NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 KA 1225

STATE OF LOUISIANA

VERSUS

DONOVAN THOMPSON

Judgment Rendered: DEC 23 2008

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On Appeal from the 19th Judicial District Court
In and For the Parish of East Baton Rouge
Trial Court No. 01-04-0398

Honorable Michael R. Erwin, Judge Presiding

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BEFORE: PETTIGREW, McDONALD, AND HUGHES, JJ.

HUGHES, J.

The defendant, Donovan Thompson, was charged by bill of information with simple escape, a violation of LSA-R.S. 14:110(A). He pled not guilty. Following a trial by jury, the defendant was convicted as charged. The State filed an "Information to Establish Habitual Offender Status," seeking to have the defendant sentenced as a second felony habitual offender under LSA-R.S. 15:529.1. At the conclusion of a habitual offender hearing held July 29, 2005, the trial court adjudicated the defendant a second felony habitual offender and sentenced him to imprisonment at hard labor for five years. The court ordered that this sentence run consecutive to any other sentences. The court also ordered that this sentence be served without the benefit of probation, parole, suspension of sentence, or good time. The defendant now appeals, challenging the sentence as excessive. Finding no merit in the assigned error, we affirm the defendant's conviction, amend the sentence and affirm the sentence as amended.

FACTS

On October 23, 2003, the defendant was present in Judge Marabella's courtroom in the 19th Judicial District Court in Baton Rouge. After Judge Marabella ordered the defendant remanded to the custody of the Sheriff's Office, he was placed in the custody of Deputy Eliot Jarreau. Shortly thereafter, the defendant asked Deputy Jarreau for permission to use the restroom. As Deputy Jarreau attempted to escort the defendant to the restroom, the defendant "bolted." Deputy Lori Sweeny testified that the defendant ran through the drug laboratory, pushed another female deputy out of his way as he passed the metal detector where she was stationed, and proceeded to run out the south stairwell. Despite the efforts of several deputies, the defendant was not immediately apprehended.

EXCESSIVE SENTENCE

In his sole assignment of error, the defendant contends the trial court erred in imposing an unconstitutionally excessive sentence. He argues that the five-year, consecutive sentence imposed in this case is beyond the need for treatment and amounts to cruel and unusual punishment. He contends the trial court, in imposing the five-year sentence (which is mandated by law to be served consecutively) essentially punished him for exercising his right to go to trial. He further asserts the trial court erred in stating that he was not eligible for good time credit on his sentence.

Article I, Section 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979); **State v. Lanieu**, 98-1260, p. 12 (La. App. 1 Cir. 4/1/99), 734 So.2d 89, 97, writ denied, 99-1259 (La. 10/8/99), 750 So.2d 962. A sentence is constitutionally excessive if it is grossly disproportionate to the severity of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. **State v. Dorthey**, 623 So.2d 1276, 1280 (La. 1993). A sentence is 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. Hogan**, 480 So.2d 288, 291 (La. 1985). A trial court is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed by it should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Lobato**, 603 So.2d 739, 751 (La. 1992).

The Louisiana Code of Criminal Procedure sets forth items that must be considered by the trial court before imposing sentence. LSA-C.Cr.P. art.

894.1. The trial court need not cite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the guidelines. **State v. Herrin**, 562 So.2d 1, 11 (La. App. 1 Cir.), writ denied, 565 So.2d 942 (La. 1990). In light of the criteria expressed by Article 894.1, a review for individual excessiveness should consider the circumstances of the crime and the trial court's stated reasons and factual basis for its sentencing decision. **State v. Watkins**, 532 So.2d 1182, 1186 (La. App. 1 Cir. 1988). Remand for full compliance with Article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982).

The procedural requirements for objecting to a sentence are provided in LSA-C.Cr.P. art 881.1, which provides, in pertinent part, as follows:

> A. (1) In felony cases, within thirty days following the imposition of sentence or within such longer period as the trial court may set at sentence, the state or the defendant may make or file a motion to reconsider sentence.
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> B. The motion shall be oral at the time of sentence or shall be in writing thereafter and shall set forth the specific grounds on which the motion is based.
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> E. Failure to make or file a motion to reconsider sentence or to include a specific ground upon which a motion to reconsider sentence may be based, including a claim of excessiveness, **shall preclude the state or the defendant from raising an objection to the sentence or from urging any ground not raised in the motion on appeal or review.** [Emphasis added.]

Initially, we note that the defendant did not file a motion to reconsider the sentence in this case. The record reflects that, at the time of sentencing, the defendant was also sentenced on several other offenses. At the conclusion of the sentencing on the various offenses, counsel for the

defendant stated, "Judge, we're going to object as it being – the sentence as being excessive, and we'll file a motion to reconsider that." The defendant did not file a motion to reconsider the sentence imposed in this particular case.[1] Therefore, the defendant is procedurally barred by LSA-C.Cr.P. art. 881.1(E) from raising any objection to the sentence on appeal, including a claim of excessiveness. **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; **State v. Duncan**, 94-1563, p. 2 (La. App. 1 Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam).

Moreover, even if we were to review the sentence, we would not find it to be excessive. As previously noted, the defendant herein was sentenced, as a second felony offender, to imprisonment for five years on the simple escape conviction. Louisiana Revised Statute 14:110 provides that a person imprisoned, committed, or detained who commits the crime of simple escape shall be imprisoned with or without hard labor for not less than two years nor more than five years "provided that such sentence shall not run concurrently with any other sentence." Under LSA-R.S. 15:529.1(A)(1)(a), as a second felony habitual offender, the defendant faced imprisonment for a maximum of ten years.

Prior to imposing sentence, the trial court reviewed the facts of the case and the defendant's criminal history. The court noted:

> Before entering the sentence the court will also note for the record that not only was Mr. Thompson found guilty in that bill of distribution – or, possession with intent to distribute cocaine, he was also found guilty of simple escape. That, in bill number 2-04-677 he was found guilty of unauthorized entry of an inhabited dwelling, the injuring or killing of a police dog, and aggravated flight from an officer. And then again in bill

[1] The only motion to reconsider filed by the defense challenged as excessive a sixty-year possession with intent to distribute sentence, imposed in a companion case (docketed before the 19th Judicial District Court as number 08-04-0057), also appealed to this court and decided this date. See **State v. Thompson**, 2008-1293 (La. App. 1 Cir. __/__/08) (unpublished).

> number 1-04-398 he was found guilty of another charge of simple escape, which is five other felony convictions that Mr. Thompson has received in the last year or so. Such actions by Mr. Thompson indicates to the court that he is a danger to the community. He is a danger to the police department. And if given a sentence any lighter than the one that I intend to impose would deprecate the seriousness of the offenses for which he's been charged, and would probably indicate to Mr. Thompson that, "I can keep doing these things if I ever get out of jail", because I don't think Mr. Thompson ever learned a lesson.

Considering the reasons stated by the trial court and based on the entire record before us, we find no abuse of discretion by the trial court in sentencing the defendant. Contrary to the defendant's claim, the five-year sentence does not amount to cruel and unusual punishment. Furthermore, the sentence was required, by statute, to be served consecutive to any other sentence. Even considering its consecutive nature, the sentence is neither grossly disproportionate to the severity of the crime, in light of the harm to society, nor so disproportionate as to shock our sense of justice.

Insofar as the defendant argues that the trial court erred in denying the diminution of sentence, we agree. Although defendant may, in fact, be ineligible for good time credit, the trial court, with certain exceptions, has no role in determining eligibility for diminution of sentence. See LSA-R.S. 15:571.3(C) and **State v. Hotard**, 2004-1092, p. 1 (La. 10/15/04), 885 So.2d 533, 534 (per curiam). However, when the sentencing court is of the opinion that a denial of diminution of sentence is warranted under the specific circumstances of the case, the trial judge's discretion should be exercised under LSA-C.Cr.P. art. 890.1. Under LSA-C.Cr.P. art. 890.1(B), the trial court may deny diminution of sentence for good behavior if the crime for which the sentence is imposed is a crime of violence. When denying the defendant's right to credit against his sentence for good behavior under this provision, the trial judge "shall designate whether the crime

involved is a crime of violence or an attempted crime of violence as defined or enumerated in R.S. 14:2(13)."[2] LSA-C.Cr.P. art. 890.1(A). The trial court in this case did not make such a designation or even mention Article 890.1. Thus, it does not appear that the court was exercising its discretion under this exception. Furthermore, because the offense of simple escape is not enumerated in LSA-R.S. 14:2(13) and it does not have, as an element, the use, attempted use, or threatened use of physical force against the person or property of another, nor does it always involve a substantial risk that such physical force will be used, we do not find the offense to be a crime of violence as defined in LSA-R.S. 14:2(13). We therefore amend the defendant's sentence to delete the denial of good time diminution.

REVIEW FOR ERROR

In his brief, the defendant asks that this court examine the record for error under LSA-C.Cr.P. art. 920(2). This court routinely reviews the record for such error, whether or not such a request is made by a defendant. Under LSA-C.Cr.P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we have found no other reversible errors.

CONVICTION AFFIRMED; SENTENCE AMENDED; AND AFFIRMED AS AMENDED.

[2] Louisiana Revised Statute 14:2 was amended in 2006 and redesignated former LSA-R.S. 14:2(13) as LSA-R.S. 14:2(B).