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**(225) 382-3000**

## Notice of Judgment

June 19, 2009

Docket Number: 2008 - KA - 2586

State Of Louisiana
versus
Glenn J. Carter

TO:

Hon. William J. Burris
P. O. Box 608
Franklinton, LA 70438

Kathryn Landry
Special Appeals Counsel
IEYOUB & LANDRY, L.L.C.
Post Office Box 82659
Baton Rouge, LA 70884

Frederick Kroenke Esq.
Louisiana Appellate Project
2310 Perkins Road
Baton Rouge, LA 70808

Hon. Walter P. Reed
St. Tammany Parish
701 North Columbia St.
Covington, LA 70433

You are hereby served with a copy of the opinion in the above-entitled case. Your attention is invited to Rule 2-18. Rehearing of the Uniform Rules of Courts of Appeal.

I hereby certify that this opinion and notice of judgment were mailed this date to the trial judge, all counsel of record, and all parties not represented by counsel as listed above.

Peggy J. Landry

CHRISTINE L. CROW
CLERK OF COURT

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2008 KA 2586**

**STATE OF LOUISIANA**

**VERSUS**

**GLENN J. CARTER**

**Judgment Rendered:** JUN 19 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. 431086

Honorable William J. Burris, Judge Presiding

* * * * * *

Walter P. Reed
District Attorney
Covington, Louisiana

Kathryn W. Landry
Special Appeals Counsel
Baton Rouge, Louisiana

Counsel for Appellee
State of Louisiana

Frederick H. Kroenke, Jr.
Baton Rouge, Louisiana

Counsel for Defendant/Appellant
Glenn J. Carter

* * * * * *

**BEFORE: PARRO, McCLENDON, AND WELCH, JJ.**

**McCLENDON, J.**

The defendant, Glenn J. Carter, was charged by grand jury indictment with second degree murder (count one), a violation of LSA-R.S. 14:30.1, and attempted second degree murder (count two), a violation of LSA-R.S. 14:27 and LSA-R.S. 14:30.1. The defendant entered a plea of not guilty. The trial court granted the state's motion to sever the charges. After a trial by jury on count one, the defendant was found guilty as charged. The trial court sentenced the defendant to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, arguing the following assignments of error: the trial court erred in denying the defense request for a special jury instruction; the trial court erred in imposing an excessive sentence; and trial counsel failed to file a motion to reconsider the sentence, which would constitute ineffective assistance of counsel should such failure preclude this court from considering the constitutionality of the sentence. For the following reasons, we affirm the conviction and sentence.

**STATEMENT OF FACTS**

On or about April 29, 2007, during the evening hours, a minimum of three assailants entered a mobile home in Slidell, Louisiana, that was occupied by Jose Luis Martinez-Carpio (the victim) and several other individuals. The assailants were armed and their faces were obscured. The victim died as a result of gunshots inflicted during the break-in. Upon his arrest, the defendant informed the police that the purpose of the break-in was to "hit a lick."[1] The defendant made further incriminating statements regarding the break-in and the killing of the victim.[2]

**ASSIGNMENT OF ERROR NUMBER ONE**

In the first assignment of error, the defendant argues that the trial court erred in denying his request for a special jury instruction regarding jury

[1] This term was defined as slang for committing a robbery or burglary.
[2] The recorded statements are not relevant to the assignments of error raised herein.

nullification. The defendant contends that current law gives the jury the option to convict the defendant of a lesser offense even though the evidence clearly and overwhelmingly supports a conviction of the charged offense. The defendant also notes that the Louisiana Supreme Court has made it plain that the jury must be told of this option, and argues that the legislative intent, by providing lesser offenses as responsive verdicts, which are not lesser, included offenses, supports his argument.

Louisiana Code Criminal Procedure article 802(1) mandates that a trial court shall charge the jury as to the law applicable in the case. "A requested special charge shall be given by the court if it does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent. It need not be given if it is included in the general charge or in another special charge to be given." LSA-C.Cr.P. art. 807.

A trial judge in Louisiana must charge with respect to responsive verdicts. LSA-C.Cr.P. art. 803; **State v. Johnson**, 2001-0006, pp. 5-6 (La. 5/31/02), 823 So.2d 917, 921 (per curiam). In Louisiana, juries are sworn "to render a verdict according to the law and the evidence." LSA-C.Cr.P. art. 790. Nonetheless, Louisiana's system of responsive verdicts presupposes a jury's authority to compromise its verdict even in the face of overwhelming evidence of the charged crime. The jurisprudence has allowed jurors to return a lesser responsive verdict fully supported by the same evidence that would also demonstrate, beyond a reasonable doubt, that the charged crime occurred. "Jury nullification is a recognized practice which allows the jury to disregard uncontradicted evidence and instructions by the trial judge." **State v. Porter**, 93-1106, p. 4 n.5 (La. 7/5/94), 639 So.2d 1137, 1140 n.5.

Herein, the defendant asked that the following jury instruction be included:

> Members of the jury you are instructed that while the defendant Glenn Carter has been charged with second degree murder, you may nevertheless find him guilty of the lesser offense of either manslaughter or negligent homicide even if it appears from the

evidence of this trial that he actually committed the offense charged of second degree murder.

The trial court denied the request, in part citing **State v. Legrand**, 2002-1462 (La. 12/3/03), 864 So.2d 89, cert. denied, 544 U.S. 947, 125 S.Ct. 1692, 161 L.Ed.2d 523 (2005), wherein the Louisiana Supreme Court addressed a similar issue in an unpublished appendix. A review of the jury instructions given herein shows that the trial court gave detailed, correct instructions to the jury as to the general law. This included instructions that "[i]n considering the evidence you must give the defendant the benefit of every reasonable doubt arising out of the evidence or out of the lack of evidence." The jury was also admonished, "As the sole judges of the credibility of witnesses and the weight their testimony deserves, you should scrutinize carefully the testimony given and the circumstances under which the witness has testified." The jury was fully instructed as to the appropriate responsive verdicts. Compare **State v. Johnson** (the Louisiana Supreme Court found that the trial court foreclosed the opportunity of the jury to return a lesser, responsive verdict. The court noted that a trial judge has no authority to decide unilaterally that an instruction on lesser and included offenses is not necessary because overwhelming evidence exists to convict the defendant on the crime charged, and reasonable jurors therefore could not rationally acquit on the greater offense, but could convict on a lesser offense).

The defendant has cited no authority to support the argument that the jury should have been instructed that it was free to disregard the law. Further, failure to give a special charge to the jury constitutes reversible error only when there is a miscarriage of justice, prejudice to substantial rights of the defendant, or a violation of a constitutional or statutory right. See **State v. Marse**, 365 So.2d 1319, 1323-24 (La.1978); see also LSA-C.Cr.P. art. 921; **State v. Gray**, 430 So.2d 1251, 1253 (La.App. 1 Cir. 1983). The defendant has failed to show how the trial court's refusal to instruct the jury to disregard the law and the evidence constituted a miscarriage of justice, prejudiced his substantial rights, or

violated a constitutional or statutory right. This assignment of error is therefore without merit.

**ASSIGNMENTS OF ERROR NUMBERS TWO AND THREE**

In the second assignment of error, the defendant argues that application of the legislature's statutory mandatory sentence makes it difficult for the judiciary to exercise its authority to determine if the sentence is constitutional, because whether or not a sentence is constitutional is determined by a review of the individual case and the individual defendant. Since the penalty established by the legislature is presumed lawful, even though the legislature could not have possibly considered the prerequisites required in each case to impose a constitutional sentence, the defendant contends the legislature has turned the constitutionality of a sentence on its head in this case. The defendant concludes by noting that since he is not the worst type of offender and this offense is not the worst type of offense, the mandatory life sentence is not warranted in this case.

In the third assignment of error, the defendant notes that a motion to reconsider the sentence was not filed in this case. The defendant asserts that in the event this court finds that the excessive sentence argument raised in assignment of error number two cannot be reviewed due to the lack of a motion to reconsider the sentence, the failure of his trial counsel to file the motion constitutes ineffective assistance of counsel.

As noted above, the record does not contain an oral or written motion to reconsider the sentence. In his appeal brief, the defendant asserts that the trial counsel objected to the sentence, and thus, the general objection should suffice as an oral motion to reconsider the sentence.

One purpose of the motion to reconsider 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, 1059-60 (La.1993) (per curiam). Under the clear language of LSA-C.Cr.P. art. 881.1E, failure to make or file a motion to reconsider a sentence precludes a defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. Moreover, a general objection to a sentence without stating specific grounds, including excessiveness, preserves nothing for appellate review. See **State v. Bickham**, 98-1839, p. 6 (La.App. 1 Cir. 6/25/99), 739 So.2d 887, 891. Accordingly, the defendant is procedurally barred in this case from having his challenge to the sentencing reviewed by this court on appeal. See **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.

As previously stated, the defendant argues in assignment of error number three that his trial counsel was ineffective in failing to file a motion to reconsider sentence. In the interest of judicial economy, we choose to consider the defendant's excessiveness argument so that we may 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.

As a general rule, a claim of ineffective assistance of counsel is more properly raised in an application for post-conviction relief in the trial court than by appeal. This is because post-conviction relief provides the opportunity for a full evidentiary hearing under LSA-C.Cr.P. art. 930.[3] However, when the record is sufficient, this court may resolve this issue on direct appeal in the interest of judicial economy. **State v. Lockhart**, 629 So.2d 1195, 1207 (La.App. 1 Cir. 1993), writ denied, 94-0050 (La. 4/7/94), 635 So.2d 1132.

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). See **State v. Fuller**, 454 So.2d 119, 125 n. 9 (La.1984).

[3] To receive such a hearing, the defendant would have to satisfy the requirements of LSA-C.Cr.P. art. 924, et seq.

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 that 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.

The failure to file a motion to reconsider a sentence in itself does not constitute ineffective assistance of counsel. **Felder**, 2000-2887 at pp. 10-11, 809 So.2d at 370. 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 the sentence, the sentence would have been changed in either the district court or on appeal. **Felder**, 2000-2887 at p. 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 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 this discretion. **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 LSA-C.Cr.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. The factors guiding the decision of the trial court are necessary for an appellate court to adequately review a sentence for excessiveness and, therefore, should be in the record. Otherwise, a sentence may appear to be arbitrary or excessive and not individualized to the particular defendant. However, the failure to articulate reasons for the sentence as set forth in Article 894.1 when imposing a mandatory life sentence is not an error. When a court has no discretion, an articulation of the reasons or factors for a mandatory sentence would be an exercise in futility. **Felder**, 2000-2887 at pp. 12-13, 809 So.2d at 371.

Under LSA-R.S. 14:30.1(B), a person convicted of second degree murder shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. Courts are charged with applying a statutorily mandated punishment, unless it is unconstitutional. To rebut the presumption that the mandatory minimum sentence is constitutional, the defendant must clearly and convincingly show that he is exceptional, which 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. See **Felder**, 2000-2887 at pp. 11-12, 809 So.2d at 370.

We find that the defendant has not proven, and the record is devoid of clear and convincing evidence, that the defendant is exceptional. The defendant has not shown that because of unusual circumstances he was a victim of the legislature's failure to assign a sentence that was meaningfully tailored to his

culpability, the gravity of the offense, and the circumstances of the case. Accordingly, there was no reason for the trial court to deviate from the mandatory sentence provided for the instant offense by LSA-R.S. 14:30.1(B). See **State v. Henderson**, 99-1945, pp. 19-20 (La.App. 1 Cir. 6/23/00), 762 So.2d 747, 760-61, writ denied, 2000-2223 (La. 6/15/01), 793 So.2d 1235.

For these reasons, we find that the sentence imposed is not excessive, and thus, assignment of error number two lacks merit. However, even if we were to conclude that the defendant's trial counsel performed deficiently in not filing a motion to reconsider his sentence, the defendant fails to show that he was prejudiced in this regard. Thus, the ineffective assistance of counsel argument raised in the final assignment of error is also without merit.

**CONVICTION AND SENTENCE AFFIRMED.**