NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2007-KA-0852**
VERSUS	*	**COURT OF APPEAL**
HORACE HICKS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 467-701, SECTION "J"
Honorable Darryl A. Derbigny, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Edwin A. Lombard, and Judge Roland L. Belsome)

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DECEMBER 19, 2007

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AFFIRMED

Appellant, Horace Hicks appeals the judgment of the district court denying his Motion to Reconsider Sentence. For the reasons stated herein, we affirm.

On November 29, 2006, the State charged Hicks with one count of simple burglary. At his arraignment on January 19, 2007, he pled not guilty. On April 10, a six-person jury found him guilty of unauthorized entry of a place of business. The court sentenced Hicks on April 18 to serve four years at hard labor. The court denied his motion to reconsider sentence and this appeal follows.

Facts

At approximately 2:00 a.m. on October 6, 2006, Ryan Lucas was packing for a trip when he heard his and the neighborhood dogs barking. He looked out his window and saw a man in a dark shirt and khaki pants kicking and hitting the door to the shop across the street from Lucas' house. Lucas testified that the man, whose face he did not see, picked up an object from the ground and threw it at the glass on the door, breaking the glass. Lucas called 911 and then looked back out the window. He saw that the man had not entered the shop, but instead he had walked down the street and out of sight. Lucas testified that soon thereafter the dogs began barking again, and he looked out and saw a man wearing a dark shirt

and khaki pants walking toward the shop from the opposite direction that he saw the man walk away from the shop. Lucas testified that the man opened the door and entered the shop. Lucas called 911 again at that point. Lucas testified that the person who entered the shop looked like the same person who had broken the door's window.

On cross-examination, Lucas testified that he did not know Hicks, but he had seen him in the neighborhood prior to the break-in. Lucas testified that he later learned that Hicks had worked for his father and that Hicks' wife worked in the shop that he had seen the man enter. He testified that he believed that the man he saw break the window was the same one who entered, and he theorized that the man must have walked around the block to approach the shop from the opposite direction. On redirect examination, he insisted that the man he saw break the window was wearing the same clothes and was the same height and weight as the man who entered the shop. He testified that the clothing worn by Hicks in a photograph taken at his arrest matched the clothing worn by the man who broke the window and the man who entered the shop.

Noliska Calloway, a 911 operator for the New Orleans Police Department, testified that the police received two 911 calls with respect to the entry into the shop, one received at 2:28 a.m. and another at 2:41. She testified that the only description given was a clothing description. After Ms. Calloway's testimony, the State played a tape of the 911 call.

Off. Terrance Clark testified that he responded to the call of the burglary at 800 Brooklyn Avenue, the House of the Seven Sisters. He testified that another officer, Off. Corey Clark, pulled up soon after he did. Off. Terrance Clark testified that he looked through the open door of the shop and saw a man inside whose

clothing fit the description he had been given. He ordered the man to exit, Hicks complied. He stated that Hicks was not carrying anything when he came out of the shop. He testified that the other officer handcuffed Hicks and placed him into one of the police cars. The two officers then entered the shop, where they found a lot of broken glass on the floor, but not much appeared to have been disturbed. He testified that they found no one else inside the shop. He positively identified Hicks as the man whom he saw inside the shop and who walked out at his command.

On cross-examination, Off. Clark testified that the shop's owner soon arrived and indicated that nothing had been taken from the shop. He testified that he did not see merchandize stacked up like it was being readied to be taken, and the cash register appeared to be intact. He stated that Hicks gave the officers his name and the address of his residence, which was nearby. He stated that Hicks then told him that he knew the owner and had gone by the shop to check on it. Hicks also told the officer that his wife worked for the owner of the shop, and he pointed toward the owner's nearby residence. On redirect, Off. Clark testified that the owner told the officers that she had not given Hicks permission to be in the shop.

Off. Corey Clark testified that he arrived on the scene just after Terrance Clark arrived, and he saw that the windows in the shop's door were broken. He testified that he saw a man he identified as Hicks come out of the shop at the officers' order. He testified that he handcuffed Hicks and advised him of his rights. He testified that he placed Hicks in one of the police cars, and then he and the other officer entered the shop. He testified that the cash register was on the floor, but it did not appear that anything else was out of place. He testified that he went to the owner's residence and took her back to the shop. He stated that the

owner told him that Hicks was her housekeeper's husband and that she had not given him permission to enter the store.

Kathy Smith testified that she owned the House of the Seven Sisters, which she classified as a museum. She testified that the operating hours of the business were 11:00 to 6:00; she denied that the business was ever open at 2:00 a.m. Ms. Smith stated that Hicks' wife was her housekeeper and that his wife sometimes cleaned the business, but she always did it during business hours and did not have a key to the business. Ms. Smith testified that Hicks did not have permission to be in the shop. She also testified that Hicks was not even allowed to walk his wife to work because of past "characteristics in the neighborhood." Because of this, she did not even want Hicks to enter her business. Ms. Smith testified that when she arrived at the shop, she noticed that the glass in the door was broken, the cash register had been disturbed, and brass cups holding pens had been knocked over onto the floor. Because of the varied inventory of the shop, she could not tell if anything had been taken.

Errors Patent

A review of the record reveals no patent errors.[1]

Hicks' Assignment of Error

By his sole assignment of error, Hicks contends that his sentence is excessive because the trial court did not give any reasons for the sentence it imposed. The court sentenced Hicks to serve four years at hard labor. The

[1] Although the record does not contain the minute entry of sentencing, it contains the docket master that contains the entry of sentencing. In addition, the record contains the sentencing transcript.

maximum sentence the court could have imposed was six years at hard labor. La. R.S. 14:62.4[2].

In State v. Smith, 2001-2574, p. 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. 5/22/95), 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

[2] A. Unauthorized entry of a place of business is the intentional entry by a person without authority into any structure or onto any premises, belonging to another, that is completely enclosed by any type of physical barrier that is at least six feet in height and used in whole or in part as a place of business. B. Whoever commits the crime of unauthorized entry of a place of business shall be fined not more than one thousand dollars or imprisoned with or without hard labor for not more than six years, or both.

> 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, Hicks maintains that his sentence must be vacated because the trial court did not give any reasons for the sentence it imposed. In his motion to reconsider sentence and on appeal he argues that the court should have ordered a presentence investigation report prior to sentencing to discover any mitigating evidence. However, although La. C.Cr.P. art. 875 authorizes a trial court to order a presentence investigation report, a defendant does not have the right to demand one. See State v. Bell, 377 So. 2d 275 (La. 1979); State v. Hollins, 2007-0014 (La. App. 4 Cir. 7/25/07), ___ So. 2d ___, 2007 WL 21773312. In both Hollins and State v. Allen, 2003-2156 (La. App. 4 Cir. 5/19/04), 876 So. 2d 122, this court found no error in the trial court's failure to order a presentence investigation where

the defendant did not request one prior to sentencing or object to its absence at sentencing. Here, not only is there no indication that the appellant requested a presentence investigation, but at sentencing, when the trial court questioned why it did not order one, defense counsel noted that it was because the appellant was not eligible for probation. Thus, there was no error in the trial court's failure to order a presentence investigation.

With respect to the court's failure to give reasons for the sentence it imposed, such failure is not fatal to the legitimacy of the sentence because the record supports the sentence imposed. Although the appellant alleges that the court could not remember the facts of the case because it did not remember what verdict the jury returned, the sentencing transcript indicates that the court remembered that the jury returned a responsive verdict and merely asked to be reminded what the verdict was that the jury returned. This question does not prove that the court could not remember the facts of the case. In addition, both defense counsel and the prosecutor set forth the appellant's prior convictions: convictions in 2004 and 2003 for possession of drug paraphernalia, a simple burglary conviction from 1999, a 1993 conviction for resisting arrest, and a 1983 conviction for forgery. The defense presented no mitigating evidence at the hearing, nor does counsel on appeal specify what, if any, mitigating factors the court could have considered. Given the facts that the judge presided over trial and was apprised of the appellant's prior record, both by the State and by defense counsel, it cannot be said that the court was unaware of the factors it needed to consider for sentencing, factors that can be gleaned from the record. The appellant's argument has no merit.

The appellant makes no specific argument as to the term of years he received, but a comparison of similar cases shows that the sentence is not excessive. In State v. Adger, 35,111 (La. App. 2 Cir. 9/26/01), 797 So. 2d 146, the court upheld a five-year sentence for a violation of La. R.S. 14:62.4. Although sentenced as a first offender, the defendant had several prior convictions, including a parole violation arising out of a murder case from Missouri. In State v. Vogel, 524 So. 2d 896 (La. App. 3 Cir. 1988), the defendant was sentenced to serve three years at hard labor for a violation of La. R.S. 14:62.4. The defendant had no prior adult convictions, but he had juvenile adjudications for simple burglary and illegal possession of stolen property. The court upheld the sentence, noting the prior adjudications and the determination by the probation office that he had been a poor probation performer.

Here, the appellant was originally charged with simple burglary, for which he faced a possible twelve-year sentence if convicted. The jury found him guilty of the responsive verdict of unauthorized entry of a place of business, for which the maximum sentence was six years. As in Adger, the appellant has several prior convictions. Given these circumstances, it does not appear that the trial court abused its discretion by imposing a four-year sentence in this case. This claim has no merit.

Decree

For the reasons stated herein we affirm Horace Hick's conviction and sentence.

AFFIRMED