NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2012-KA-0494**
VERSUS	*	
		COURT OF APPEAL
ALTON KENNEDY	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 491-878, SECTION "B"
Honorable Lynda Van Davis, Judge

* * * * * *

PAUL A. BONIN
JUDGE

* * * * * *

(Court composed of Judge Paul A. Bonin, Judge Daniel L. Dysart, and Judge Sandra Cabrina Jenkins)

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AFFIRMED

JANUARY 23, 2013

Thirty-two year old Alton Kennedy, who was adjudicated a third felony offender, has been sentenced to serve consecutive periods of eighty years and five years for his conviction of armed robbery with a firearm; both periods are without benefit of probation, parole, or suspension of sentence. *See* La. R.S. 14:64 and 64.3 A; La. R.S. 15:529.1 A(3)(a), and *State v. Kennedy,* 10-1606, p. 1 (La. App. 4 Cir. 8/10/11), 73 So. 3d 985, 986.

Mr. Kennedy's sole assignment of error is that his sentence is excessive.

After our review, we conclude that the district judge did not abuse the considerable discretion entrusted to her in imposing this sentence and that the sentence imposed does not violate Mr. Kennedy's constitutional protection against an excessive sentence.

We explain our conclusions in greater detail below.

I

In this Part we first turn to describe the facts of the offense for which Mr. Kennedy is being punished and then turn to the predicate felonies as well as pending arrests.

A

Mr. Kennedy admitted to the police that he entered the Jimani Bar on Chartres Street near the French Quarter and decided to rob the bar. He brandished a firearm, asked for money and then left the bar. Much of the robbery was captured on a closed-circuit video system.

A repairman was sitting at the bar during a shift change when he noticed a man wearing dreadlocks approaching. He later identified the man as Mr. Kennedy. He then heard the man saying, "Give me the box." He testified that it was then that Mr. Kennedy had a chrome gun. After pausing for several seconds, Mr. Kennedy repeated the phrase, and it was then that the bartender complied with his demand and handed over the box. The box contained $1,950 dollars, a fact which the bartender knew because she had just counted the contents during the shift change. Both bartenders present during the shift change recognized Mr. Kennedy because he had been coming into the bar several times each month for about a year.

Mr. Kennedy then walked out of the bar and ran around the corner. The police were called.

About two weeks later, Mr. Kennedy returned to the Jimani Bar. The bartender again recognized him and was intimidated by his reappearance, stating that she feared that he came back just to frighten her into silence.

B

Before Mr. Kennedy was "billed" as a multiple offender, the trial judge sentenced him to thirty years. Following her ruling on the multiple bill, the trial judge re-sentenced Mr. Kennedy to eighty years. After remand by our court, the trial judge added the additional five-year consecutive period of incarceration. *See Kennedy, supra.*

Mr. Kennedy's earlier felony conviction was for a violation of La. R.S. 14:69 B(2), illegal possession of a stolen thing (automobile) valued at $500 or more. He had entered a plea of guilty to that offense in 1998.

His more recent felony conviction was for a violation of La. R.S. 14:62 A, simple burglary. He had entered a plea of guilty to that crime in 2001.

Mr. Kennedy correctly points out that his predicate convictions are not statutorily classified as crimes of violence. *See* La. R.S. 14:2 B. And we note that the Habitual Offender Law provides for that distinction in the sentencing ranges. Had both predicate crimes been classified as crimes of violence, the mandatory penalty would have been imprisonment for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence. *See* La. R.S. 15:529.1 A(3)(b).

But for *this* third felony adjudication, the penalty range is "imprisonment for a determinate term not less than two-thirds of the longest possible sentence for the conviction and not more than twice the longest possible sentence for a first conviction." *See* La. R.S. 15:529.1 A(3)(a). Thus, the sentencing range on the

underlying § 64 armed robbery violation is not less than sixty-six years and not more than one hundred ninety-eight years.

Not only did the prosecution invoke the habitual offender enhancement provisions, but it also invoked the sentencing enhancement provision of La. R.S. 14:64.3 A because the weapon used by Mr. Kennedy in the armed robbery was a firearm. Thus, once the sentence was imposed upon Mr. Kennedy as an habitual offender for the armed robbery, the sentencing judge was also required to impose an additional five year sentence to run consecutively with the sentence imposed on the underlying conviction. *See State v. King,* 06-1903, (La. 10/16/07), 969 So. 2d 1228.

We thus consider whether the consecutive sentences totaling eighty-five years are excessive.

C

At sentencing the prosecution sought the maximum sentence, arguing that Mr. Kennedy also had a second degree murder charge pending before the court. *See State v. Ballett,* 98-2568, p. 25 (La. App. 4 Cir. 3/15/00), 756 So. 2d 587, 602 ("The trial court is entitled to consider the defendant's entire criminal history in determining the appropriate sentence to be imposed.") The trial judge noted that even were she to sentence Mr. Kennedy to the "minimum" he would be incarcerated until he was ninety-nine years old. She seemed to disregard the prosecution's request to consider the pending charge in determining the sentence to be imposed.

Nonetheless, because of the consecutive periods of the sentence imposed, Mr. Kennedy would not be eligible for release from incarceration until he was more than 110-years old.[1]

II

In this Part we consider the principles that guide our decision in this case.

Excessive punishment is prohibited by the federal and state constitutions. The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The prohibition of cruel and unusual punishments "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." *Solem v. Helm*, 463 U.S. 277, 284 (1983).

La. Const. art. I, § 20 expressly prohibits excessive punishment: "No law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment." A punishment will be found excessive when it imposes punishment grossly disproportionate to the severity of the offense or constitutes nothing more than needless infliction of pain and suffering. *See State v. Bonanno*, 384 So. 2d 355, 357 (1980); *see also State v. Cann*, 471 So. 2d 701, 703 (La. 1985) (To be found excessive, the penalty must be "so grossly disproportionate to the crime committed, in light of the harm caused to society, as to shock our sense of justice.").

[1] Even if the sixty-six-year minimum sentence under the habitual offender statute was imposed, followed by the required five-year consecutive sentence, Mr. Kennedy would not be eligible for release from confinement until he was almost 100-years old.

We review a challenge to the excessiveness of the sentence under the abuse of discretion standard. *State v. Square*, 433 So. 2d 104, 110 (La. 1983). When reviewing 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.

As a general rule, the factors listed in La. C.Cr.P. art. 894.1 that must be given weight in determining whether a defendant should be placed on probation[2] or have his sentence suspended "[a]nalogically … provide guidance as to whether the sentence should be closer to the maximum rather than to the minimum statutory range of sentence." *State v. Sepulvado*, 367 So. 2d 762, 767-768 (La. 1979). The criteria in Article 894.1 "are similar to those evolved by other courts in other American jurisdictions with a constitutional or statutory duty to review excessiveness" and "provide appropriate criteria by which to measure whether a sentence within statutory limits is nevertheless excessive, either by reason of its length or because it specifies confinement rather than less onerous sentencing alternatives." *Sepulvado*, 367 So. 2d at 769.

In discharging our review function, we first look to whether the sentencing judge adequately considered the guideline factors under La. C.Cr.P. art. 894.1. *See State v. Batiste*, 06-0875, p. 18 (La. App. 4 Cir. 12/20/06), 947 So. 2d 810, 820. Our purpose is not to enforce mechanical compliance by a sentencing judge, but to ensure that there is a factual basis for the sentence imposed. *Id.*; *see also State v.*

[2] Here, of course, probation or suspension of sentence are not a statutorily provided options.

Lanclos, 419 So. 2d 475, 477-478 (La. 1982). If we find that the district court adequately considered the factual basis and individual considerations for the sentence, "then review will focus upon whether the trial court's large discretion has been abused." *State v. Saunders*, 393 So. 2d 1278, 1281 (La. 1981), *citing State v. Spencer*, 374 So. 2d 1195 (La. 1979).

B

At the first sentencing in this matter, the sentencing judge queried whether Mr. Kennedy wished to allocute; he declined. At the time of sentencing under the multiple bill proceedings, the defendant did allocute.[3] *See State v. Green,* 10-0825, pp. 20-22 (La. App 4 Cir. 6/29/11), 69 So. 3d 716, 727-728. Mr. Kennedy requested that the sentencing judge take into consideration what he at first misstated was his guilty plea; upon being challenged by the trial judge, he agreed that he was referring to his confession at the time of his arrest. And he noted that he also confessed at that same time to other crimes.

On the one hand, neither Mr. Kennedy nor his trial counsel argued to the sentencing judge at any of the three sentencing hearings (initial, multiple bill, post-remand) any of the mitigating factors set out in Article 894.1 B(22)-(33). Moreover, appellate counsel for Mr. Kennedy has not suggested which, if any, of the Article's mitigating factors could or should have been considered by the sentencing judge.

[3] Allocution is the now-convicted defendant's statement to the sentencing judge seeking mercy, explaining his conduct, apologizing for the crime, or saying anything else in an effort to lessen the impending sentence. *See generally,* Celine Chan, "The Right to Allocution: A Defendant's Word on Its Face or Under Oath?", 75 Brooklyn L. Rev. 579 (2009), *citing to* Black's Law Dictionary 88 (9th ed. 2009).

On the other hand, the sentencing judge, who also presided over the jury trial, heard ample evidence of aggravating factors under Article 894.l, such as: that Mr. Kennedy "knowingly created a risk of death or great bodily harm to more than one person," B(5); that he "used threats of or actual violence in the commission of the offense," B(6), that he "used a dangerous weapon in the commission of the offense," B(8), and that he "used a firearm" in this armed robbery, B(19). While these are all related to the elements of the offense of armed robbery as enhanced by §64.3, they are nevertheless clearly indicative of the actual and potential harm to others which Mr. Kennedy's conduct entailed and suggest that Mr. Kennedy was an undue risk of committing another crime, *see* La. R.S. 894.1 A(1), that he was in need of a custodial environment, A(2), and, as the sentencing expressly stated, a lesser sentence would deprecate the seriousness of the crime, *see* A(3).

Thus, we can identify no mitigating factor which the sentencing judge should have but did not consider. And at the same time we cannot find that this lengthy sentence, which perhaps even extends beyond Mr. Kennedy's life expectancy, was only for an improper purpose such as the imposition of useless pain and suffering. *See State v. Caston*, 477 So. 2d 868 (La. App. 4th Cir. 1985).

Mr. Kennedy is a recidivist. His three convictions suggest a trajectory of an ever-increasing degree of lawlessness and violence in his behavior. We cannot find that this sentence exceeds that which is permitted by the Louisiana constitution. And the sentencing judge has broad discretion; we do not find that she abused it in this case.

DECREE

The consecutive sentences imposed upon Alton Kennedy under La. R.S. 14:64, 14:64.3 A, and 15:529.1 A(3)(a), totaling eighty-five years at hard labor, without benefit of parole, probation, or suspension of sentence, but with credit for time served, are affirmed.

AFFIRMED