**NOT DESIGNATED FOR PUBLICATION**

| | | |
|---|---|---|
| **STATE OF LOUISIANA** | * | **NO. 2008-KA-0534** |
| **VERSUS** | * | **COURT OF APPEAL** |
| **WILBERT VAN BUREN** | * | **FOURTH CIRCUIT** |
| | * | **STATE OF LOUISIANA** |

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 469-335, SECTION "F"
Honorable Dennis J. Waldron, Judge
* * * * * *
**Judge Patricia Rivet Murray**
* * * * * *

(Court composed of Judge Patricia Rivet Murray, Judge Michael E. Kirby, Judge Paul A. Bonin)

Robert L. Freeman, Jr.
District Attorney
David S. Pipes, Jr.
Assistant District Attorney
Parish of Orleans
1340 Poydras Street, Suite 700
New Orleans, LA 70112-1221

COUNSEL FOR PLAINTIFF/APPELLEE, STATE OF LOUISIANA

Michael H. Idoyaga
LOUISIANA APPELLATE PROJECT
5721 Magazine Street
PM Box 105
New Orleans, LA 70115--3209

COUNSEL FOR DEFENDANT/APPELLANT, WILBERT VAN BUREN

**AFFIRMED**

Defendant Wilbert Van Buren appeals his conviction of manslaughter and his sentence as a third-felony offender habitual offender.

**STATEMENT OF THE CASE**

On March 15, 2007, defendant was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1. Defendant pled not guilty at his March 21, 2007 arraignment. He was tried by a twelve-person jury on October 9-10, 2007, and found guilty of manslaughter, a violation of La. R.S. 14:31. On October 17, 2007, defendant was adjudicated a third-felony habitual offender and sentenced to eighty years at hard labor, without benefit of probation or suspension of sentence. On that same date the trial court granted defendant's oral motion for appeal and noted defendant's motion for reconsideration of sentence, which the court denied.

**FACTS**

Defendant was indicted, tried and convicted for the shooting death of Eric McCormick on November 20, 2006. At trial, seven witnesses testified for the prosecution: one expert in forensic pathology and six fact witnesses, including the

victim's sister, uncle, aunt, a bystander who witnessed the event, and two investigating police officers.

Dr. Paul McGarry, who was qualified by stipulation as an expert in the field of forensic pathology, autopsied the victim on November 21, 2006. Dr. McGarry testified that the victim had sustained two gunshot wounds from .38 caliber bullets. One bullet had entered the upper left arm, approximately five inches below the shoulder and had struck the bone of the arm, stopping there. This wound was not fatal. The second bullet had entered the chest under the victim's left arm, gone across his chest, struck his spine, gone through his left lung, and had lodged in his left pleural/chest cavity. This second wound was fatal and had caused death in a matter of minutes. Dr. McGarry also identified two bullets recovered by him during the autopsy.

Dr. McGarry testified on cross examination that the fatal wound was such that the left arm could not have been hanging at rest in the "neutral" position. He said the shooter had been a few feet to a few yards away from the victim. The victim's left side had been facing the shooter, but Dr. McGarry could not say whether the victim had been leaning back, leaning forward, moving, or standing still.

Twenty-four-year old Kenosha McCormick, the victim's sister, testified that on the day her brother died she had given him a ride to the 2600 block of Dumaine Street, where some family members lived. She also had observed defendant, who was a friend of hers and who knew her brother, in that block on that day.

Fifty-year-old Joseph Nixon III, the victim's uncle by marriage, testified that he knew defendant by the moniker "Man." Mr. Nixon related that on the day of the shooting, he was sitting on the porch at 2631 Dumaine Street while the victim

and defendant were shooting dice in front of 2641 Dumaine Street. Mr. Nixon observed defendant and the victim get into a fist fight that then moved into the street. The victim won the fight, at which point defendant left on a bicycle, got a gun, and came back. Defendant then got off his bicycle, walked to the corner, walked back, saw the victim emerging from an alley alongside 2641 Dumaine, and shot him. The shooting happened during the afternoon. Nothing was blocking Mr. Nixon's view of the shooting. He said defendant was armed with a black 9 mm or Glock handgun. Mr. Nixon heard five shots; he said the victim was struck in the side and the leg. After witnessing the shooting, Mr. Nixon identified defendant's photo in a lineup presented to him by police. In addition, Mr. Nixon admitted that he had pled guilty to possession of crack cocaine in 1992, and that he had been drinking a can of beer while sitting on the porch the day of the shooting.

Forty-nine-year-old Yacanette Nixon, the victim's aunt by marriage, testified that at the time of the shooting, she was standing in the doorway of 2631 Dumaine Street. She knew defendant by the moniker "Nephew." Defendant and the victim, and perhaps some others, were shooting dice. A fight broke out between the victim and defendant. After the fight defendant said something to the effect that he would be back. Defendant rode off on a bicycle and returned, riding slowly. Still standing in the doorway, Ms. Nixon heard the shots but could not see the victim from her vantage point because he was in an alley. Hearing the shots caused her to duck back inside and close the door. She subsequently opened the door and saw the victim by the curb. He told her he had been shot, and he asked her to call the police. Ms. Nixon subsequently identified defendant in a photographic lineup as the person she had seen threaten the victim, and she identified him in court.

Ms. Nixon admitted to having two prior convictions involving crack cocaine and one conviction for manslaughter, the latter conviction for which she had served five years in prison. Under cross examination, she stated that she had been arrested on March 3, 2007 for illegally carrying a weapon, possession of crack cocaine, and possession of drug paraphernalia. She had been released from jail on those charges because the District Attorney's Office had not timely charged her. She also admitted that she had been arrested on or about April 27, 2007 for possession of crack cocaine, but did not know the status of that charge.

Forty-six-year-old Robin Pruett testified that on November 20, 2006 she was overseeing some men moving furniture into 2654 Dumaine Street. She observed a dice game at some point. She saw a fist fight between two males, with one getting beaten in the face really badly. Other males broke up the fight. The loser started to walk away, but turned around and came back to get his bicycle. The loser said that it wasn't over yet, that he would be back, that he "had something for" his opponent. Pruett identified defendant in court as that person. She said she also had identified the person in a photo lineup presented to her by a police detective. Pruett said she did not observe the shooting because she left shortly after the fight ended to get some more furniture, and by the time she returned, the police were on the scene. Pruett confirmed on cross examination that there had been twenty or thirty people on the street the day of the shooting. Pruett was confronted with her testimony from a prior hearing indicating that when viewing the photo lineup, she had said: "You know, could this be him but maybe he's a little bit older and a little bit thinner?"

New Orleans Police Department Detective Sergeant Nichole Barbe´ testified that she investigated the shooting in the instant case. As a result of her

investigation, she developed defendant as a suspect and learned that he resided in the Iberville Housing Project. Det. Barbe´ interviewed Robin Pruett the day following the shooting, and that evening she showed Ms. Pruett a photo lineup in which Pruett selected defendant's photograph. In January 2007 Det. Barbe´ and another detective located defendant at a house trailer on Haynes Boulevard. When Det. Barbe´ asked defendant his name, he replied, "Jonathan Barrow." Defendant agreed to accompany the detectives to their office. During the ride Det. Barbe´ asked defendant where he had been living or staying. He replied that he had been staying with a sister in Tennessee for the past several months, but he could not remember where that had been. Nor could defendant provide the detectives with his sister's telephone number or tell them some other way to get in touch with her to verify that he had been staying with her. Defendant continued to maintain that his name was Jonathan Barrow. When the detectives returned to their office, another police officer asked defendant what his name was, and he admitted that it was Wilbert Van Buren. Asked why he had lied, defendant explained that he thought he had some open municipal attachments. Det. Barbe´ said she then arrested defendant for the murder of Eric McCormack, the victim in the instant case.

Det. Barbe´ later determined there had been no municipal attachment for defendant. Det. Barbe´ interviewed Yacanette Nixon after defendant's arrest. Ms. Nixon identified defendant in a photographic lineup. Det. Barbe´ testified that Ms. Nixon told her that when defendant had ridden his bicycle back onto the scene, the victim had jumped up to go and fight him again, but Ms. Nixon had told her nephew not to, that it was not worth it.

New Orleans Police Detective Decynda Barnes testified that on March 6, 2007, she obtained a formal taped statement from Joseph Nixon and showed him a photo lineup containing defendant's photo. Det. Barnes confirmed on cross examination that March 6, 2007 was approximately three and one–half months after the homicide in question.

**ERRORS PATENT**

A review of the record reveals no patent errors.

**ASSIGNMENT OF ERROR NO. 1**

In his first assignment of error, defendant argues that: (1) he was deprived of a meaningful opportunity to impeach the State's witnesses for lack of a transcript of the preliminary hearing, "the recording of which was irretrievably lost because of technical difficulties;" and (2) that the trial court erred in denying him a continuance so his attorneys could reevaluate their strategy.

Defendant asserts that on February 15, 2007, prior to indictment, a preliminary hearing was held, and that on March 20, 2007, his OIDP staff attorney submitted a written request for a transcript of the preliminary hearing. According to defendant's appellate brief, his counsel received no response to this request until October 4, 2007, when the court reporter left a telephone message stating that the audio recording of the hearing could not be retrieved and that she could not find her notes. Defendant asserts that his trial counsel then moved for a continuance to reevaluate trial strategy, which was denied. The record confirms that a motion for continuance was filed on October 5, 2007 and denied over the telephone by the presiding judge the same day, and that this court denied defendant's emergency

writ application on the issue.[1] The record further reflects that defense counsel noted an objection for the record at an October 9, 2007 motion hearing.

La. C.Cr.P. art. 843 provides that in felony cases, the clerk or court stenographer shall record all of the proceedings. Upon motion by the defendant a transcript of the preliminary examination may be made. La. C.Cr.P. art. 294(D). The transcript of the testimony of a witness given at a preliminary examination may be used by any party in a subsequent judicial proceeding for the purpose of impeaching or contradicting the testimony of such witness. La. C.Cr.P. art. 295(C).

This court has held that the defendant in a criminal proceeding has a statutory right to a transcript of the preliminary hearing in his prosecution; however, the failure to provide the defendant with such preliminary hearing transcript does not constitute reversible error absent a showing that his cross-examination and impeachment of the State's witnesses were hampered at trial. State v. Nelson, 562 So. 2d 1076, 1078 (La. App. 4 Cir. 1990) (citing State v. Benson, 368 So. 2d 716 (La. 1979) and State v. Allen, 276 So. 2d 868 (La. 1973))

In the instant case, the record reflects that Det. Nicole Barbe´ testified at the defendant's February 15, 2007 preliminary hearing. Det. Barbe´, who was the primary law enforcement officer to testify at defendant's trial, also testified at an April 20, 2007 motion hearing, as reflected by the transcript of that hearing that is contained in the record. Defendant's trial counsel obviously had access to a transcript of that motion hearing, because during the trial he cross examined two of

[1] State v. Van Buren, unpub., 2007-1289 (La. App. 4 Cir. 10/5/07)("The relator has an adequate remedy on appeal.").

the State's lay witnesses, Robin Pruett and Joseph Nixon, as to their prior testimony given at the motion hearing. Thus, defendant's trial counsel also had access to the prior testimony Det. Barbe´ gave during that same motion hearing.

There is no indication that defense counsel's cross examination of any of the State's witnesses was hampered in any way by his trial counsel's inability to obtain the preliminary hearing transcript. Therefore, we conclude that defendant has failed to show he was prejudiced by the denial of his motion for a continuance.

Generally, a timely-filed motion for continuance may be granted, in the discretion of the trial court, if there is good ground therefore. La. C.Cr.P. art. 712. In State v. Snyder, 98-1078 (La. 4/14/99), 750 So. 2d 832, reversed on other grounds, Snyder v. Louisiana, __ U.S. __, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008), the court stated:

> As a general matter, the decision to grant or deny a motion for continuance rests within the sound discretion of the trial judge, and a reviewing court will not disturb a trial court's determination absent a clear abuse of discretion. La.C.Cr.P. art. 712; State v. Strickland, 94-0025, p. 23 (La.11/1/96), 683 So.2d 218, 229; State v. Bourque, 622 So.2d 198, 224 (La.1993), overruled on other grounds by State v. Comeaux, 93-2729 (La.7/1/97), 699 So.2d 16. Whether a refusal to grant a continuance was justified depends on the circumstances of the particular case presented. State v. Bourque, 622 So.2d at 224; State v. Simpson, 403 So.2d 1214, 1216 (La.1981). Generally, this court declines to reverse convictions for improper denial of a motion to continue absent a showing of specific prejudice. State v. Strickland, 94-0025 at p. 23, 683 So.2d at 229; State v. Gaskin, 412 So.2d 1007, 1011 (La.1982).

98-1078 at p. 22, 750 So. 2d at 849.

Considering the facts and circumstances in the instant case, we cannot say that the trial court abused its discretion by denying the motion to continue. Moreover, even assuming that the trial court had abused its discretion by denying the motion, we would have found it to be harmless error because the guilty verdict

rendered in the instant case was surely unattributable to any such error. See State v. Castleberry, 98-1388, p. 23 (La. 4/13/99), 758 So. 2d 749, 768-769.

We therefore reject this assignment of error.

**ASSIGNMENT OF ERROR NO. 2**

In his second assignment of error, defendant argues that his sentence is unconstitutionally excessive. At the conclusion of sentencing the trial court denied defendant's motion to reconsider sentence, and noted an objection on behalf of the defendant to the sentence imposed, thus preserving defendant's right under La. C.Cr.P art. 881.1 and La. C.Cr.P. art. 881.2 to seek review of the sentence based on the issue of excessiveness. See State v. Dunbar, 2006-1030, p. 3 (La. App. 4 Cir. 3/19/08), 981 So. 2d 51, 53.

Defendant was convicted of manslaughter, a violation of La. R.S. 14:31, which provides for a sentence of imprisonment at hard labor for not more than forty years, providing that the victim is ten years of age or older, as in the instant case. Defendant was adjudicated a third-felony habitual offender and sentenced by the trial court, pursuant to La. R.S. 15:529.1(A)(b)(i), to eighty years at hard labor––without benefit of probation or suspension of sentence, as stipulated by La. R.S. 15:529.1(G).

La. R.S. 15: 529.1(A)(b)(i) states that a third felony offender convicted of the types of felony offenses for which defendant in the instant case was convicted shall be sentenced to imprisonment for a determinate term not less than two-thirds of the longest possible sentence for the instant conviction—in this case, manslaughter—and not more than twice the longest possible sentence prescribed for a first conviction.

Thus, in the instant case defendant, who was twenty-three years old at the time he shot and killed the victim in this case, legally could have been sentenced to imprisonment for not less than twenty-six and two-thirds years, and not more than eighty years. He was sentenced to the maximum term allowable under law, eighty years. Pursuant to La. R.S. 15:529.1(G), defendant's sentence is without the benefit of probation or suspension of sentence. Although defendant is eligible for parole, he will not be eligible for parole until he has served at least eighty-five percent of his eighty-year sentence, or sixty-eight years because manslaughter is listed as a crime of violence under La. R.S. 14:2. See La. R.S. 15:574.4(B).[2]

La. Const. art. I, § 20 explicitly 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); State v. Francis, 96-2389, p. 6 (La. App. 4 Cir. 4/15/98), 715 So.2d 457, 461, grant of post conviction relief on other grounds affirmed, 2001-1667 (La. App. 4 Cir. 2/6/02), 809 So. 2d 1132. 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). A sentence is

---

[2] La. R.S. 15:574.4(B) states, in pertinent part:

> Notwithstanding any other provisions of law to the contrary, a person convicted of a crime of violence and not otherwise ineligible for parole shall serve at least eighty-five percent of the sentence imposed, before being eligible for parole.

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, 677; State v. Webster, 98-0807, p. 3 (La. App. 4 Cir. 11/10/99), 746 So. 2d 799, 801, reversed on other grounds, State v. Lindsey, 99-3256 (La. 10/17/00), 770 So. 2d 339. 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; 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.

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).

96-1214 at p. 10, 708 So. 2d at 819.

In State v. Soraporu, 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).

In the instant case, the trial court expounded on senseless killings in general, and the killing in the instant case in particular, before pronouncing sentence on defendant. The trial court's reasons for sentencing accounted for ten pages of the sentencing transcript.

The trial court considered defendant's two prior convictions for which, along with the instant conviction, he was adjudicated a third-felony habitual offender. In 2004 defendant pled guilty to possession of crack cocaine, and in August 2001 he pled guilty to possession with the intent to distribute crack cocaine. The trial court

noted that in connection with defendant's 2001 conviction, the sentencing judge had recommended defendant for the intensive incarceration program, with opportunities for self-betterment. The trial court also noted that three years later the sentencing judge in the 2004 conviction had given defendant three years active probation, with the condition that defendant participate in the drug court program to help him change his lifestyle.

The trial court recounted the anguish the parents of victim Eric McCormick must have gone through, from identifying the remains of their son to going to the funeral home to commending their son to the earth, all because of defendant. The trial court also mentioned that during the trial, the State had offered defendant a plea bargain that would have resulted in a sentence of twenty-five years imprisonment, which figure was subsequently reduced to twenty years. The trial court specifically noted that although the victim's parents had agreed to each plea bargain deal, the defendant had rejected them. Finally, the trial court noted a lack of any remorse in defendant for what he had done.

In State v. Walker, 99-2868 (La. App. 4 Cir. 10/18/00), 772 So. 2d 218, this court found that an eighty-year sentence imposed on a second-felony habitual offender convicted of manslaughter was not unconstitutionally excessive. The defendant in Walker had confessed to strangling a woman he had picked up and smoked crack and had sex with, after she had allegedly began hitting and pushing him when he informed her he had no more money or crack. As in the instant case, the defendant in Walker had been tried for second-degree murder, but the jury had found him guilty of the lesser offense of manslaughter. In Walker, the defendant's one prior conviction was for theft valued at more than five hundred dollars.

In State v. Hopkins, 34,119 (La. App. 2 Cir. 12/20/00), 774 So. 2d 1178, the court found that a mandatory sentence of life imprisonment at hard labor without the benefit of parole, probation or suspension of sentence imposed on a third-felony habitual offender convicted of manslaughter was not unconstitutionally excessive. The defendant in Hopkins had shot and killed an individual in the course of robbing the individual of illicit drugs. One of the defendant's prior convictions was a plea of guilty to simple robbery, the other was unknown.

In the instant case, defendant returned to the scene of the earlier confrontation apparently motivated by a desire to either continue the fight and/or to exact revenge upon those who had "won." The sentencing judge was obviously influenced by defendant's seeming lack of remorse for such a cavalier killing. Additionally, defendant apparently had not taken advantage of the opportunities for rehabilitation that were afforded him after his two prior drug convictions. Under these circumstances, the extended sentence of imprisonment is not needless and purposeless, but negates defendant's opportunity to commit similar violent crimes in the future. We cannot say that the sentence makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless imposition of pain and suffering, or is grossly out of proportion to the severity of the crime. Thus, we conclude that that the defendant's sentence is not unconstitutionally excessive.

We therefore reject this assignment of error.

**CONCLUSION**

Accordingly, for the reasons stated, defendant's conviction and sentence are affirmed.

**AFFIRMED**