NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2008 KA 0658

STATE OF LOUISIANA

VERSUS

CONNIE S. CANADA

Judgment Rendered: September 12, 2008.

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On Appeal from the
22nd Judicial District Court,
in and for the Parish of St. Tammany
State of Louisiana
District Court No. 427803

The Honorable William J. Burris, Judge Presiding

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Walter P. Reed
District Attorney
Covington, La.
Kathryn W. Landry
Baton Rouge, La.

Counsel for Plaintiff/Appellee,
State of Louisiana

Frederick H. Kroenke, Jr.
Baton Rouge, La.

Counsel for Defendant/Appellant,
Connie S. Canada

* * * * *

BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

Downing, J. concurs and assigns reasons.

CARTER, C.J.

The defendant, Connie S. Canada, was charged by bill of information with possession of cocaine, a violation of La. R.S. 40:967C. The defendant pled not guilty, and following a jury trial, she was found guilty of the responsive offense of attempted possession of cocaine, a violation of La. R.S. 40:967C and La. R.S. 40:979A. The defendant was sentenced to two years at hard labor. The sentence was suspended, and she was placed on two years of supervised probation. As part of her probation, the defendant was ordered to pay a fine of $750 plus court costs. The defendant appeals, designating two assignments of error. We affirm the conviction and sentence.

FACTS

On the evening of February 16, 2007, during Mardi Gras in Slidell, the defendant, her boyfriend, Ernest Bergens, and the defendant's friend, Sandra "Jeannie" Parris, were near the intersection of Kostmayer and the 3300 block of Pontchartrain Drive waiting for the Selene parade. They were next to Parris's parked Lincoln Navigator. While patrolling the area, Sergeant Nicky Mistretta, Detective Fred Ohler, and Detective Dennis Bush, all with the Slidell Police Department, detected a strong odor of marijuana that led them to Parris's Navigator.

While Detectives Ohler and Bush spoke with Bergens and Parris, Sergeant Mistretta observed the defendant move away from the vehicle. The defendant began pulling contents from her pockets, which caused Sergeant Mistretta to become suspicious. Sergeant Mistretta approached the defendant, asked why she was digging in her pockets, and conducted a pat

down search. During this time, Sergeant Mistretta observed a small, blue plastic container[1] on the ground near the defendant's feet. Sergeant Mistretta picked up the container and opened it. Inside, he found a zip lock bag containing 1.88 grams of cocaine and a piece of a plastic straw. Sergeant Mistretta advised the defendant of her **Miranda** rights. According to Sergeant Mistretta's testimony at trial, the defendant denied the cocaine was hers but admitted she had used cocaine earlier that night. The defendant was placed under arrest and brought to a transport unit. At this point, the defendant admitted that the cocaine she had used earlier had come from the container found by Sergeant Mistretta.

ASSIGNMENTS OF ERROR NUMBERS 1 AND 2

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

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, p. 2 (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 her sentence is excessive, even in the absence

[1] Defense counsel described the container as a "Bayer aspirin tin."

of a motion to reconsider sentence, in order to address the defendant's claim of ineffective assistance of counsel. **State v. Wilkinson**, 99-0803, p. 3 (La. App. 1 Cir. 2/18/00), 754 So.2d 301, 303, writ denied, 2000-2336 (La. 4/20/01), 790 So.2d 631.

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, her sentence would have been different, a basis for an ineffective assistance claim may be found. See **State v. Felder**, 2000-2887, p. 11 (La. App. 1 Cir. 9/28/01), 809 So.2d 360, 370, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173.

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. 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, pp. 8-9 (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. 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**, 2002-2231, p. 4 (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, her prior criminal record, the seriousness of the offense, the likelihood that she will commit another crime, and her potential for rehabilitation through correctional services other than confinement. See **State v. Jones**, 398 So.2d 1049, 1051-1052 (La. 1981).

In the instant matter, the trial court imposed a two-year sentence at hard labor, suspended the sentence, and placed the defendant on two years of supervised probation. The trial court further imposed a $750 fine plus court costs. It is clear from the trial court's reasons for judgment at sentencing that it considered Article 894.1. Upon its review of the defendant's presentence investigation report, the trial court noted that the instant conviction was the defendant's first offense. Given the defendant was forty-seven years old, with no previous record, the trial court found the defendant was "a very appropriate candidate for probation."

The maximum sentence pursuant to La. R.S. 40:967C and La. R.S. 40:979A is two and one-half years imprisonment and a possible fine of up to

$2,500. Considering the trial court's consideration of the circumstances and the fact that the defendant was placed on probation in lieu of being imprisoned, the sentence imposed is not grossly disproportionate to the severity of the offense and, therefore, is not unconstitutionally excessive.

Because we find the sentence is 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. **Wilkinson**, 99-0803 at p. 3, 754 So.2d at 303; see **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Her claim of ineffective assistance of counsel must fall.

These assignments of error are without merit.

CONCLUSION

For the above stated reasons, the defendant's sentence and conviction are affirmed.

CONVICTION AND SENTENCE AFFIRMED.

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DOWNING, J. concurring.

Not only is this sentence not excessive, the defendant should be eternally grateful she didn't go to prison. This appeal is a major waste of judicial time and resources.