NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 1778

STATE OF LOUISIANA

VERSUS

BETTY L. METREJEAN

Judgment Rendered: **May 2, 2012**

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APPEALED FROM THE SIXTENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ST. MARY
STATE OF LOUISIANA
DOCKET NUMBER 2009-181921

THE HONORABLE PAUL J. DeMAHY, JUDGE

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BEFORE: GAIDRY, MCDONALD, AND HUGHES, J.J.

McDONALD, J.

The defendant, Betty L. Metrejean, was charged by bill of information, in count one, with distribution of hydrocodone (Lortab), a Schedule III controlled dangerous substance, and, in count two, with distribution of clonazepam (Klonopin), a Schedule IV controlled dangerous substance, in violation of La. R.S. 40:968(A)(1) and La. R.S. 40:969(A)(1). The defendant originally pled not guilty. As to count one, she later withdrew her not guilty plea and pled guilty as charged, while count two was dismissed. The State filed a habitual offender bill of information. After a hearing, the defendant was adjudicated a second-felony habitual offender and sentenced to five years imprisonment at hard labor.[1] The defendant now appeals, challenging the constitutionality of the sentence imposed and the effectiveness of her trial counsel for failure to file a motion to reconsider sentence. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence.

STATEMENT OF FACTS

As the defendant entered a guilty plea herein, the facts were not fully developed. According to the bill of information and the factual basis admitted by the defendant at the **Boykin**[2] hearing, she sold thirty-two Lortab pills to an undercover police officer on June 18, 2009, in Morgan City, Louisiana.

ASSIGNMENTS OF ERROR NUMBERS ONE AND TWO

In assignment of error number one, the defendant contends the sentence imposed herein is unconstitutionally excessive. She contends there were no inquiries into her personal history, physical infirmities, possible addictions, employment history, childhood and/or adult adversities, or other issues that may

[1] The defendant's predicate offense consists of an April 25, 2005 conviction for possession of alprazolam (Xanax), a Schedule IV controlled dangerous substance, in violation of La. R.S. 40:969(C).

have set her on the path to criminal behavior. The defendant notes that she is the sole caretaker for her elderly mother and her disabled niece. She contends that, under the unusual circumstances of this case, the five-year sentence is an extreme hardship on her vulnerable family members, and the harm to society from the sentence imposed outweighs any benefit to be realized. In her second assignment of error, the defendant notes she is procedurally barred from having her sentence reviewed on appeal since her trial counsel did not file a motion to reconsider sentence. She argues this preclusion is prejudicial as the sentence is unconstitutionally excessive. Thus, the defendant contends her trial counsel was ineffective for failing to file a motion to reconsider sentence.

One purpose of the motion to reconsider sentence is to allow the defendant to raise any errors that may have occurred in sentencing while the trial judge still has the jurisdiction to change or correct the sentence. The defendant may point out such errors or deficiencies, or may present argument or evidence not considered in the original sentencing, thereby preventing the necessity of a remand for resentencing. **State v. Mims**, 619 So.2d 1059 (La. 1993) (per curiam). Under the clear language of La. C.Cr.P. art. 881.1(E), failure to make or file a motion to reconsider sentence precludes a defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. As noted by the defendant, a motion to reconsider sentence was not filed in this case. Accordingly, the defendant is procedurally barred from having her challenge to the sentencing, raised in assignment of error number one, reviewed by this court on appeal. **State v. Felder**, 2000-2887 (La. App. 1 Cir. 9/28/01), 809 So.2d 360, 369, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173. However, in assignment of error number two, the defendant argues her trial counsel was ineffective in failing to file a motion to reconsider sentence. Thus, in the interest of judicial economy, we

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[2] **Boykin v. Alabama**, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

choose to consider the defendant's excessiveness argument in order to address the 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, 2000-2336 (La. 4/20/01), 790 So.2d 631.

As a general rule, a claim of ineffective assistance of counsel is more properly raised in an application for postconviction relief in the trial court than on appeal. This is because postconviction relief provides the opportunity for a full evidentiary hearing under La. C.Cr.P. art. 930.[3] 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.

The claim of ineffective assistance of counsel is to be assessed by the two-part test of **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). **State v. Fuller**, 454 So.2d 119, 125 n.9 (La. 1984). The defendant must show that counsel's performance was deficient and that the deficiency prejudiced him. Counsel's performance is deficient when it can be shown that he made errors so serious that he was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. Counsel's deficient performance will have prejudiced the defendant if he shows the errors were so serious as to deprive him of a fair trial. The defendant must make both showings to prove his counsel was so ineffective as to require reversal. **Strickland**, 466 U.S. at 687, 104 S.Ct. at 2064. To carry his burden, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability

[3] The defendant would have to satisfy the requirements of La. C.Cr.P. art. 924 *et seq.* to receive such a hearing.

sufficient to undermine confidence in the outcome." **Strickland**, 466 U.S. at 694, 104 S.Ct. at 2068.

The failure to file a motion to reconsider sentence in itself does not constitute ineffective assistance of counsel. However, if the defendant can show a reasonable probability that, but for counsel's error, the sentence would have been different, a basis for an ineffective assistance claim may be found. Thus, the defendant must show that, but for counsel's failure to file a motion to reconsider sentence, the sentence would have been changed, either in the district court or on appeal. **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 punishment. Although a sentence falls within statutory limits, it may be excessive. **State v. Smith**, 407 So.2d 652, 656 (La. 1981); **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. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks one's sense of justice. **State v. Andrews**, 94-0842 (La. App. 1 Cir. 5/5/95), 655 So.2d 448, 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. 1 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 La. C.Cr.P. art. 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. **State v. Brown**, 2002-2231 (La. App. 1 Cir. 5/9/03), 849 So.2d 566, 569.

In **State v. Dorthey**, 623 So.2d 1276, 1280-81 (La. 1993), the Louisiana Supreme Court recognized that if a trial judge determines the punishment mandated by the Habitual Offender Law makes no measurable contribution to acceptable goals of punishment, or that the sentence amounts to nothing more than the purposeful imposition of pain and suffering, and is grossly out of proportion to the severity of the crime, he is duty bound to reduce the sentence to one that would not be constitutionally excessive. However, the holding in **Dorthey** was made only after, and in light of, express recognition by the court that the determination and definition of acts that are punishable as crimes is purely a legislative function. It is the legislature's prerogative to determine the length of the sentence imposed for crimes classified as felonies. Moreover, courts are charged with applying these punishments unless they are found to be unconstitutional. **Id.**, 623 So.2d at 1278.

It is presumed that a mandatory minimum sentence under the Habitual Offender Law is constitutional. **State v. Johnson**, 97–1906 (La. 3/4/98), 709 So.2d 672, 676. In **Johnson**, the Louisiana Supreme Court reexamined the issue of when **Dorthey** permits a downward departure from a mandatory minimum sentence. The court held that, to rebut the presumption that the mandatory minimum sentence was constitutional, the defendant had to "clearly and convincingly" show that:

> [he] is exceptional, which in this context means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case.

State v. Johnson, 709 So.2d at 676, citing **State v. Young**, 94-1636 (La. App. 4 Cir. 10/26/95), 663 So.2d 525, 528 (Plotkin, J., concurring), writ denied, 95-3010 (La. 3/22/96), 669 So.2d 1223.

During the **Boykin** colloquy at the time of the defendant's guilty plea herein, the trial court noted there had been no promise or commitment regarding the sentence that would be imposed. In accordance with La. R.S. 40:968(B), the

trial court noted the sentencing range for the underlying offense, distribution of hydrocodone (Lortab), is not more than ten years imprisonment at hard labor and a possible fine of not more than fifteen thousand dollars. Since the defendant was adjudicated a second-felony habitual offender, pursuant to La. R.S. 15:529.1(A)(1)(a) (prior to 2010 amendments), her sentencing exposure increased to not less than five years and not more than twenty years imprisonment at hard labor. Thus, in sentencing the defendant to five years imprisonment at hard labor, the trial court imposed the minimum sentence under the Habitual Offender Law.

At the sentencing hearing, before the trial court imposed sentence, the defense attorney noted that the defendant had submitted a letter informing the trial court that her severely disabled niece was in her care and custody. The defense attorney further stated the defendant hoped she would be provided the minimum mandatory sentence of five years to minimize the amount of time she would spend away from her niece and other obligations. The defense attorney further noted the defendant's convictions were for nonviolent offenses and the defendant has a drug problem that contributed to her criminal behavior. The defendant then addressed the court directly, reiterating that her handicapped niece needed her and further stating that she did not kill anyone, that she had asked for drug court while in jail, that she was not a big drug dealer, that she had an elderly mother who needed her, and that she personally has a "lot of sicknesses." Regarding the defendant's predicate offense, the State noted that she was originally charged with distribution of Xanax but pled guilty to the lesser offense of possession. The State further noted that the instant conviction is for distribution of drugs as opposed to mere possession. After the State's rebuttal, the defendant requested to make another statement wherein she indicated that she had been set up by the police, admitted that she was wrong, and reiterated the effect that her incarceration would have on

her niece. The defendant also noted that her life "went down" after she lost her own daughter in 2007, adding that it was a nightmare.

In imposing sentence, the trial court noted that, in committing a crime, the defendant decided the drugs were more important than her niece, and the defendant had to face consequences as a result of her actions. The trial court further noted its consideration of the guidelines of La. C.Cr. P. art. 894.1. The trial court found that there was an undue risk that, during any period of a suspended sentence or probation, the defendant would commit another crime and noting that probation or suspension was not allowed under the law. See La. R.S. 15:529.1(G). The trial court further noted the instant crime did not involve injury to a victim, the use of a weapon, or a risk of death or great bodily harm, or violence of any kind. The trial court further noted the case did not involve a major economic offense. The trial court noted the defendant's criminal history consisting of similar offenses. The trial court concluded the hardship caused to the defendant's family by her imprisonment did not override the necessity of incarceration in this case.

Based on the record before us, we find the defendant has failed to show that her situation is exceptional or that the mandatory minimum sentence is not meaningfully tailored to her culpability, the gravity of the offense, and the circumstances of the case. Thus, we do not find that a downward departure from the mandatory minimum sentence was required in this case. The defendant received the sentence requested at the sentencing hearing, and the record clearly supports the imposition of the minimum sentence. As we find the sentence is not excessive, even if we were to conclude the defendant's trial counsel performed deficiently in not filing a motion to reconsider sentence, the defendant has failed to

show she was prejudiced in this regard. Thus, assignments of error numbers one and two are without merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.