NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2003-KA-0151**
VERSUS	*	**COURT OF APPEAL**
WILTON M. EVERETT	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 416-421, SECTION "H"
HONORABLE CAMILLE BURAS, JUDGE
* * * * * *
JUDGE MAX N. TOBIAS, JR.
* * * * * *

(COURT COMPOSED OF CHIEF JUDGE WILLIAM H. BYRNES III, JUDGE MAX N. TOBIAS, JR., AND JUDGE LEON A. CANNIZZARO, JR.)

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CONVICTION AND SENTENCE AFFIRMED.

The defendant, Wilton Everett ("Everett"), was charged by bill of information on 29 August 2000 with attempted first-degree murder, a violation of La. R.S. 14:(27)30. Everett pleaded not guilty at his 1 September 2000, arraignment. On 7 May 2001, a twelve-person jury found Everett guilty of the lesser-included charge of attempted manslaughter. On 22 June 2001, Everett's motion for a new trial was denied; he waived sentencing delays and was sentenced to twenty years at hard labor in the Department of Corrections. On that same date, the state filed a multiple bill. On 18 June 2002, the court found Everett to be a second offender. On 15 November 2002, the trial court vacated its previous sentence, and Everett was re-sentenced to twenty years at hard labor as a second offender. The court granted Everett's appeal on 20 December 2002.

Lumas Garrett, a state commissioned police officer employed by Tulane University, testified that on 6 July 2000, as he patrolled the university campus, he observed Everett riding a bike with another bike in tow. Officer Garrett stopped Everett and asked for registration or a receipt of purchase for the bike in tow. When Everett failed to produce the

paperwork Officer Garrett took Everett into custody to further investigate the situation. Officer Garrett requested backup to conduct the investigation, and Officers Michael Jordy and Gay Mladenoff responded. Officers Jordy and Mladenoff escorted Everett to the campus Public Safety Office on foot while Officer Garrett investigated. Once in the Public Safety Office Everett agreed to give a written statement. Everett stated that he found the bike he was towing abandoned on Willow Street near a Goodwill collection box. Everett was placed in a holding cell. Officer Garrett checked the university's registrations and found that the bike Everett was riding belonged to a Tulane student. Everett was informed that the bike was stolen, and that he was under arrest for the theft.

As Officers Jordy and Garrett photographed the two bikes outside of the Public Safety Office, the officers observed Everett exit the building. When the officers ordered Everett to stop, he ran. The officers gave chase on foot. During the foot chase Officer Jordy fell to the ground, but Officer Garrett continued the pursuit. Officer Garrett followed Everett into a courtyard area behind one of the university buildings. Officer Garrett, with his gun drawn, ordered Everett to get on the ground several times and each time Everett refused. Officer Garrett testified that he holstered his gun and used baton and pepper spray in an attempt to apprehend Everett. Officer

Garrett testified that Everett ran towards him, and as they struggled he felt his gun being taken out of his holster. The weapon then discharged, hitting the officer in the leg.

ERRORS PATENT/ASSIGNMENT OF ERROR NUMBER 5

A review of the record reveals no errors patent.

ASSIGNMENT OF ERROR NUMBER 1

Everett complains that the trial court erred in adjudging him to be a second offender because the guilty plea form for the predicate offense does not indicate that he actually waived the rights outlined on the form.

In *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969), the United States Supreme Court emphasized three federal constitutional rights which are waived by a guilty plea: the privilege against self-incrimination; the right to trial by jury; and the right to confront one's accusers. The purpose of the *Boykin* rule is to ensure that the defendant had adequate information to plead guilty intelligently and voluntarily.

In *State v. Alexander*, 98-1377, pp. 5-6 (La. App. 4 Cir. 2/16/00), 753 So.2d 933, 937, this court set forth the standard of proof in multiple bill hearings: La. R.S. 15:529.1 D(1)(b) states that the district attorney has the burden of proving beyond a reasonable doubt any issue of fact and that the

presumption of regularity of judgment shall be sufficient to meet the original burden of proof. In *State v. Shelton*, 621 So.2d 769, 779-780 (La. 1993), the Supreme Court stated:

> If the defendant denies the allegations of the bill of information, the burden is on the State to prove the existence of the prior guilty pleas and that defendant was represented by counsel when they were taken. If the State meets this burden, the defendant has the burden to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. If the defendant is able to do this, then the burden of proving the constitutionality of the plea shifts to the State. The State will meet its burden of proof if it introduces a "perfect" transcript of the taking of the guilty plea, one which reflects a colloquy between judge and defendant wherein the defendant was informed of and specifically waived his right to trial by jury, his privilege against self-incrimination, and his right to confront his accusers. If the State introduces anything less than the "perfect" transcript, for example, a guilty plea form, a minute entry, and "imperfect" transcript, or any combination thereof, the judge then must weigh the evidence submitted by the defendant and by the State to determine whether the State has met its burden of proving that the defendant's prior guilty plea was informed and voluntary, and made with an articulated waiver of the three Boykin rights. (footnotes omitted).

In *State ex rel. Le Blanc v. Henderson*, 261 La. 315, 259 So. 2d 557 (1972), the court held that a determination of voluntariness of a guilty plea is

not limited by *Boykin* to the verbatim entry made at the time of the plea but rather is determined from the entire record, which can include evidence taken at a reconstruction of the plea proceedings at a hearing when the plea is later attacked. In *State v. Bland*, 419 So.2d 1227, 1232 (La. 1982), the Supreme Court stated that the state may affirmatively prove that a defendant was fully Boykinized by either the transcript of the plea of guilty or by the minute entry. "Most importantly, for our purposes, we have also held that the state has met its burden of proving a prior guilty plea in a habitual offender hearing where it submitted a very general minute entry, and a well executed plea of guilty form." *State v. Tucker*, 405 So.2d 506, 509 (La. 1981).

In the instant case, the state provided a plea of guilty form from the state of Mississippi, which outlines the rights waived by Everett. The form indicates that counsel represented Everett at the time the plea was made. The form was signed by defense counsel, Everett, and the judge. During his trial testimony Everett admitted he pled guilty to possession of cocaine in Pascagoula, Mississippi in 1989. Under *Shelton* the defendant has not shown the state failed to meet its burden of proving the validity of the prior guilty pleas. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 2

Everett complains that he received ineffective assistance from trial counsel. Specifically, Everett complains that his trial counsel failed to adequately prepare his case and that his trial counsel had a conflict of interest.

The Supreme Court in *State v. Brooks*, 505 So.2d 714, 724 (La. 1987), citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), 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.

This court in *State v. Jason*, 99-2551 (La. App. 4 Cir. 12/6/00), 779 So.2d 865, 871, citing *Strickland v. Washington, id.*, 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*, *id*. 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*, *id*, citing *Strickland*, *id*. Generally, the issue of ineffective assistance of counsel is a matter more properly addressed in an application for post-conviction relief filed in the trial court where a full evidentiary hearing can be conducted. Only if the record discloses sufficient evidence to rule on the merits of the claim do the interest of judicial economy justify consideration of the issues on appeal. *State v. Myers*, 97-2401 (La. App. 4 Cir. 12/6/00), 773 So.2d 884.

Everett alleges that his trial counsel failed to adequately prepare the case. The record before this court is not sufficient to review this portion of Everett's claim of ineffective assistance of counsel. Therefore, this court declines to review this portion of the assignment, preserving Everett's right to raise the issue by an application for post-conviction relief.

Everett further alleges that trial counsel, Kendal Green, was ineffective for representing him because he had filed a malpractice lawsuit against Mr. Green. At a hearing held on 21 March 2001, the trial court addressed Everett's lawsuit on the record. The following exchange occurred.

Mr. Green: Judge, just to make the record clear, I

> was contacted by the Civil District Court's Clerk's Office yesterday to say that Mr. Everett had filed a lawsuit against me and OIDP. So I asked him about it this morning, and he will tell you what happened.
>
> Court: Mr. Everett?
>
> Defendant: Yes. I had filed it before we had the motion hearing. I think it was two weeks ago. And I had filed so many motions I accidentally put in the wrong paper. I was trying to go to civil court with another lawsuit, and after I realized what I had done I wrote the court and asked the clerk to withdraw it.
>
> Court: So it's not an active lawsuit?
>
> Defendant: No. No. And I still want Mr. Green to represent me.
>
> Court: You still want Mr. Green to represent you?
>
> Defendant: Yes.

Everett refers to a lawsuit filed after the above-cited hearing and a few days before trial. It is not clear that the trial court had actual notice of the second lawsuit, but Everett indicated again at a hearing held on 7 May 2001, just prior to the start of his trial, that he was ready for trial with Mr. Green as counsel. Subsequent to the 7 May 2001 hearing, Everett filed a pro se motion for new trial on this same issue and cited his second malpractice lawsuit. The trial court addressed the issue of Mr. Green's representation and the second lawsuit at a 22 June 2001 hearing and Mr. Green was

promptly removed as counsel of record. Everett has failed to show or demonstrate how he was prejudiced by trial counsel's representation. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 3

Everett complains that his twenty-year sentence is excessive. The record on appeal does not indicate that Everett filed a motion to reconsider sentence. He alleges on appeal that his counsel was ineffective for failing to file one. Thus, the merits of the excessiveness argument must be addressed in order to determine if counsel was ineffective.

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 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. 14:27 provides in pertinent part:

> A. Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose.
>
> * * *
>
> D. Whoever attempts to commit any crime shall be punished as follows:
>
> * * *
>
> (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.

La. R.S. 14:31 provides:

> A. Manslaughter is:
> (1) A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed; or
> (2) A homicide committed, without any intent to cause death or great bodily harm.
> (a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Article 30 or 30.1, or of any intentional misdemeanor directly affecting the person; or
> (b) When the offender is resisting lawful arrest by means, or in a manner, not inherently dangerous, and the circumstances are such that the killing would not be murder under Article 30 or 30.1.
>
> B. Whoever commits manslaughter shall be imprisoned at hard labor for not more than forty years. However, if the victim was killed as a result of receiving a battery and was under the age of ten years, the offender shall be imprisoned at hard labor, without benefit of probation or suspension of sentence, for not less than ten years nor more than forty years.

In *State v. Boyd*, 95-1248 (La. App. 4 Cir. 8/28/96), 681 So.2d 396, this court found that a twenty-year sentence was not excessive for a defendant who was convicted of attempted manslaughter as a first offender.

In the instant case, Everett argues that his twenty-year sentence as a first offender was excessive. However, the court subsequently vacated this sentence and re-sentenced the defendant to twenty years as a second offender, one-half of the maximum sentence he could have received. In light of *Boyd*, we do not find that this sentence is excessive. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 4

Everett complains that the evidence was insufficient to support his conviction for attempted manslaughter.

The standard for reviewing a claim of insufficient evidence is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found all of the essential elements of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979). The reviewing court is to consider the record as a whole, and not just evidence most favorable to the

prosecution; and if rational triers of fact could disagree as to the interpretation of the evidence, the rational decision to convict should be upheld. *State v. Mussall*, 523 So.2d 1305 (La. 1988). Additionally, the reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. *Id*. The trier of fact's determination of credibility is not to be disturbed on appeal absent an abuse of discretion. *State v. Cashen*, 544 So.2d 1268 (La. App. 4 Cir. 1989).

When circumstantial evidence forms the basis for the conviction, such evidence must exclude every reasonable hypothesis of innocence. La. R.S. 15:438. The court does not determine whether another possible hypothesis suggested by the defendant could afford an exculpatory explanation of the events. Rather, this court when evaluating the evidence in the light most favorable to the prosecution, must determine whether the possible alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt under *Jackson*. *State v. Davis*, 92-1623 (La. 5/23/94), 637 So.2d 1012. This is not a separate test from *Jackson*, but is instead, an evidentiary guideline for the jury when considering circumstantial evidence, and this test facilitates appellate review of whether a rational juror could have found the defendant guilty beyond a

reasonable doubt. *State v. Wright*, 445 So.2d 1198 (La. 1984).

To obtain a conviction for attempted manslaughter, the state must prove beyond a reasonable doubt that the defendant possessed the specific intent to kill, a finding which is not necessary to support a manslaughter conviction. *State v. Dubroc*, 99-730 (La. App. 3 Cir. 12/15/99), 755 So.2d 297. Specific intent is a state of mind that need not be proven as fact but may be inferred from circumstances and the actions of the defendant. *State v. Bailey*, 2000-1398 (La. App. 5 Cir. 2/14/01), 782 So.2d 22.

As we quoted above La. R.S. 14:27A provides:

> Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose.

Officer Garrett testified at trial that he pursued Everett on foot as he tried to escape by running away. When Everett stopped running and refused to get on the ground Officer Garrett drew his gun and ordered Everett to get on the ground, but he refused. At that point Officer Garrett holstered his gun and attempted to apprehend Everett with his pepper spray and baton. It was during this attempted apprehension that Everett charged at Officer Garrett and removed Officer Garrett's weapon from the holster. Officer Garrett and

Everett struggled, and Officer Garrett was shot. Everett concedes that Officer Garrett did in fact give that testimony, but he argues that the testimony was unbelievable. The jury as the trier of fact found Officer Garrett's testimony to be truthful. The trier of fact's determination of credibility is not to be disturbed on appeal absent an abuse of discretion. *State v. Cashen*, 544 So.2d 1268 (La. App. 4 Cir. 1989). Therefore, the jury found that Everett satisfied the requisite elements of the crime when he charged Officer Garrett, removed the officer's weapon, and shot the officer. The evidence was sufficient to support Everett's conviction. This assignment of error is without merit.

CONCLUSION

For the foregoing reasons, Everett's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.