion of the trial judge, and the judge's ruling will not be disturbed on appeal absent a clearing showing of abuse. The merits of such a motion must be viewed with extreme caution in the interest of preserving the finality of judgments. *State v. Dickerson,* 579 So.2d 472 (La. App. 3 Cir. 1991), modified on other grounds and affirmed, 584 So.2d 1140 (La. 1991).

This court in *State v. Jason,* 99-2551 (La. App. 4 Cir. 12/6/00), 779 So.2d 865, 871, citing *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984), stated that the claim of ineffective assistance of counsel is to be assessed by the two-part test of *Strickland.* The defendant must show that his counsel's performance was deficient and that the deficiency prejudiced him. Counsel's performance is ineffective when it can be shown that he made errors so serious that counsel was not functioning as the "counsel"

guaranteed to the defendant by the Sixth Amendment. *Jason,supra.* Counsel's deficient performance will have prejudiced the defendant if he can show that the errors were so serious as to deprive him of a fair trial. To carry this burden, the defendant "must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Jason, supra,* citing *Strickland, supra.*

At the hearing on the defendant's motion for new trial, the defendant's trial counsel, Willie Turk, testified that he spoke to the co-defendant, Christopher Causey, prior to the defendant's trial and asked Mr. Causey if he would be willing to testify on the defendant's behalf. Mr. Causey declined to testify. Additionally, Mr. Turk testified that he read the transcript of Mr. Causey's testimony at Causey's own trial, which was prior to the defendant's trial, and balanced the likelihood of Mr. Causey saying something that could harm the defendant against not using him as a witness; he chose not to use Mr. Causey as a witness. Mr. Turk further testified that he believed the transcript alone was insufficient without Mr. Causey's testimony to back it up.

The Louisiana Supreme Court in *State v. Brooks*, 505 So.2d 714, 724

(La. 1987), citing *Strickland, supra*, stated that hindsight is not the proper perspective for judging the competence of counsel's trial decisions. Neither may an attorney's level of representation be determined by whether a particular strategy is successful.

Mr. Causey testified in his own trial that Tobias was present during the armed robberies. Mr. Causey alleged two others, Danny and Debo, had forced him and the defendant into a van. Danny and Debo then forced Mr. Causey to commit armed robberies by threatening Tobias' life. Mr. Causey alleged that during the commission of the robberies Danny and Debo held Tobias at gunpoint in a van.

Contrariwise, Tobias testified that on the days of the alleged robberies he spent the majority of his time at the home of a friend playing cards and dominoes, and he left only to play a game of basketball. He further testified that after his basketball game he decided to take the bus to another friend's home. As he walked to the bus stop Mr. Causey stopped him asking if he wanted a ride and it was shortly after entering the vehicle that the police arrived arresting him and Mr. Causey at the Popeye's restaurant.

The defendant has failed to show how his trial counsel's decision not to present conflicting testimony was deficient, and how the deficiency prejudiced him. Additionally, the defendant has failed to show how the trial

court abused its discretion by denying the defendant's motion for new trial based on the defendant's claim of ineffective assistance of counsel.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 2

On appeal, the defendant also complains that the trial court erred in imposing an excessive sentence as to count four, attempted armed robbery, by mistakenly sentencing him to 15 years as if the conviction on that count was for armed robbery when only attempted armed robbery was alleged, proven, or found.

Tobias filed a motion for reconsideration of sentence that did not indicate of which of the four sentences he was complaining. We interpret his motion as being applicable to all four. Likewise, Tobias' counsel's oral argument to the trial court did not indicate that Tobias was complaining about any one individual sentence; he specifically complained about those for 20 years. The transcript from the trial court hearing similarly did not indicate which, if not all, of the sentences the trial court was ruling upon were being reduced to 15 years, or whether the trial court was increasing the sentence on the count for which he had been formerly sentenced to 10 years to 15 years. However, the minutes and sentencing order show that the trial

court reduced Tobias' sentence on the armed robbery charges to 15 years and to 15 years on one of the attempted armed robbery charges. The trial court did not adjust the 10-year sentence on the other armed robbery charge. Therefore, our review is only of the sentence of 15 years as it applied to count four, the conviction for attempted armed robbery.

Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. *State v. Sepulvado*, 367 So.2d 762 (La. 1979). A sentence is unconstitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the needless and purposeless imposition of pain and suffering and is grossly out of proportion to the severity of the crime. *State v. Labato*, 603 So.2d 739 (La. 1992).

Generally, a reviewing court must determine whether the trial judge adequately complied with the sentencing guidelines set forth in La. C.Cr.P. art. 894.1 and whether the sentence is warranted in light of the particular circumstances of the case. *State v. Soco*, 441 So.2d 719 (La. 1983).

If adequate compliance with article 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 his or her case, keeping in mind that maximum sentences should be reserved for the most egregious

violators of the offense so charged. *State v. Quebedeaux*, 424 So.2d 1009 (La. 1982).

The trial judge is given wide discretion in imposing a sentence, and a sentence imposed within the statutory limits will not be deemed excessive in the absence of manifest abuse of discretion. *State v. Walker,* 96-112 (La. App. 3 Cir. 6/5/96), 677 So.2d 532, 535, citing *State v. Howard,* 414 So.2d 1210 (La. 1982).

La. R.S. 14:64 provides in pertinent part:

> B. Whoever commits the crime of armed robbery shall be imprisoned at hard labor for not less than ten years and for not more than ninety-nine years, without benefit of parole, probation or suspension of sentence.

La. R.S. 14:27 provides in pertinent part:

> (C)(3) In all other cases he shall be fined or imprisoned or both, in the same manner as for the offense attempted; such fine or imprisonment shall not exceed one-half of the largest fine, or one-half of the longest term of imprisonment prescribed for the offense so attempted or both.

The sentencing range for an attempted armed robbery is a minimum of 5 years and a maximum of 49.5 years, all without benefit of parole, probation, or suspension of sentence. The defendant was sentenced to 15 years, which is on the lower end of the sentencing range allowed by statute. We do not read or understand the record to indicate, as the defendant now

argues, that the trial court may have believed the conviction on count four to be for armed robbery and not attempted armed robbery, even though the trial court imposed a 10-year sentence for the other attempted armed robbery count in this case. It should be noted that all of the defendant's sentences are to be served concurrently; effectively, no real prejudice is present if the trial court believed that the conviction was for armed robbery instead of attempted armed robbery. We find no abuse of discretion by the trial court's giving inconsistent sentences for different attempted armed robberies occurring at different times and involving different victims.

However, the defendant's sentences were illegally lenient due to the Louisiana Supreme Court's finding in *Sullivan v. Maggio,* 432 So.2d 854 (La. 1983), that a person adjudged guilty of attempted armed robbery must be imprisoned at hard labor without benefit of parole, probation, or suspension of sentence. The trial court in the instant case failed to sentence the defendant without noting that no benefits were available. Previously under *State v. Fraser*, 484 So.2d 122 (La. 1986), when a defendant alone appealed and the record contained a patent error favorable to him, an appellate court should ignore it unless the prosecution raised the issue at trial and sought appellate review. Now under *State v. Williams*, 2000-1725 (La. 11/28/01) 800 So.2d 790, the Louisiana Supreme Court has found that La.

R.S. 15:301.1(A) allows for the correction of an illegally lenient sentence without impediment to the defendant's right to appeal. The Court also found the correction does not increase the defendant's sentence; it merely puts the illegal sentence in conformity with the statutory requirements. In this context, we clarify that all of Tobias' sentences are to be served without the benefits of parole, probation, or suspension of sentence.

CONCLUSION

Considering the foregoing, the defendant's convictions are affirmed and his sentences on all counts are amended to include that they be served without benefit of parole, probation or suspension of sentence.

CONVICTIONS AFFIRMED; SENTENCES AMENDED AND AS AMENDED, AFFIRMED.