NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 2023

STATE OF LOUISIANA

VERSUS

ANTHONY JEROME KINCHEN

Judgment Rendered: June 8, 2012.

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On Appeal from the
19th Judicial District Court,
in and for the Parish of East Baton Rouge
State of Louisiana
District Court No. 07-10-0084

The Honorable Bonnie P. Jackson, Judge Presiding

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* * * * *

BEFORE: CARTER, C.J., PARRO AND HIGGINBOTHAM, JJ.

CARTER, C.J.

The defendant, Anthony Jerome Kinchen, was charged by bill of information with two counts of armed robbery while armed with a firearm, violations of Louisiana Revised Statutes sections 14:64 and 14:64.3A. The defendant pled not guilty to the charges and, following a jury trial, was found guilty as charged on both counts. For each of the counts, the defendant was sentenced to fifteen years at hard labor without benefit of parole, probation, or suspension of sentence; and the additional enhancement penalty of five years at hard labor without benefit of parole, probation, or suspension of sentence on each count. The five-year sentences were ordered to run consecutively to the fifteen-year sentences (i.e., two twenty-year sentences), and each of the twenty-year sentences were ordered to run consecutively (forty years total). The defendant now appeals, designating two assignments of error. We affirm the convictions and sentences.

FACTS

On the evening of March 3, 2010, Trinese Cotton drove to the Capital One Bank ATM machine on Tom Drive in Baton Rouge. She had her two small children with her. With her children remaining in the vehicle, she withdrew $300 from the ATM. When she turned around, the defendant was standing in front of her. He pointed a handgun at her and demanded the money. When she did not immediately give him the money, the defendant waved the gun at her vehicle and told her to give him the money or he was going to kill her babies. The defendant then grabbed the money from Trinese's hand and hit her on the head with his gun. The defendant got into the back of a car, and the driver of the car drove away.

A month later on the morning of April 2, 2010, Elsy Delcid was at home with her one-year-old son in her townhouse on Boulevard de Province in Baton Rouge. Elsy's husband was not home, having left for work. Elsy and her son were upstairs in Elsy's bedroom. The defendant broke in through the downstairs back door. He then went upstairs and kicked open the door to Elsy's bedroom. The defendant had a handgun and asked Elsy where the money was. When she responded that she did not have any money, the defendant grabbed her, pushed her into the wall, and with his gun pointed at her head, again demanded money. When Elsy again denied having money, the defendant pointed his gun at her son's head. At that point, Elsy told the defendant she had money in her closet. The defendant went into the closet and took $500. He said the money was not enough. Elsy said she had a camera, so they went downstairs, and the defendant also took her Sony camera. The defendant told Elsy to go back to her bedroom. Elsy complied, and a few minutes later, the defendant left the townhouse.

Both victims identified the defendant in a photographic lineup as the person who robbed them at gunpoint. They also testified at trial and identified the defendant in court. The defendant lived on Boulevard de Province, which is about three miles from Tom Drive. The defendant did not testify at trial.

ASSIGNMENTS OF ERROR NOS. 1 and 2

In these related assignments of error, the defendant argues that the aggregate forty-year sentence imposed is excessive and that defense counsel's failure to file a motion to reconsider sentence constitutes ineffective assistance of counsel. Specifically, the defendant contends that

the trial court should have directed that his sentences be served concurrently rather than consecutively.

The record does not contain an oral or written motion to reconsider sentence. Louisiana Code of Criminal Procedure article 881.1E provides that the failure to file or make a motion to reconsider sentence precludes the defendant from raising an excessive sentence argument on appeal. Ordinarily, pursuant to the provisions of this article and the holding of *State v. Duncan*, 94-1563 (La. App. 1 Cir. 12/15/95), 667 So. 2d 1141, 1143 (en banc per curiam), we would not consider an excessive sentence argument. However, in the interest of judicial economy, we will consider the defendant's argument that his sentence is excessive, even in the absence of a motion to reconsider sentence, in order to address the defendant's claim of ineffective assistance of counsel. *See State v. Wilkinson*, 99-0803 (La. App. 1 Cir. 2/18/00), 754 So. 2d 301, 303, *writ denied*, 00-2336 (La. 4/20/01), 790 So. 2d 631.

In *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the United States Supreme Court enunciated the test for evaluating the competence of trial counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

In evaluating the performance of counsel, the inquiry must be whether counsel's assistance was reasonable considering all the circumstances. *State v. Morgan*, 472 So. 2d 934, 937 (La. App. 1st Cir. 1985). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *State v. Robinson*, 471 So. 2d 1035, 1038-39 (La. App. 1st Cir.), *writ denied*, 476 So. 2d 350 (La. 1985).

Failure to file a motion to reconsider sentence in itself does not constitute ineffective assistance of counsel. *State v. Felder*, 00-2887 (La. App. 1 Cir. 9/28/01), 809 So. 2d 360, 370, *writ denied*, 01-3027 (La. 10/25/02), 827 So.2d 1173. However, if the defendant can show a reasonable probability that, but for counsel's error, his sentence would have been different, a basis for an ineffective assistance claim may be found. *See Felder*, 809 So. 2d at 370.

The Eighth Amendment to the United States Constitution and Article I, Section 20, of the Louisiana Constitution prohibit the imposition of excessive or cruel punishment. Although a sentence falls within statutory limits, it may be excessive. *State v. Sepulvado*, 367 So. 2d 762, 767 (La. 1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. *State v. Andrews*, 94-0842 (La. App. 1 Cir. 5/5/95), 655 So. 2d 448, 454. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. *Andrews*, 655 So. 2d at 454. The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set

aside as excessive in the absence of a manifest abuse of discretion. *See State v. Holts*, 525 So. 2d 1241, 1245 (La. App. 1st Cir. 1988). Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the trial court to consider when imposing sentence. While the entire checklist of Article 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. *State v. Brown*, 02-2231 (La. App. 1 Cir. 5/9/03), 849 So. 2d 566, 569.

The articulation of the factual basis for a sentence is the goal of Article 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary even where there has not been full compliance with Article 894.1. *State v. Lanclos*, 419 So. 2d 475, 478 (La. 1982). The trial judge should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than confinement. *See State v. Jones*, 398 So. 2d 1049, 1051-52 (La. 1981).

At sentencing, the trial court stated in pertinent part:

> Mr. Kinchen, you're classified as a second felony offender. You had originally been charged with an armed robbery. You were allowed to plead guilty on a previous offense to simple robbery. You were placed on probation. You also had a possession of cocaine where you got five years and on May -- I'm sorry, April 11th of this year the probation was revoked[,] and you are serving a sentence as a result of those convictions. Also, Mr. Kinchen, I note that as a juvenile you have had some run-ins with law. Starting in 2001, you were charged with aggravated battery and aggravated assault, and a theft, misdemeanor theft. You were placed on an informal adjustment agreement. That agreement was terminated unsatisfactorily, and you were ordered to serve a six-month sentence, which was suspended. You were placed on one year

> active supervised probation. On September 9, 2002, you were charged with battery of a school teacher, battery of a police officer, disturbing the peace. The prosecution was deferred due to the sentence on the previously announced charge. Then you had a simple battery in 2006 which was dismissed due to your being placed on adult probation. This case involved a robbery of two women, one of whom was at an ATM machine, and one of whom was in her home. In both instances the children of the women were present. In both instances the women indicated that in an effort to further intimidate them, as if having a gun were not enough, you indicated that if they didn't cooperate with you that you were going to shoot their children. Mr. Kinchen, that shows a certain level of ruthlessness and a total disregard for other people. You elected -- you could have done a lot of things in your life but you elected to be an armed robber. You elected to be a criminal. And so there are consequences to that, Mr. Kinchen. And you know, you put yourself in a position where for the safety of the community as a whole you need to be placed in confinement for a substantial period of time because you have indicated that you have no intention of letting the rules that apply to everybody else apply to you. You have no intention of going out and getting an education. You have no intention of getting a job. You decided that you wanted to pr[e]y on other people and let them go to work and make the money and I'll just, you know, rob them for it.

The defendant suggests that his two sentences should have run concurrently. According to the defendant, under Louisiana Code of Criminal Procedure article 883, "the similarities of the two incidents clearly imply that they were part of a common scheme, or plan." We note initially that the defendant agreed to a sentence of at least forty years in exchange for the State's not pursuing habitual offender proceedings against him. The State's habitual offender bill of information indicated that the defendant had previous convictions for possession of cocaine and simple robbery and sought to have the defendant adjudicated a third-felony habitual offender.

Concurrent rather than consecutive sentences are the general rule for multiple convictions arising out of a single course of criminal conduct, at least for a defendant without a prior criminal record. *See* La. Code Crim.

Proc. Ann. art. 883. However, even if convictions arise out of a single course of conduct, consecutive sentences are not necessarily excessive; other factors must be taken into consideration in making this determination. *State v. Breland*, 97-2880 (La. App. 1 Cir. 11/6/98), 722 So. 2d 51, 53. For instance, consecutive sentences are justified where an offender poses an unusual risk to public safety. *See Breland*, 722 So. 2d at 53.

In the instant matter, the trial court specifically found that with his anti-social behavior, his criminal conduct, and his refusal to abide by the rules of society, the defendant was a threat to the safety of the community. Under these circumstances, the imposition of consecutive sentences for these armed robberies did not render these sentences excessive. *See State v. Crocker*, 551 So. 2d 707, 715 (La. App. 1st Cir. 1989). The sentences imposed for these offenses were well within the statutory limits and did not constitute an abuse of discretion by the trial court. *See State v. Palmer*, 97-0174 (La. App. 1 Cir. 12/29/97), 706 So. 2d 156, 160.

Moreover, despite the defendant's contention, his convictions for the two armed robberies did not arise out of a single course of criminal conduct. The armed robberies took place a month apart, occurred at different times, in different places, and involved different victims. It was clearly within the trial court's discretion to order that the sentences run consecutively rather than concurrently. *See State v. Berry*, 95-1610 (La. App. 1 Cir. 11/8/96), 684 So.2d 439, 460, *writ denied*, 97-0278 (La. 10/10/97), 703 So. 2d 603.

The maximum sentence pursuant to Louisiana Revised Statutes sections 14:64B and 14:64.3A is 104 years imprisonment at hard labor. Thus, with concurrent sentences, the defendant's sentencing exposure was

104 years and, with consecutive sentences, his exposure was 208 years. Even if the defendant had been adjudicated only a second-felony habitual offender, his sentencing exposure would have been over 400 years imprisonment at hard labor. *See* La. Rev. Stat. Ann. § 15:529.1A(1)(a) (prior to 2010 amendments); *State v. Shaw*, 06-2467 (La. 11/27/07), 969 So. 2d 1233, 1245. Considering the trial court's careful review of the case, the presentence investigation report, the nature of the instant crimes, and the fact that the actual sentences imposed were far less than the years of imprisonment the defendant faced, we find no abuse of discretion by the trial court. The sentences imposed are not grossly disproportionate to the severity of the offenses and, therefore, are not unconstitutionally excessive.

Because we find the sentences are not excessive, defense counsel's failure to file or make a motion to reconsider sentence, even if constituting deficient performance, did not prejudice the defendant. His claim of ineffective assistance of counsel, therefore, must fall.

These assignments of error are without merit.

CONVICTIONS AND SENTENCES AFFIRMED.