NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 1623

STATE OF LOUISIANA

VERSUS

DANE R. KOEPP

Judgment rendered May 2, 2012.

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Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. 466286
Honorable Richard A. Swartz, Judge

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DANE R. KOEPP

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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

McClendon J. concurs and assigns reasons.

PETTIGREW, J.

The defendant, Dane R. Koepp, was charged by bill of information with one count of driving while intoxicated, fourth offense, a violation of La. R.S. 14:98. The bill of information lists the following three predicate DWI convictions: April 16, 1999[1]; March 5, 2001[2]; and December 16, 2002.[3] The defendant pled not guilty. The defendant filed a pro se motion to quash the predicate convictions. The motion to quash was heard on December 13, 2010, after which the trial court denied the motion. Immediately following the denial of the motion to quash, the defendant pled guilty pursuant to **State v. Crosby**, 338 So.2d 584 (La. 1976), preserving his right to appeal the denial of the motion to quash. The trial court accepted the defendant's guilty plea of driving while intoxicated, fourth offense and sentenced him to ten years imprisonment with the Department of Public Safety and Corrections.

In a prior appeal with this court under Docket Number 2011 KA 0761, the defendant appealed the denial of the motion to quash. However, that appeal was dismissed as being untimely. Subsequently, the defendant filed an application for post conviction relief, requesting permission to file an out-of-time appeal, which was granted. The instant appeal does not challenge the denial of his motion to quash. Rather, the defendant now appeals, urging three assignments of error related to his sentence. Specifically, the defendant contends:

1. The trial court abused its discretion by imposing a constitutionally excessive sentence where although the range of sentencing to be imposed under the statute for a fourth offense DWI was not less than ten, nor more than thirty years, the statute only mandated that three years of incarceration be imposed, and allowed the remainder of the ten years to be suspended.

2. The trial court erred in failing to consider the sentencing factors of [La. Code Crim. P. art.] 894.1, or to articulate them if they had, in fact, been considered prior to sentencing the defendant.

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[1] The bill of information alleges this conviction was obtained in the 24th Judicial District Court in Jefferson Parish under Docket Number 98-4641.

[2] The bill of information alleges this conviction was obtained in the 24th Judicial District Court in Jefferson Parish under Docket Number 00-3348.

[3] The bill of information alleges this conviction was obtained in the 24th Judicial District Court in Jefferson Parish under Docket Number 02-5713.

3. Defendant's trial counsel was ineffective for failing to file a motion to reconsider the sentence, which caused prejudice to the defendant.

For the reasons set forth below, we affirm the defendant's conviction and sentence.

FACTS

Because the defendant pled guilty, the facts of the offense were not fully developed. The bill of information charged that the defendant committed the instant offense on April 26, 2009. At the hearing on the motion to quash, the State produced evidence of the underlying facts for his three predicate convictions and the sentences imposed. This evidence shows that on April 7, 1999, the defendant pled guilty to two counts of third-offense DWI. The sentences imposed for the April 7, 1999 convictions provided the defendant with the benefit of suspension of part of the sentences, home incarceration, and participation in a court-approved substance abuse program. On March 5, 2001, the defendant, once again, pled guilty to a third-offense DWI. The sentence imposed required the defendant to complete a substance abuse program and prohibited him from driving any vehicle without an Interlock device. In the third predicate offense, the defendant pled guilty on December 16, 2002, to a fourth-offense DWI. For this fourth-offense DWI conviction, the defendant was sentenced to ten years imprisonment at hard labor with all but sixty days suspended and for the defendant to serve sixty days on the home incarceration program. Upon release, the trial court ordered the defendant be placed on active probation for two years. However, the evidence discloses the defendant's original commitment was amended and his probation revoked. The trial court resentenced him to five years imprisonment at hard labor.

ASSIGNMENTS OF ERROR

The defendant's three assignments of error are interrelated. The first and second assignments of error challenge his sentence as being excessive and imposed without proper consideration or articulation of the sentencing guidelines in La. Code Crim. P. art. 894.1. However, in his third assignment of error, the defendant notes his trial attorney

failed to file a motion to reconsider sentence, which failure procedurally barred him from having his sentence reviewed on appeal. The defendant argues that this preclusion is prejudicial as the sentence is unconstitutionally excessive. Thus, in his last assignment of error, the defendant claims his trial counsel was ineffective for failing to file a motion to reconsider sentence.

First and Second Assignments of Error

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. Code Crim. 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. In the instant matter, trial counsel did not file a motion to reconsider sentence. Accordingly, the defendant is procedurally barred from having his first and second assignments of error reviewed by this court on appeal. **State v. Felder**, 2000-2887, p. 10 (La. App. 1 Cir. 9/28/01), 809 So.2d 360, 369, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173.

Third Assignment of Error

In his third assignment of error, the defendant argues that his trial counsel was ineffective in failing to file a motion to reconsider sentence. Initially, we note that a claim of ineffective assistance of counsel is more properly raised by an application for post conviction relief in the district court where a full evidentiary hearing may be conducted. Nonetheless, where the record discloses evidence needed to decide the issue of ineffective assistance of counsel, and that issue is raised by assignment of error on appeal, the issue may be addressed in the interest of judicial economy. **State v. Henry**, 2000-2250, pp. 3-4 (La. App. 1 Cir. 5/11/01), 788 So.2d 535, 538, writ denied, 2001-2299 (La. 6/21/02), 818 So.2d 791. Thus, in the interest of judicial economy, we

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, 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.

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

Applying this test to the case at hand, 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, his sentence would have been different, a basis for an ineffective assistance claim may be found. Thus, the defendant must show that but for his 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**, 2000-2887 at 11, 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. 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. 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. Code Crim. P. art. 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.

On appeal, the defendant contends that the applicable sentencing provision for his offense is La. R.S. 14:98(E)(4)(a). It provides:

> If the offender has previously been required to participate in substance abuse treatment and home incarceration pursuant to Subsection D of this Section, the offender shall not be sentenced to substance abuse treatment and home incarceration for a fourth or subsequent offense, but shall be imprisoned at hard labor for not less than ten nor more than thirty years, and at least three years of the sentence shall be imposed without benefit of suspension of sentence, probation, or parole.

The record before us reveals that the defendant was previously required to participate in substance abuse treatment and home incarceration in his April 7, 1999 and March 5, 2001 predicate DWI convictions. However, it also reflects his predicate December 16, 2002 DWI conviction was for a fourth offense, all but sixty days of his sentence were suspended, and he received the benefit of probation upon release. Although his parole was later revoked, the record establishes the defendant received the benefit of suspension of sentence and probation in his prior fourth-offense DWI conviction. Under these circumstances, the applicable sentencing provision at the time of the instant fourth-offense DWI is provided by La. R.S. 14:98(E)(4)(b) (prior to amendment by 2010 La. Acts No. 801, §1). It states:

> If the offender has previously received the benefit of suspension of sentence, probation, or parole as a fourth offender, no part of the sentence may be imposed with benefit of suspension of sentence, probation, or parole, and no portion of the sentence shall be imposed concurrently with the remaining balance of any sentence to be served for a prior conviction for any offense.

In the instant matter, the sentence imposed by the trial court is the mandatory minimum sentence possible under the appropriate sentencing provisions, and its imposition is presumed constitutional. See **State v. Johnson**, 97-1906, p. 6 (La. 3/4/98), 709 So.2d 672, 675; **State v. Dorthey**, 623 So.2d 1276, 1278 (La. 1993). In **Dorthey**, the Louisiana Supreme Court recognized that if a trial judge determines that 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. **Dorthey**, 623 So.2d at 1278.

In **Johnson**, the Louisiana Supreme Court reexamined the issue of when **Dorthey** permits a downward departure from a mandatory minimum sentence, albeit in the context of the Habitual Offender Law. The court held that to rebut the presumption that a mandatory minimum sentence is constitutional, the defendant had to "clearly and convincingly" show:

> [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.

Johnson, 97-1906 at 8, 709 So.2d at 676. While both **Dorthey** and **Johnson** involve the mandatory minimum sentences imposed under the Habitual Offender Law, the Louisiana Supreme Court has held that the sentencing review principles espoused in

Dorthey are not restricted in application to the penalties provided by La. R.S. 15:529.1. See **State v. Henderson**, 99-1945, p. 19 n.5 (La. App. 1 Cir. 6/23/00), 762 So.2d 747, 760 n.5, writ denied, 2000-2223 (La. 6/15/01), 793 So.2d 1235.

On appeal, the defendant contends that the trial court failed to take into consideration his alcoholism and the impact it has on his ability to make rational decisions. He points out that under La. R.S. 14:98(G), conviction of a third or subsequent DWI conviction is presumptive evidence of the existence of a substance abuse disorder in the offender. He argues that in order to address a disease such as this one, there must be some type of meaningful intervention that focuses on treatment of the disease and not simply implementation of punishment. The defendant also argues that he is not the worst of offenders, as there was only minimal property damage and no one was injured as a result of him committing this offense. However, we find that the Legislature has already taken these factors into account when it set the minimum mandatory sentence for a fourth-offense DWI offender who has received the benefit of suspension of sentence and probation for a previous fourth-offense DWI conviction. Under the various sentencing provisions in La. R.S. 14:98, the Legislature, in its wisdom, struck a balance between the benefits society receives when a DWI offender participates in court-ordered substance abuse treatment and the serious threat a serial DWI offender, who continues to drive while intoxicated, poses to the health and safety of the public. Under the particular facts in the instant case, that balance is provided in La. R.S. 14:98(E)(4)(b). The record before us reflects nothing unusual about the defendant's circumstances that would justify a downward departure from the mandatory minimum sentence under La. R.S. 14:98(E)(4)(b). Thus, based on the record before us, we find the defendant has failed to clearly and convincingly show that he is exceptional due to unusual circumstances.

The defendant also contends the trial court did not mention any of the factors delineated in Article 894.1 prior to imposing sentence. The defendant contends the trial court only inquired as to his age, education level, and recited his predicate offenses

before imposing sentence. He argues that it is impossible to tell whether the trial court properly considered the statutory sentencing guidelines.

In the instant matter, sentencing immediately followed the hearing on the motion to quash and the **Boykin** proceeding. The transcript indicates the defendant entered a guilty plea as a result of a plea agreement that was the result of prior discussions among the trial court, defense counsel, and the district attorney. During the **Boykin** portion of the proceeding, the trial court informed the defendant that the substance of the plea agreement would be "disposed" when sentence was imposed. It further advised the defendant that he could withdraw his guilty plea if the sentence imposed was not in accordance with his understanding.

However, the record also reflects the trial court did not disclose during sentencing the specific terms of the plea agreement. In sentencing the defendant, the trial court stated:

> [H]aving [earlier] stated he was 52 years of age, having [withdrawn] his previously entered plea of not guilty and having been adjudicated guilty today of driving while intoxicated fourth offense, he is hereby sentenced to serve ten years with the Department of Public Safety and Corrections. That sentence is to be **consecutive** to the sentence he is currently serving. (Emphasis original.)

After imposing sentence, the trial court asked the defendant if he understood his sentence and the defendant replied that he did. Neither defense counsel nor the district attorney indicated to the trial court that the sentence was not consistent with their prior discussions and agreement. While the trial court could have reiterated the details of the plea agreement discussions, under the particular circumstances reflected in the transcript, we find the record provides this court with an adequate basis for review and constitutes adequate compliance with Article 894.1.

In the instant matter, the sentencing range for a fourth-offense DWI is ten to thirty years at hard labor. La. R.S. 14:98(E)(4)(a). However, as the defendant has previously had the benefit of suspension of sentence and probation in a prior fourth-offense DWI conviction, La. R.S. 14:98(E)(4)(b) mandates that the sentence imposed is without the benefit of parole, probation, or suspension of sentence. As previously noted, the

defendant has not shown that a downward departure from the mandatory minimum sentence is clearly and convincingly warranted in this matter, and the record supports the sentence imposed. As we find the sentence is not excessive, even if we were to conclude that the defendant's trial counsel performed deficiently in not filing a motion to reconsider sentence, the defendant has not shown he was prejudiced in this regard. Thus, the defendant's assignment of error is without merit.

SENTENCING ERROR

In accordance with La. Code Crim. P. art. 920(2), all appeals are reviewed for errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. **State v. Price**, 2005-2514, p. 18 (La. App. 1 Cir. 12/28/06), 952 So.2d 112, 123 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277. After a careful review of the record, we have found two sentencing errors. First, we note that in addition to the sentencing provisions provided in La. R.S. 14:98(E)(4)(a) and (b), the statute mandates that a person who is convicted of a fourth or subsequent DWI offense shall be fined five thousand dollars ($5,000.00). See La. R.S. 14:98(E)(1)(a). The sentencing transcript indicates the trial court failed to impose the mandatory fine.[4] Accordingly, the defendant's sentence, which did not include the fine, is illegally lenient. However, since the sentence is not inherently prejudicial to the defendant, and neither the State nor the defendant has raised this sentencing issue on appeal, we decline to correct this error. See **Price**, 2005-2514 at 18-22, 952 So.2d at 123-125.

Additionally, we note the trial court failed to specify that the sentence is without the benefit of parole, probation, or suspension of sentence. See La. R.S. 14:98(E)(4)(b). However, when a criminal statute requires that all or a portion of a sentence imposed for a violation of that statute be served without the benefit of parole, probation, or suspension of sentence, the sentence imposed under the provisions of that statute shall be deemed to contain the provisions relating to the service of that sentence without the

[4] The minutes also reflect no fine was imposed.

benefit of parole, probation, or suspension of sentence. See La. R.S. 15:301.1(A). See also **State v. Williams**, 2000-1725, p. 10 (La. 11/28/01), 800 So.2d 790, 798-799.

CONVICTION AND SENTENCE AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 1623

STATE OF LOUISIANA

VERSUS

DANE R. KOEPP

****

McCLENDON, J., concurs and assigns reasons.

While I am concerned about the failure of the trial court to impose the legislatively mandated fine, given the state's failure to object and in the interest of judicial economy, I concur with the majority opinion.