STATE OF LOUISIANA	*	**NO. 2002-KA-1282**
VERSUS	*	**COURT OF APPEAL**
DAVID M. RECTOR	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 397-763, SECTION "A"
HONORABLE CHARLES L. ELLOIE, JUDGE
* * * * * *
JAMES F. MCKAY III
JUDGE
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge James F. McKay III, Judge Max N. Tobias, Jr.)

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AFFIRMED

On May 6, 1998 the State filed a bill of information charging David M. Rector, also known as Gregory E. Fisher, with two counts of armed robbery, violations of La. R.S. 14:64. On May 21, 1998, he entered a plea of not guilty by reason of insanity. After a lunacy hearing on July 7, 1998, Rector was found to be sane and able to stand trial. On July 27, 1999, after being advised of his Boykin rights, Rector pleaded guilty as charged on each count. He was sentenced that same day to serve ten years at hard labor without benefit of parole, probation, or suspension of sentence on each of the two counts. The State filed a multiple bill charging Rector as a second offender, and the defendant filed a motion to quash the bill, which the trial court denied. The trial court found the defendant to be a second offender on October 30, 2000. On November 28, 2000, the trial court quashed the multiple bill, and the State objected and gave notice of its intent to file writs. This Court granted the State's writ and vacated the trial court's judgment quashing the multiple bill of information. State v. Rector, 2001-0407, unpub. (La. App. 4 Cir. 7/6/01). On October 31, 2001, Rector was sentenced as a second felony offender to serve forty-nine and one-half years at hard labor on each count; the terms are to be served concurrently. Rector

was granted an out-of-time appeal as to his multiple bill sentences on May 22, 2002.

Because there was no trial, no testimony is part of the record. The bill of information indicates that on February 26, 1998, while armed with a gun, the defendant robbed Terry Joseph of a Motorola radiofone, and on the same day while armed with a gun robbed Trenese Johnson of U.S. Currency and a 1996 Nissan 200SX. The arrest warrant reveals that when Ms. Joseph drove into her employer's parking lot, a man parked in the lot got out of a truck and robbed her at gunpoint of her cell phone; he also demanded the keys to her car. Then Ms. Johnson drove into the lot. Turning to her, the defendant pointed his gun and commanded her to get out of her car and give him the keys. She did so, and he drove away on Chef Menteur Highway. He was apprehended after allegedly committing a robbery in Natchez. The New Orleans detectives were able to get a picture of him and present it to the victims of the robberies here. Both identified him as the robber.

A review of the record for errors patent reveals that the trial court failed to impose the defendant's sentences for armed robbery without the benefits of probation, parole, or suspension of sentence. Paragraph A of La. R.S. 15:301.1 provides that in instances where the statutory restrictions are not recited at sentencing, they are included in the sentence given, regardless

of whether or not they are imposed by the sentencing court. See State v. Williams, 2000-1725 (La. 11/28/01), 800 So. 2d 790. Hence, this Court need take no action to correct the trial court's failure to specify that the sentences be served without benefit of parole, probation or suspension of sentence. The correction is statutorily effected. (La. R.S. 15:301.1A).

The defendant, through counsel, argues that (1) the sentences are excessive and (2) the defendant received ineffective assistance of counsel. In a pro se brief, Rector contends that (1) this court erred in overruling the district court's quashing of the multiple bill; (2) the trial court erred in finding it had no discretion in sentencing the appellant; (3) the sentences are excessive; and (4) he received ineffective assistance of counsel.

The defense counsel's first and the defendant's third assignments both concern the length of the sentence. In 1998, La. R.S. 14:64 provided for a sentencing range of five to ninety-nine years without benefits of parole, probation, or suspension of sentence. Rector, sentenced as a second offender under La. R.S. 15:529.1 and La. R.S. 14:64, faced a sentencing range of forty-nine and one-half years to one hundred ninety-eight years. Rector acknowledges he received the minimum sentence but avers that it is constitutionally excessive.

However, the first question is whether this issue is preserved for

appeal. At sentencing on October 31, 2001, the defense attorney did not object to the sentence, and no motion for reconsideration of sentence was filed. This court has held that failure to object to sentences as excessive at sentencing or to file a motion to reconsider the sentence precludes appellate review of the claim of excessiveness. State v. Robinson, 98-1606, p.9 (La. App. 4 Cir. 8/11/99), 744 So. 2d 119, 125; State v. Martin, 97-0319, p. 1 (La. App. 4 Cir. 10/1/97), 700 So. 2d 1322, 1323; State v. Green, 93-1432, pp. 5-6 (La. App. 4 Cir. 4/17/96), 673 So. 2d 262, 265; State v. Salone, 93-1635, p. 4 (La. App. 4 Cir. 12/28/94), 648 So. 2d 494, 495-96. Thus, this claim that the sentence is constitutionally excessive is not subject to review, by appeal or otherwise.

In defense counsel's second and defendant's pro se fourth assignment of error, both argue ineffective assistance of counsel in that the defense attorney at the sentencing hearing did not object or file a motion for reconsideration of sentence.

In State v. Rodriguez, 2000-0519 (La. App. 4 Cir. 2/14/01), 781 So. 2d 640, this Court considered a similar argument and set out the following standard:

> "As a general rule, claims of ineffective assistance of counsel are more properly raised by application for post conviction relief in the trial court where a full evidentiary hearing may be conducted if warranted." State v. Howard, 98-0064, p. 15 (La. 4/23/99), 751 So. 2d 783, 802, cert. denied,

Howard v. Louisiana, 528 U.S. 974, 120 S.Ct. 420, 145 L. Ed.2d 328 (1999). However, where the record is sufficient, the claims may be addressed on appeal. State v. Wessinger, 98-1234, p. 43 (La. 5/28/99), 736 So. 2d 162, 195, cert. denied, Wessinger v. Louisiana, 528 U. S. 1050, 120 S.Ct. 589, 145 L. Ed. 2d 489 (1999); State v. Bordes, 98-0086, p. 7 (La. App. 4 Cir. 6/16/99), 738 So. 2d 143, 147. Ineffective assistance of counsel claims are reviewed under the two-part test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 Led. 2d 674 (1984). State v. Brooks, 94-2438, p. 6 (La. 10/16/95), 661 So.2d 1333, 1337 (on rehearing); State v. Robinson, 98-1606, p. 10 (La. App. 4 Cir. 8/11/99), 744 So. 2d 119, 126. In order to prevail, the defendant must show both that: (1) counsel's performance was deficient; and (2) he was prejudiced by the deficiency. Brooks, supra; State v. Jackson, 97-2220, p. 8 (La. App. 4 Cir. 5/12/99), 733 So. 2d 736, 741. Counsel's performance is ineffective when it is shown that he made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland at 686, 104 S.Ct. at 2064; State v. Ash, 97-2061, p. 9 (La. App. 4 Cir. 2/10/99), 729 So. 2d 664, 669, writ denied, 99-0721 (La. 7/2/99), 747 So. 2d 15. Counsel's deficient performance will have prejudiced the defendant if he shows that the errors were so serious as to deprive him of a fair trial. To carry his burden, the defendant must show that there is a reasonable probability that, but for counsel's deficient performance the result of the proceeding would have been different; "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland at 694, 104 S.Ct. at 2068; State v. Guy, 97-1387, p. 7 (La. App. 4 Cir. 5/19/99), 737 So. 2d 231, 236, writ denied, 99-1982 (La. 1/7/00), 752 So. 2d 175.

Thus, to prevail on this claim defendant must show that there is a reasonable probability that, had defense counsel filed a motion to reconsider sentence and preserved the issue of excessiveness of sentence, this court would have found merit in the assignment of error.

La. Const. art. I, section 20 prohibits excessive sentences. State v. Baxley, 94-2982, p. 4, (La. 5/22/95), 656 So. 2d 973, 977. "'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,

p. 17 (La. App. 4 Cir. 2/3/99), 727 So. 2d 1264, 1272, rehearing granted on other grounds, (La. App. 4 Cir. 3/16/99) (quoting State v. Francis, 96-2389, p. 6 (La. App. 4 Cir. 4/15/98), 715 So. 2d 457, 461), writ denied, 98-2360 (La. 2/5/99), 737 So. 2d 741). However, the penalties provided by the legislature reflect the degree to which the criminal conduct is an affront to society. Baxley, 94-2984 at p. 10, 656 So. 2d at 979, citing State v. Ryans, 513 So. 2d 386, 387 (La. App. 4 Cir. 1987), writ denied, 516 So. 2d 366 (La. 1988). 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, pp. 6-7 (La. 3/4/98), 709 So. 2d 672, 676. "'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, 94-2984 at p. 9, 656 So. 2d at 979 (quoting State v. Lobato, 603 So. 2d 739, 751 (La. 1992)); State v. Hills, 98-0507, p. 5 (La. App. 4 Cir. 1/20/99), 727 So. 2d 1215, 1217.

In reviewing a claim that a sentence is excessive, an appellate court generally must determine whether the trial judge has adequately complied with statutory guidelines in La. C.Cr.P. art. 894.1, and whether the sentence is warranted under the facts established by the record. State v. Trepagnier, 97-2427, p. 11 (La. App. 4 Cir. 9/15/99), 744 So. 2d 181, 189; State v. Robinson, 98-1606, p. 12 (La. App. 4 Cir. 8/11/99), 744 So. 2d 119, 127. 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. Ross, 98-0283, p. 8 (La. App. 4 Cir. 9/8/99), 743 So. 2d 757, 762; State v. Bonicard, 98-0665, p. 3 (La. App. 4 Cir. 8/4/99), 752 So. 2d 184, 185, writ denied, 99-2632 (La. 3/17/00), 756 So. 2d 324.

However, in State v. Major, 96-1214 (La. App. 4 Cir. 3/4/98), 708 So. 2d 813, this court stated:

> The articulation of the factual basis for a sentence is the goal of Art. 894.1, not rigid or mechanical

> compliance with its provisions. 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). [Cite omitted].

In State v. Soraparu, 97-1027 (La. 10/13/97), 703 So. 2d 608, the Louisiana Supreme Court stated:

> On appellate review of sentence, the only relevant question is "'whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate.'" State v. Cook, 95-2784, p. 3 (La. 5/31/96), 674 So.2d 957, 959 (quoting State v. Humphrey, 445 So.2d 1155, 1165 (La.1984)), cert. denied, --- U.S. ---, 117 S.Ct. 615, 136 L.Ed.2d 539 (1996). For legal sentences imposed within the range provided by the legislature, a trial court abuses its discretion only when it contravenes the prohibition of excessive punishment in La. Const. art. I, § 20, i.e., when it imposes "punishment disproportionate to the offense." State v. Sepulvado, 367 So.2d 762, 767 (La.1979). In cases in which the trial court has left a less than fully articulated record indicating that it has considered not only aggravating circumstances but also factors militating for a less severe sentence, State v. Franks, 373 So.2d 1307, 1308 (La.1979), a remand for resentencing is appropriate only when "there appear[s] to be a substantial possibility that the defendant's complaints of an excessive sentence ha[ve] merit." State v. Wimberly, 414 So.2d 666, 672 (La.1982).

State v. Rodriguez, 2000-0519, pp. 9-12, 781 So. 2d at 647-649.

As noted above, the defendant received the minimum mandatory term. The trial court did not state any reasons when imposing the sentence. The defendant has a prior offense for possession of a stolen auto worth more than $500. He was also arrested for another robbery on the day after committing the two crimes at issue in this appeal. Thus, his criminal record consists of at least *four* offenses.

Considering defendant's record, and the fact that he received the lowest possible term, we do not find the defendant's sentence unconstitutionally excessive. Therefore, it cannot be said that defense counsel's failure to file a motion to reconsider sentence constituted ineffective assistance of counsel.

The defendant also argues that his attorney was ineffective in failing to file a brief in response to the writ application as ordered by this court on May 4, 2001. However, in considering the State's writ application, this court noted the defense counsel's argument that there was an unreasonable delay in adjudicating the defendant a multiple offender and for that reason the multiple bill was properly quashed. There is no merit in this assignment.

Finally, Rector complains that he had four different attorneys during his sentencing, and none was effective. However, Rector does not state his

counsel's mistakes or how his case was prejudiced by them. The assignment is without merit.

In his first pro se assignment of error, the defendant argues that this court erred in overruling the trial court's quashing of the multiple bill; however, the defendant's out-of-time appeal was granted only as to the sentencing. Thus, defendant's first issue is not properly before this court.

In his second pro se assignment of error, the defendant maintains that the trial court erred in finding it had no discretion in sentencing the defendant. The defendant notes that at the final sentencing on October 31, 2001, the court stated:

> "the Fourth Circuit is saying that there is a minimum Sentence [sic] now. I imagine that your people did not apply to the Louisiana Supreme Court to review the ruling of the Fourth Circuit back in July. So now you are here, and I have the unpleasant task of vacating the Sentence imposed on 7/29/99. . . .

The court then imposed the minimum sentence. The defendant also cites an earlier hearing at which the trial court stated that the multiple bill was quashed because "it's not my intent for him to serve 49 ½ years." The defendant is correct in that quote; however, the court continued, "We did a jury trial in this matter and I remember the circumstances of Mr. Rector's involvement in this." The defendant pleaded guilty in this matter, so obviously the court was confused as

to the circumstances of this case.

Because the Habitual Offender Law has been held constitutional, the minimum sentences it imposes upon multiple offenders are also presumed to be constitutional. State v. Johnson, 97-1906, pp. 5-6 (La. 3/4/98), 709 So. 2d 672, 675. A statutory sentence may be found constitutionally excessive only if it '"makes no measurable contribution to acceptable goals of punishment', or is nothing more than 'the purposeful imposition of pain and suffering' and is 'grossly out of proportion to the severity of the crime.'" Johnson at pp. 6-7, 709 So. 2d at 676, citing State v.Dorthey ,623 So. 2d 1276, 1280-81 (La. 1993). This Court has held that a trial court does not err in imposing the sentence mandated by statute where a defendant fails to demonstrate, with clear and convincing evidence, that he is an exception and should, therefore, receive less than the mandatory minimum sentence. State v. Finch, 97-2060, p. 13 (La. App. 4th Cir. 2/24/99), 730 So. 2d 1020, 1027.

Furthermore, the current convictions are for crimes of violence under La. R.S. 14:2(13). Hence, the defendant fits the profile of those the Habitual Offender Law was tailored to control. Rector, who is about forty-three years old, produced no evidence or argument of any mitigating circumstances, which would mandate a reduction of the sentence below the statutory minimum. Johnson, 97-1906 at p. 11, 709 So. 2d at 678. Under these facts,

the statutory minimum sentence of life imprisonment was not shown to be constitutionally excessive.

There is no merit in this assignment.

Accordingly, we affirm the trial court's judgment.

AFFIRMED