NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 1286

STATE OF LOUISIANA

VERSUS

CARLYNN M. KEENEY

Judgment Rendered: February 10, 2012

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On Appeal from the 22nd Judicial District Court
In and For the Parish of St. Tammany
Trial Court No. 493,062

The Honorable Allison H. Penzato, Judge Presiding

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

HUGHES, J.

The defendant, Carlynn M. Keeney, was charged by bill of information with one count of driving while intoxicated, third offense, a violation of LSA-R.S. 14:98. The defendant pled not guilty. At the trial, the defendant stipulated that she had two prior alcohol-related convictions under LSA-R.S. 14:98. Following a jury trial, the defendant was found guilty as charged. At the sentencing hearing, the defendant was sentenced to three years at hard labor. The defendant filed a motion to reconsider sentence, which was denied. Subsequently, the trial court amended the sentence to impose the $2,000.00 fine mandated by LSA-R.S. 14:98(D)(1)(a) plus costs, and to add the mandatory parole restriction that "at least" 45 days of the defendant's sentence must be served without benefit of parole.[1] [2] The defendant now appeals, designating one assignment of error. For the reasons set forth below, we affirm the defendant's conviction and sentence.

FACTS

On September 15, 2008 Lisa Wharton was driving on U.S. Highway 190 in Mandeville and attempting to make a right turn when a vehicle operated by the defendant ran into the rear of Ms. Wharton's vehicle. The force of the impact spun Ms. Wharton's vehicle around 180 degrees and caused it to come to rest in a ditch. Michael Riley witnessed the accident. Mr. Riley testified that the defendant did not apply the brakes or slow down prior to impact.

Ms. Wharton was taken from the accident scene by ambulance. Ms. Wharton suffered injuries to her head and neck. A passenger in the vehicle

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[1] The version of LSA-R.S. 14:98(D)(1)(a) in effect at the time of the offense provided, in part:

> Forty-five days of the sentence of imprisonment shall be imposed without benefit of probation, parole, or suspension of sentence." LSA-R.S. 14:98 (prior to amendment by 2010 La. Acts No. 801, §1).

[2] Although the issue may now be moot because it has been more than forty-five days since sentencing, the trial court misspoke when it stated that "at least" forty-five days of the sentence was to be served without benefit of parole as the statute requires forty-five days of the sentence be served without benefit of parole. To the extent that the wording may cause confusion, out of an abundance of caution we strike the words "at least" from the sentence.

operated by the defendant was also transported from the accident scene by ambulance. The record does not indicate the extent of the passenger's injuries.

Officer Donald Behlar of the Mandeville Police Department arrived at the accident scene. After dispatching the ambulance and making sure Ms. Wharton and the passenger were in route, Officer Behlar interviewed the defendant. Officer Behlar observed that the defendant's speech was very slow and slurred. The pupils of the defendant's eyes were dilated and her balance was not normal. Although he did not smell alcohol, based on his other observations, Officer Behlar had reason to believe that the defendant had some type of impairment. Officer Behlar summoned Officer David Sharp to assist in the accident investigation.

Officer Sharp also observed that the defendant's speech was slurred, her balance was poor, the pupils of her eyes were enlarged, and the defendant's eyes were watery. Although he did not smell alcohol, Officer Sharp also had reason to believe that the defendant had some type of impairment. Officer Sharp conducted a field sobriety test on the defendant, which the defendant failed.

The defendant was arrested at the accident scene and taken to the Mandeville police complex. Once there, Officer Behlar read the arrestee rights form to the defendant, which she signed. During her interview, the defendant was asked if she was ill or if she had taken any types of medication or drugs in the past twenty-four hours. The defendant responded that she was mentally ill and that she had taken an anti-inflammatory, vicodin, and another medication.

The defendant submitted to an intoxilyzer breath test, which registered zeros. The defendant also submitted to a urine chemical analysis which was positive for marijuana, trazodone, several benzodiazepines, and two opiates.

ASSIGNMENT OF ERROR

In her sole assignment of error, the defendant alleges that her sentence is excessive, arguing that she was on prescribed medication and should have been sentenced under the provisions of LSA-R.S. 14:98(D)(1)(b)(*i*) and (D)(1)(b)(*ii*). Specifically, the defendant contends that the trial court failed to give adequate consideration to the following mitigating circumstances: the defendant accepted responsibility for her actions; the defendant was under medical care; and there was no evidence that the defendant had prior criminal history other than the predicate LSA-R.S. 14:98 convictions. In addition, the defendant urges that the trial court did not give adequate consideration to the total guidelines provided in LSA-C.Cr.P. art. 894.1 in particularizing the defendant's sentence.

The Eighth Amendment to the United States Constitution and Article I, § 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. 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. **State v. Andrews**, 94-0842 (La. App. 1st 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. 1st Cir. 1988); see also LSA-C.Cr.P. art. 881.4(D). 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 LSA-C.Cr.P. art. 894.1 need not be recited; the record must reflect that the trial court adequately

considered the criteria. **State v. Brown**, 2002-2231 (La. App. 1st Cir. 5/9/03), 849 So.2d 566, 569.

The articulation of the factual basis for a sentence is the goal of LSA-C.Cr.P. art. 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 LSA-C.Cr.P. art. 894.1. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982). At sentencing, the trial court stated, in pertinent part:

> The defendant is now being sentenced in accordance with the provisions of Louisiana Code of Criminal Procedure article 894.1.
>
> The Court finds that there is an undue risk that during a period of a suspended sentence or probation that the defendant will commit another crime, particularly this crime.
>
> Ms. Keeney, as I recall from the facts of this case, this was an issue of you taking medications and driving in spite of the fact that you were taking medications. I realize that you were prescribed these medications. However, you have now come to your third offense, and have not realized that you cannot take these drugs and drive because they impair your ability.
>
> The court finds the defendant is also in need of correctional treatment, or a custodial environment, that can be provided most effectively by her commitment to an institution.

At sentencing, it is clear that the trial court considered LSA-C.Cr.P. art. 894.1. The trial court articulated that it was cognizant that the medications the defendant was taking at the time of the offense were prescribed to her. The trial court also articulated its concern that if granted probation, there was an undue risk that the defendant would commit another crime of driving while intoxicated. The record supports the trial court's concern. At the trial, Nikki Smith, who is employed by the probation department for the Twenty-Second Judicial District Court, testified that the defendant's probation was revoked in her predicate conviction in docket number 472468 on June 4, 2009, which is after the date of the

instant offense. Subsequently, the defendant tested positive for marijuana and opiates.

The defendant argues that a three year sentence is grossly out of proportion to the severity of the crime. The defendant further suggests that sentencing the defendant under the discretionary provisions of LSA-R.S. 14:98(D)(b)(1)(*i*) and (*ii*) would provide a better benefit to society and to the defendant. At trial, the defendant testified that she was under a psychiatrist's care for her bi-polar, post-traumatic stress, and borderline personality disorders, and that the prescription medications that she was taking at the time of the accident were prescribed by her physicians. The defendant urges that the sentence is a needless imposition of pain and suffering, as she needs evaluation and treatment.

The law in effect at the time of the defendant's September 19, 2008 offense provided for a minimum sentence of one year and a maximum sentence of five years, with forty-five days of the sentence to be served without the benefit of probation, parole or suspension of sentence. It also provided that the "court, in its discretion, may suspend all or any part of the remainder of the sentence of imprisonment." LSA-R.S. 14:98(D)(1)(a). In this case, the defendant's actions resulted in injuries to two people. The trial court found that the defendant has not realized that these drugs impair her ability to drive and that she cannot take the drugs and drive.

CONCLUSION

The three-year sentence imposed by the trial court was well within the statutory sentencing range. Considering the trial court's careful review of the circumstances and that the defendant's actions resulted in injuries to two people, we find no abuse of discretion by the trial court in imposing a mid-range sentence of which only the statutory minimum of forty-five days are to be served without benefit of parole. For these reasons, we find no merit in the defendant's

assignment of error. We affirm the defendant's conviction and sentence. All costs of this appeal are assessed to the defendant, Carlynn M. Keeney.

CONVICTION AND SENTENCE AFFIRMED.