NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2007-KA-0348**
VERSUS	*	**COURT OF APPEAL**
TERRY MCELVEEN	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 434-834, SECTION "J"
Honorable Darryl A. Derbigny, Judge

* * * * * *

Charles R. Jones
Judge

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(Court composed of Judge Charles R. Jones, Judge James F. McKay III, and Judge Roland L. Belsome)

BELSOME, J., CONCURS IN THE RESULTS

Eddie J. Jordan, Jr., District Attorney
Alyson Graugnard, Assistant District Attorney
1340 Poydras Street, Suite 700
New Orleans, LA 70112-1221

COUNSEL FOR PLAINTIFF/APPELLEE

Sherry Watters
LOUISIANA APPELLATE PROJECT
P. O. Box 58769
New Orleans, LA 70158-8769

COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

The Appellant, Terry McElveen, appeals his sentence to thirty years at hard labor without benefits. We affirm.

On November 19, 2002, the State charged Terry McElveen with three counts of armed robbery, one count of first degree robbery, and one count of simple burglary of an inhabited dwelling.[1] At his arraignment on February 21, 2003, he pled not guilty to all counts. The court reset the matter several times for motion hearings because of changes in counsel, and on March 22, 2004, the court ordered a lunacy commission. This matter was reset several times due to either the absence of counsel or the defendant (he was in jail but not transported to court). On September 2, 2004, the court found McElveen competent to proceed. The court again reset the matter several times for a status hearing, with various counsel, possibly all from O.I.D.P., appearing with McElveen, and on March 16, 2006, the court held a preliminary hearing as to two of the armed robbery counts. The court found probable cause to hold McElveen for trial. On July 18, 2006, the State elected to try McElveen on count four only, one of the armed robbery counts. At

[1] His brother, Thatcher McElveen, was charged in the same bill with two counts of armed robbery and one count of first degree robbery. He has not yet gone to trial on any of these counts and is not a party to this appeal.

the conclusion of trial, a twelve-person jury found McElveen guilty as charged. The court ordered a pre-sentence investigation and reset the matter for sentencing.

On December 13, 2006, the court sentenced McElveen to serve thirty years at hard labor without benefit of parole, probation, or suspension of sentence. The court also denied his oral motion for reconsideration of sentence and granted his oral motion for appeal; his counsel filed formal written motions the next day.[2]

FACTS

Sometime after 11:00 p.m. on July 22, 2002, Leetta Austin left her job at a downtown hotel and boarded a bus for her home uptown. When she got off the bus at the corner of Magazine Street and Washington Avenue, she noticed a young man also exit the bus and walk to a gas station on the corner. Ms. Austin testified that she began walking down Washington Avenue toward her house on Annunciation Street, and as she crossed Constance Street, the man who had exited the bus with her walked past her and told her goodnight. She returned the greeting, and she watched the man turn at Laurel Street and walk out of sight. Ms. Austin testified that she continued walking down Washington Avenue, and when she was in the next block, passing by a vacant lot, the same man jumped out at her from behind a tree. Ms. Austin stated that the man, who then had a red bandana around the bottom of his face, put a gun to her head and told her to give him her pocketbook, which she was carrying on her back. Ms. Austin testified that she refused, and she noticed a car driving toward them. She stated that the man grabbed her pocketbook off of her shoulder, pushed her to the ground, and ran down Laurel Street.

[2] New counsel has enrolled in the district court in connection with the remaining counts. These counts are still viable, as a motion hearing with respect to counts one and two (those he shares with his brother) was set for June 18,

Ms. Austin testified that she got up and began walking toward her house. She stated that she flagged down a passing police car to report the robbery, and other police officers later came to her house to interview her. She stated that the officers took her to the police station, where she assisted in making a composite sketch of the robber. She stated that some days afterward, the police showed her various photographic lineups, and from the third lineup she viewed she chose the photo of the defendant, Terry McElveen, whom she testified she had not seen prior to the robbery. Ms. Austin also identified McElveen in court as the man who robbed her on Washington Avenue. She denied telling the police that the assailant was wearing a blue scarf.

Det. John Hartman testified that he investigated the robbery. He testified that the police used the composite sketch to find suspects, and several photographic lineups were shown to Ms. Austin. Det. Hartman testified that Ms. Austin did not identify anyone from the first two lineups, but she positively identified McElveen from the third lineup. Det. Hartman testified that at the time of the robbery, McElveen lived in the 700 block of Fourth Street, which is only a few blocks from the scene of the robbery. He also testified that he did not remember if Ms. Austin told him or any other officers that the robber was wearing a blue scarf.

Roy Allen testified that he worked in the Clerk's Office property room. He testified that the evidence in this case, which consisted of only three manila folders with photographs, had been stored in a file cabinet in the property room prior to Hurricane Katrina. He stated that the property room was inundated with six feet of

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2007. Both McElveen brothers are also charged in case 464-604J with one count of first degree murder. Neither McElveen has yet gone to trial in that case.

water during the storm. Mr. Allen testified that the evidence from the file cabinet had been taken away to be cleaned, and it was not available in time for trial.

A review of the record reveals no patent errors.

By his sole assignment of error, McElveen contends that the district court imposed an excessive sentence.

The sentence for armed robbery is not less than ten nor more than ninety-nine years at hard labor without benefit of parole, probation, or suspension of sentence. The court imposed a sentence of thirty years at hard labor without benefits.

In *State v. Smith*, 2001-2574, p. 6-7 (La. 1/14/03), 839 So.2d 1, 4, the Court set forth the standard for evaluating a claim of excessive sentence:

> Louisiana Constitution of 1974, art. I, § 20 provides, in pertinent part, that "[n]o *law* shall subject any person to ··· *excessive*··· *punishment.*" (Emphasis added.) Although a sentence is within statutory limits, it can be reviewed for constitutional excessiveness. *State v. Sepulvado*, 367 So.2d 762, 767 (La.1979). A sentence is unconstitutionally excessive when it imposes punishment grossly disproportionate to the severity of the offense or constitutes nothing more than needless infliction of pain and suffering. *State v. Bonanno*, 384 So.2d 355, 357 (La.1980). A trial judge has broad discretion when imposing a sentence and a reviewing court may not set a sentence aside absent a manifest abuse of discretion. *State v. Cann*, 471 So.2d 701, 703 (La.1985). On appellate review of a sentence, the relevant question is not whether another sentence might have been more appropriate but whether the trial court abused its broad sentencing discretion. *State v. Walker*, 00-3200, p. 2 (La.10/12/01), 799 So.2d 461, 462; *cf. State v. Phillips*, 02-0737, p. 1 (La.11/15/02), 831 So.2d 905, 906.

See also *State v. Johnson*, 97-1906 (La. 3/4/98), 709 So. 2d 672; *State v. Baxley*, 94-2982 (La. 5/22/96), 656 So. 2d 973; *State v. Batiste*, 2006-0875 (La. App. 4 Cir.

12/20/06), 947 So. 2d 810; *State v. Landry*, 2003-1671 (La. App. 4 Cir. 3/31/04), 871 So. 2d 1235.

In *Batiste*, at p. 18, 947 So. 2d at 820, this court further explained:

> An appellate court reviewing a claim of excessive sentence must determine whether the trial court adequately complied with the statutory guidelines in La. C.Cr.P. art. 894.1, as well as whether the facts of the case warrant the sentence imposed. *State v. Landry*, *supra*; *State v. Trepagnier*, 97-2427 (La. App. 4 Cir. 9/15/99), 744 So.2d 181. However, as noted in *State v. Major*, 96-1214, p. 10 (La. App. 4 Cir. 3/4/98), 708 So.2d 813:
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> > 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).
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> If the reviewing court finds adequate compliance with art. 894.1, it must then determine whether the sentence the trial court imposed is too severe in light of the particular defendant as well as 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. Landry*, 2003-1671 at p. 8, 871 So.2d at 1239. See also *State v. Bonicard*, 98-0665 (La. App. 4 Cir. 8/4/99), 752 So.2d 184.

Here, the district court adequately complied with La. C.Cr.P. art. 894.1. Besides mentioning the aggravating factors of art. 894.1, the court also referred to the pre-sentence investigation report, which is contained in the appeal record. And, although McElveen refused to be interviewed for the report and the victim could not be found at the time the report was compiled (she had moved to Houston), the report listed in detail the multitude of the McElveen's juvenile

arrests and adjudications. And, while some of these offenses were relatively minor, they did include property crimes.

The PSI listed arrests for ten offenses between 1998 and 1999. As an adult in 2001, McElveen had arrests for possession of stolen property, driving without a license, reckless operation of a vehicle, and unauthorized use of a vehicle. At the time of sentencing, he had no prior adult convictions, but he had pending charges for one count of first degree murder, one count of simple battery, two counts of armed robbery, one count of first degree robbery, one count of simple criminal damage to property valued under $500, and one count of simple burglary of an inhabited dwelling. In addition, the court noted that the victim in this case was elderly and sustained minor injuries (she had skinned knees).

McElveen's sentence is not excessive when compared to other armed robbery sentences upheld by this court and the Supreme Court. Indeed, in *State v. Smith*, 2001-2574, at p. 7, 839 So. 2d at 4, the Court noted that the defendant's *forty-year* sentence was "within the thirty-five to fifty-year range this Court has found acceptable for first offenders convicted of armed robbery. *State v. Thomas,* 98-1144, p. 2 (La.10/9/98), 719 So.2d 49, 50; *State v. Augustine,* 555 So.2d 1331, 1332 (La.1990) and the cases cited therein." Likewise, in *State v. Wix*, 2002-1493 (La. App. 4 Cir. 1/15/03), 838 So. 2d 41, this court upheld two thirty-seven-year sentences for two counts of armed robbery. As here, the defendant accosted the victims on the street, brandished a gun, and robbed them.

Here, McElveen argues that his thirty-year sentence is excessive because he was only eighteen at the time of the offense, and this conviction was his first felony conviction as an adult. However, he had a significant number of juvenile

arrests and adjudications, and he still has pending charges as an adult for armed robbery, first degree robbery, first degree murder, simple battery, simple burglary of an inhabited dwelling, and criminal damage to property. McElveen argues that his sentence cannot stand because the court mistakenly stated that the victim begged for her life, while her testimony showed that she initially refused to give McElveen her pocketbook. Nonetheless, the record reveals that McElveen put a gun to the elderly victim's head and demanded her pocketbook. When a car approached, he forcefully took the pocketbook from her shoulder and pushed her to the ground, injuring her knees. Given these circumstances and McElveen's past and pending criminal charges, his thirty-year sentence is not excessive, a sentence which is less than one third the maximum sentence he could have received. This assignment of error has no merit.

DECREE

Accordingly, we affirm Terry McElveen's conviction and sentence.

AFFIRMED