NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 KA 2282

STATE OF LOUISIANA

VERSUS

ARNULFO GONZALES, JR.

Judgment Rendered: MAY - 7 2010

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On Appeal from the Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Docket No. 602276, 602999, 700165

Honorable Ernest G. Drake, Jr., Judge Presiding

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BEFORE: DOWNING, GAIDRY, AND McCLENDON, JJ.

McCLENDON, J.

The defendant, Arnulfo Gonzales, Jr., was charged with simple burglary, a violation of LSA-R.S. 14:62, in each bill of information for three separate cases (docket numbers 602276, 602999, and 700165 of the 21st Judicial District Court in Tangipahoa Parish). The defendant ultimately entered pleas of guilty as charged in each case. The State advised the defendant that no habitual offender bill of information would be filed. The defendant was sentenced to twelve years imprisonment at hard labor in docket number 602276, and to five years imprisonment at hard labor in both docket numbers 602999 and 700165. The trial court ordered that the sentences be served consecutively. The defendant now appeals, raising the following counseled assignments of error:

1. The trial court should have rejected the defendant's guilty pleas in docket numbers 602276 and 700165 since there was not a sufficient factual basis given to support a conviction on either of these charges.

2. The sentences were cumulatively excessive, considering the circumstances of this case.

The defendant further raises the following *pro se* assignments of error:

1. The arresting agency failed to present the defendant before a [j]udge within 72-hours [sic] for the purpose of [a]ppointment of [c]ounsel and due process.

2. The trial court erred in not first determining if petitioner had the right to court appointed counsel, and on impulse appointed indigent counsel, den[y]ing petitioner the reasonably effective assistance guaranteed by the [Sixth] Amendment.

For the following reasons, we affirm the convictions and sentences.

STATEMENT OF FACTS

The following facts are based on the factual bases presented at the time of the guilty pleas.[1] In docket number 602276, the defendant burglarized a vehicle to obtain the speakers that were installed in the vehicle. The defendant

[1] According to the bills of information, the instant offenses were committed May 28, 2006 (docket number 602276), August 7, 2006 (docket number 602999), and August 18, 2006 (docket number 700165) in Tangipahoa Parish.

claimed that he had bought the speakers from the owner of the vehicle and wanted to gain possession of them. In docket number 602999, the defendant entered a residence and took a television and a video game. The defendant stated that he stashed the items in nearby bushes. The defendant did not know the occupants of the home. Regarding docket number 700165, the defendant stated that he was accused of taking a computer and other items from his cousin's husband's residence. According to the defendant, he was in the same neighborhood in which the residence was located when he was stopped and told that if he did not confess to this burglary, his bond would be revoked for his prior offense. The defendant stated that had he committed this burglary, he would not have remained in the neighborhood.

COUNSELED ASSIGNMENT OF ERROR NUMBER ONE

In the first counseled assignment of error, the defendant contends that the trial court should have rejected his guilty pleas in docket numbers 602276 and 700165. The defendant specifically argues that the factual bases given in support of those convictions were insufficient. The defendant contends that his statements regarding the incidents should have put the trial court on notice that he may have been pleading guilty to crimes of which he might be innocent. The defendant notes that he pled guilty against his trial counsel's advice and that the facts the defendant recited did not support a conviction in those two cases. Regarding docket number 602276, the defendant notes his claim that he paid for the speakers that he took and therefore had no intent to commit a theft. The defendant further notes that he completely denied involvement in the crime alleged in docket number 700165. The defendant concludes that the trial court erred in not questioning the State as to the facts it was prepared to prove, contending that the facts he recited did not support a conviction on either charge.

Generally, guilty pleas constitute a waiver of all non-jurisdictional defects, see **State v. McKinney**, 406 So.2d 160, 161 (La. 1981), and courts review them only to ensure that the plea "was both counseled and voluntary." **United**

States v. Broce, 488 U.S. 563, 569, 109 S.Ct. 757, 762, 102 L.Ed.2d 927 (1989). Even when a formal motion to withdraw a guilty plea is not filed, the Louisiana Supreme Court has held that a constitutionally infirm guilty plea may be set aside either by means of an appeal or post-conviction relief. **State v. Dixon**, 449 So.2d 463, 464 (La. 1984). See also **State v. Shepherd**, 532 So.2d 474, 476 (La.App. 1 Cir. 1988). The due process clause imposes no constitutional duty on state trial judges to ascertain a factual basis prior to accepting a guilty plea. Louisiana law has no statutory provision requiring accompaniment of a guilty plea by the recitation of a factual basis. **State v. Griffin**, 633 So.2d 358, 360 n.1 (La.App. 1 Cir. 1993), writ denied, 94-0240 (La. 10/14/94), 643 So.2d 157. Due process requires a finding of a significant factual basis for a defendant's guilty plea only when a defendant proclaims his innocence or when the trial court is otherwise put on notice that there is a need for an inquiry into the factual basis. **State v. Estes**, 42,093, p. 11 (La.App. 2 Cir. 5/9/07), 956 So.2d 779, 787, writ denied, 2007-1442 (La. 4/4/08), 978 So.2d 324.

An express admission of guilt is not a constitutional requirement for the imposition of a criminal penalty. **State v. Miller**, 537 So.2d 310, 312 (La.App. 1 Cir. 1988); **State v. McCarty**, 499 So.2d 292, 293 (La.App. 1 Cir. 1986), writ denied, 505 So.2d 56 (La. 1987). "An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." **North Carolina v. Alford**, 400 U.S. 25, 37, 91 S.Ct. 160, 167, 27 L.Ed.2d 162 (1970). Accordingly, the fact that a defendant believes he is innocent, and makes such belief known to the court, does not preclude him from entering a guilty plea. **Miller**, 537 So.2d at 312. The presence of significant evidence of actual guilt provides a means by which the court may test whether a plea was intelligently entered. **State v. Pitre**, 506 So.2d 930, 932 (La.App. 1 Cir.), writ denied, 508 So.2d 87 (La. 1987).

In the instant case, during the **Boykin** hearing the defendant recited statements of fact sufficient to form a significant factual basis for each offense. The record contains strong evidence of actual guilt as to the offenses charged in the challenged pleas, thereby providing a means by which the trial court could test whether or not the pleas were intelligently entered. Based upon the foregoing, we conclude that the trial judge properly inquired into and investigated the factual bases for the guilty pleas in light of defendant's decision to forego trial. The record supports the trial court's finding that the pleas were intelligently entered. Accordingly, we find this assignment of error lacks merit.

COUNSELED ASSIGNMENT OF ERROR NUMBER TWO

In the second counseled assignment of error, the defendant contends the sentences imposed were cumulatively excessive, considering the circumstances of the case. The defendant argues that the questionable nature of the evidence of guilt and the fact that his attorney advised him against entering guilty pleas should have been considered in the imposition of more lenient sentences. The defendant concludes that the trial court should have allowed the sentences to run concurrently, giving him a total of no more than twelve years, arguing that he only admitted to one offense.

Article I, Section 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Hurst**, 99-2868, pp. 10-11

(La.App. 1 Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 00-3053 (La. 10/5/01), 798 So.2d 962.

Louisiana Code of Criminal Procedure article 894.1 sets forth items that must be considered by the trial court before imposing sentence. The trial court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the criteria. **State v. Leblanc**, 04-1032, p. 10 (La.App. 1 Cir. 12/17/04), 897 So.2d 736, 743, writ denied, 05-0150 (La. 4/29/05), 901 So.2d 1063, cert. denied, 546 U.S. 905, 126 S.Ct. 254, 163 L.Ed.2d 231 (2005); **State v. Faul**, 2003-1423, p. 4 (La.App. 1 Cir. 2/23/04), 873 So.2d 690, 692. Failure to comply with Article 894.1 does not necessitate the invalidation of a sentence or warrant a remand for resentencing if the record clearly illumines and supports the sentencing choice. **State v. Smith**, 430 So.2d 31, 46 (La. 1983).

Maximum sentences may be imposed only for the most serious offenses and the worst offenders, or when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. **State v. Miller**, 96-2040, p. 4 (La.App. 1 Cir. 11/7/97), 703 So.2d 698, 701, writ denied, 98-0039 (La. 5/15/98), 719 So.2d 459. A trial court is entitled to consider the defendant's entire criminal history in determining the appropriate sentence to be imposed. **State v. Ballett**, 98-2568, p. 25 (La.App. 4 Cir. 3/15/00), 756 So.2d 587, 602, writ denied, 00-1490 (La. 2/9/01), 785 So.2d 31. Louisiana Code of Criminal Procedure article 883 provides:

> If the defendant is convicted of two or more offenses based on the same act or transaction, or constituting parts of a common scheme or plan, the terms of imprisonment shall be served concurrently unless the court expressly directs that some or all be served consecutively. Other sentences of imprisonment shall be served consecutively unless the court expressly directs that some or all of them be served concurrently. In the case of the concurrent sentence, the judge shall specify, and the court minutes shall reflect, the date from which the sentences are to run concurrently.

Herein, as to all three cases, the defendant was subject to a maximum imprisonment term of twelve years imprisonment at hard labor, a maximum fine

of two thousand dollars, or both, for each simple burglary conviction. LSA-R.S. 14:62. The trial court imposed a twelve-year sentence and two five-year sentences, but no fines. The trial court specified that the sentences would be served consecutively. Although defendant pled guilty to all three crimes on the same date, the offenses that led to the defendant's convictions occurred on different dates over a three-month period and did not arise out of the same course of conduct. Thus, consecutive sentences are indicated under Article 883, and the trial court committed no error in having the defendant's three sentences for simple burglary run consecutively.

Before sentence was imposed, a presentence investigation was conducted. The trial court noted the defendant's extensive criminal history consisted of eight felonies, including the instant offenses.

Based on our review of the record, we do not find that the trial court abused its wide discretion in imposing the sentences herein. The defendant poses an unusual risk to the public safety due to his past conduct of repeated criminality. The defendant's sentences are not grossly out of proportion to the severity of the crimes nor do they constitute needless infliction of pain and suffering. This assignment of error lacks merit.

PRO SE ASSIGNMENT OF ERROR NUMBER ONE

In the first *pro se* assignment of error, the defendant contends that the arresting agency failed to present him before a judge within seventy-two hours for the purpose of appointment of counsel and due process. The defendant designates the August 31, 2006 arraignment. The defendant contends that he was held in custody in the Tangipahoa Parish jail from August 24 to September 7, 2006, without ever being brought before a judge for the purpose of appointment of counsel, and in the whole course of the proceeding had never been determined as a matter of record to be indigent by the court or the Office of Indigent Defender Board. The defendant contends that while the minutes reflect that the trial court appointed the Office of Public Defender to represent him, the transcript does not so reflect.

Generally, LSA-C.Cr.P. art. 230.1(A) requires the period between arrest and arraignment not exceed 72 hours. Nonetheless, the remedy for a violation of LSA-C.Cr.P. art. 230.1 is pretrial release of a defendant, but not reversal of a conviction. Thus, pursuant to Article 230.1(D), "[t]he failure of the sheriff or law enforcement officer to comply with the requirements herein shall have no effect whatsoever upon the validity of the proceedings thereafter against the defendant." **State v. Manning**, 03-1982, pp. 27-28 (La. 10/19/04), 885 So.2d 1044, 1075-76, cert. denied, 544 U.S. 967, 125 S.Ct. 1745, 161 L.Ed.2d 612 (2005). Moreover, the minutes and the trial transcript consistently indicate that the Office of Public Defender was appointed and represented the defendant below, and the defendant concedes such representation on appeal (as noted in the argument for the following *pro se* assignment of error). Accordingly, *pro se* assignment of error number one is without merit.

PRO SE ASSIGNMENT OF ERROR NUMBER TWO

In the second *pro se* assignment of error, the defendant argues that a spur of the moment appointment of counsel without a determination of indigent status deprived him of effective assistance of counsel. The defendant notes that on the date of the guilty pleas, he met his counsel for the first time and was told that he could expect no less than fifteen years, even in a plea agreement. The defendant adds that he saw no other alternative and threw himself on the mercy of the court before sentencing. The defendant notes that the record does not reflect that his counsel filed anything on behalf of his defense or that his previous counsel withdrew before the counsel representing him at the plea proceeding was appointed. The defendant adds that he was never asked if he was indigent or signed papers indicating such status. The defendant asks that the guilty pleas be vacated.

As a general rule, a claim of ineffective assistance of counsel is more properly raised in an application for post-conviction relief in the trial court than on appeal. This is because post-conviction relief provides the opportunity for a

full evidentiary hearing under LSA-C.Cr.P. art. 930.[2] However, when the record is sufficient, this court may resolve this issue on direct appeal in the interest of judicial economy. **State v. Lockhart**, 629 So.2d 1195, 1207 (La.App. 1 Cir. 1993), writ denied, 94-0050 (La. 4/7/94), 635 So.2d 1132.

A defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, Section 13 of the Louisiana Constitution. In assessing a claim of ineffective assistance of counsel, a two-pronged test is employed. The defendant must show that (1) his counsel's performance was deficient, and (2) the deficiency prejudiced him. **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The defendant must make both showings to prove that counsel was so ineffective as to require reversal. **Strickland**, 466 U.S. at 687, 104 S.Ct. at 2064. The error is prejudicial if it was so serious as to deprive the defendant of a fair trial, or "a trial whose result is reliable." **Strickland**, 466 U.S. at 687, 104 S.Ct. at 2064. Effective assistance of counsel does not mean errorless counsel, or counsel who may be judged ineffective on mere hindsight. **State ex rel. Graffagnino v. King**, 436 So.2d 559, 564 (La. 1983).

At the August 31, 2006 arraignment, the trial court asked the defendant if he had an attorney. The defendant stated, "No, ma'am." The trial court then appointed public defender, Mr. Augustine, and the defendant did not object to the appointment. Further, the defendant was represented by the Public Defender's Office, Mr. Frierson specifically, at the time of the **Boykin** hearing and again did not object to such representation. The defendant specifically stated that he wanted to take responsibility for the offenses. The defendant also responded, "Yes, sir[,]" when asked if he was satisfied with the representation he received.

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[2] The defendant would have to satisfy the requirements of LSA-C.Cr.P. art. 924 et seq., to receive such a hearing.

As the defendant did not object to the appointment of the Public Defender's Office, this issue has not been preserved for appeal. Therefore, the defendant is not entitled to contest the trial court's appointment of the Public Defender's Office on appeal. See LSA-C.Cr.P. art. 841. Also, as previously stated herein, guilty pleas constitute a waiver of all non-jurisdictional defects, and generally courts review them only to ensure that the plea was both counseled and voluntary. Additionally, a criminal defendant who has been appointed counsel has no right under the Sixth Amendment to the counsel of his choice; rather, he "only has the right under the federal constitution to effective representation." **State v. Reeves**, 06-2419, pp. 36-37 (La. 5/5/09), 11 So.3d 1031, 1056, cert. denied, ___ U.S.___, 130 S.Ct. 637, ___ L.Ed.2d ___ (2009).

For purposes of an ineffective assistance of counsel claim, the filing of pretrial motions is squarely within the ambit of the attorney's trial strategy, and counsel is not required to engage in futility. **State v. LeBeau**, 621 So.2d 26, 29 (La. App. 2 Cir.), writ denied, 629 So.2d 359 (La. 1993). The defendant has failed to support a valid claim of deficiency of performance or prejudice as to representation of counsel. Based on the foregoing, the second and final *pro se* assignment of error lacks merit.

For the foregoing reasons, we affirm the convictions and sentences.

CONVICTIONS AND SENTENCES AFFIRMED.