

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 KA 1208

STATE OF LOUISIANA

VERSUS

DONALD P. BARZE

Judgment Rendered: DEC 23 2009

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On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket No. 458865

Honorable Richard A. Swartz, Judge Presiding

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BEFORE: DOWNING, GAIDRY, AND McCLENDON, JJ.

McCLENDON, J.

The defendant, Donald P. Barze, was charged by bill of information with driving while intoxicated (DWI), fourth offense, a violation of LSA-R.S. 14:98E. Defendant pleaded not guilty and was found guilty as charged after a trial by jury. Defendant was sentenced to twenty years imprisonment at hard labor to be served without the benefit of probation, parole, or suspension of sentence. The trial court denied defendant's motion to reconsider sentence. Defendant appealed, assigning as error the constitutionality of the sentence imposed. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

On or about November 9, 2008, Corporal Kenneth Bailey of the Madisonville Police Department was performing routine patrol duty. During the early morning hours, Corporal Bailey observed a dark Ford pickup truck travelling towards him on Main Street. The truck was travelling down the center of the roadway and was being operated by defendant. Corporal Bailey continued to watch the vehicle as it passed him and approached a four-way stop at Highway 22 and Main Street. The vehicle remained at the intersection for an extended period of time, but ultimately was driven through the intersection. Corporal Bailey pulled out of St. Francis Street and began following defendant.

As Corporal Bailey followed defendant, he observed defendant's vehicle twice veer over the center line of the roadway then back to the travel lane. Defendant stopped the vehicle at St. Tammany and Main streets and sat at the intersection for a few seconds. Upon resuming travel, Corporal Bailey observed the vehicle cross the center line again. Defendant made a sharp turn on St. John Street, again crossing and veering into the wrong lane. Corporal Bailey activated his unit police lights and defendant stopped his vehicle.

Corporal Bailey instructed defendant to exit his vehicle. Defendant delayed in complying. When defendant exited his vehicle he used the door to maintain his balance. Corporal Bailey informed defendant of the reason for the stop and requested his driver's license. Defendant had difficulty retrieving his

license from his wallet, and his speech was slurred. Defendant swayed while standing and had an odor of alcoholic beverage on his breath. Corporal Bailey informed defendant of his **Miranda**¹ rights. Thereafter, Corporal Bailey conducted the standardized field sobriety test, which included the horizontal-gaze nystagmus, the walk-and-turn test, and the one-legged stand test. Defendant performed poorly. Corporal Bailey determined that defendant was impaired, placed him under arrest, and transported him to the police station.

After defendant was informed of his rights related to chemical testing and signed a form indicating that he understood his rights, a breath test was conducted. Despite Corporal Bailey's insistence, defendant did not continuously blow into the mouthpiece and the sample was invalid. Corporal Bailey advised defendant that he was unable to provide a proper sample and would be booked for DWI. Defendant expressed his regret and desire to be retested. Upon further testing, defendant's blood-alcohol level was determined to be 0.172 grams.

ASSIGNMENT OF ERROR

In his sole assignment of error, defendant contends that the trial court erred in imposing an unconstitutionally excessive sentence. Defendant argues that he is not the worst type of offender, noting that no one was injured. Defendant further noted that there was no evidence put forth that he previously received the benefit of probation, parole, or suspension of sentence on a fourth offense DWI, or the opportunity for evaluation and treatment. Defendant contends that the trial court compounded the seriousness of the offense by imposing the entirety of the sentence without benefits. Defendant argues that the trial court failed to address his drinking disorder and could have imposed a lesser sentence. Defendant also contends that his condition requires treatment and not simply punishment, noting that the Journal of the American Medical Association defines alcoholism in part as a chronic disease. Defendant contends

¹ **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

that the trial judge did not properly consider the seriousness of the crime, his criminal history, his personal history, and the potential for rehabilitation.

Article I, Section 20 of the Louisiana Constitution explicitly prohibits excessive sentences. Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. In reviewing a sentence for excessiveness, the appellate court must consider the punishment and the crime in light of the harm to society. It also must gauge whether the penalty is so disproportionate as to shock its sense of justice or that the sentence makes no reasonable contribution to acceptable penal goals and, therefore, is nothing more than the needless imposition of pain and suffering. See **State v. Guzman**, 99-1528, 99-1753, p. 15 (La. 5/16/00), 769 So.2d 1158, 1167. The trial court has wide discretion in imposing a sentence within the statutory limits and such a sentence will not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Loston**, 03-0977, pp. 19-20 (La.App. 1 Cir. 2/23/04), 874 So.2d 197, 210, writ denied, 04-0792 (La. 9/24/04), 882 So.2d 1167.

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**, 03-1423, 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 illuminates and supports the sentencing choice. See **State v. Smith**, 430 So.2d 31, 46 (La. 1983).

At the time of the trial, defendant and the state stipulated that defendant had three prior DWI offenses. At the time of the instant offense, the crime of driving while intoxicated, fourth offense, was punishable by a five thousand

dollar fine and imprisonment with or without hard labor for not less than ten nor more than thirty years. LSA-R.S. 14:98E. In imposing sentence, the trial court noted that the sentence was being imposed in accordance with LSA-C.Cr.P. art. 894.1. The trial court found that there was an undue risk that during the period of a suspended sentence or probation defendant would commit another crime, that defendant was in need of correctional treatment in a custodial environment, and that a lesser sentence would deprecate the seriousness of the offense. The trial court further noted defendant's prior DWI convictions and that the instant offense was actually defendant's second DWI fourth-offense conviction.

At the hearing on defendant's motion to reconsider sentence, defendant noted that he was extremely remorseful and that he had the desire to enter a guilty plea in this case before the trial. The trial court noted its consideration of these factors and further noted that defendant was a fifth DWI offender and had been given the benefit of probation in the past. The trial court concluded that it would be inappropriate to reduce the sentence. Defendant entered a general objection.

We note that defendant did not specifically object to the trial court's determination that he had previously received the benefit of probation, and this issue was not raised in defendant's motion to reconsider sentence or at the time of the sentencing. Thus, defendant cannot raise this issue on appeal. LSA-C.Cr.P. art. 841; LSA-C.Cr.P. art. 881.1E. Moreover, based on the record before us, we find that the trial court was within its discretion in imposing the sentence. The sentence imposed by the trial court is mid-range as opposed to the maximum. Contrary to defendant's claim, the sentence is neither grossly disproportionate to the severity of the crime and defendant's criminal history, nor does it shock our sense of justice. Accordingly, this assignment of error lacks merit.

SENTENCING ERROR

Pursuant to LSA-C.Cr.P. art. 920, we note the following sentencing error. The trial court failed to impose the mandatory fine for a conviction of fourth-

offense DWI. In accordance with LSA-R.S. 14:98E, defendant was subject to a mandatory fine of five thousand dollars. Although the failure to impose the fine is error under LSA-C.Cr.P. art. 920(2), it certainly is not inherently prejudicial to defendant. Because the trial court's failure to impose the fine was not raised by the state in either the trial court or on appeal, we are not required to take any action. As such, we decline to correct the illegally lenient sentence. **State v. Price**, 05-2514, pp. 18-22 (La.App. 1 Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 07-0130 (La. 2/22/08), 976 So.2d 1277.

CONVICTION AND SENTENCE AFFIRMED.