NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2008 KA 0307

STATE OF LOUISIANA

VERSUS

HARRIS COOK MENTEL

Judgment rendered SEP 26 2008

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Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. 430227
Honorable Peter J. Garcia, Judge

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HARRIS COOK MENTEL

* * * * * *

BEFORE: PETTIGREW, McDONALD, AND HUGHES, JJ.

PETTIGREW, J.

The defendant, Harris Cook Mentel, was charged by bill of information with one count of second fourth offense driving while intoxicated, in violation of La. R.S. 14:98(E), and one count of simple escape, in violation of La. R.S. 14:110. The defendant pled not guilty and, following a jury trial, was found guilty as charged on both counts. The defendant filed a motion for new trial, a motion for postverdict judgment of acquittal, and a motion in arrest of judgment, all of which were denied. For the second fourth offense DWI conviction, the defendant was sentenced to twenty years at hard labor. For the simple escape conviction, the defendant was sentenced to one year at hard labor. The sentences were ordered to run consecutively. The defendant filed a motion to reconsider sentence, which was denied. The defendant now appeals, asserting two assignments of error. For the reasons that follow, we affirm the convictions and sentences.

FACTS

On April 18, 2007, at about 9:45 p.m., the defendant was driving westbound on U.S. Highway 190 toward Madisonville, St. Tammany Parish. The defendant veered from his lane of traffic into the opposite lane of oncoming traffic, and crashed, head-on, into a vehicle being driven by Michael Mulling. Moments later, Officer Charlene Frosch, with the Mandeville Police Department, arrived at the accident scene. At trial, Officer Frosch described the defendant as "wobbly and woozy." She further stated the defendant was unable to stand up well, he was unable to answer her questions in a coherent manner, his breath smelled of alcohol, and it was obvious that he was impaired.

Officer David Sharp, with the Mandeville Police Department, was called to the accident scene. Officer Sharp asked the defendant if he had had anything to drink. The defendant told Officer Sharp that he had not. Officer Sharp testified at trial that the defendant had slurred speech, poor balance, and bloodshot eyes. He further stated the defendant had a strong odor of alcohol coming from both his breath and body. Officer Sharp conducted a field sobriety test on the defendant, which he failed. The

defendant was placed under arrest for DWI, mirandized, handcuffed, and placed in the back of Officer Sharp's police unit. At this point, Officer Sharp asked the defendant how much he had had to drink. The defendant responded he drank six or seven beers.

Officer Sharp left his police unit, with the defendant in the backseat, and returned to the accident scene to inventory the defendant's vehicle. He found an open can of beer, two unopened cans of beer, and a hand-made aluminum foil pipe in the defendant's vehicle. When Officer Sharp returned to his police unit, he discovered the defendant had gotten out of his unit and fled. Based on an anonymous tip, the Mandeville police apprehended the defendant at his mother's house the following day. The defendant was still in handcuffs.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the trial court erred in denying his motion to quash. Specifically, the defendant contends that the transcript of the proceedings of a prior DWI conviction does not indicate that he pled guilty.

Prior to trial, a hearing was held, inter alia, on the defendant's motion to quash a DWI predicate offense, namely a guilty plea on February 22, 2001, in docket #325045 in the 22nd Judicial District Court, St. Tammany Parish. According to the defendant, a reading of the transcript of the February 22, 2001 hearing does not indicate that he "actually pleaded guilty."

In order for a guilty plea to be used as a basis for actual imprisonment, enhancement of actual imprisonment, or conversion of a subsequent misdemeanor into a felony, the trial judge must inform the defendant that by pleading guilty he waives: (a) his privilege against compulsory self-incrimination; (b) his right to trial and jury trial where applicable; and (c) his right to confront his accuser. **State v. Henry**, 2000-2250, p. 8 (La. App. 1 Cir. 5/11/01), 788 So.2d 535, 541, writ denied, 2001-2299 (La. 6/21/02), 818 So.2d 791. The judge must also ascertain that the accused understands what the plea connotes and its consequences. **State v. Cadiere**, 99-0970, p. 3 (La. App. 1 Cir. 2/18/00), 754 So.2d 294, 296, writ denied, 2000-0815 (La. 11/13/00), 774 So.2d 971. If the defendant denies the allegations of the bill of information, the State

has the initial burden to prove the existence of the prior guilty plea and that the defendant was represented by counsel when it was taken. If the State meets this burden, the defendant has the burden to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. If the defendant is able to do this, then the burden of proving the constitutionality of the plea shifts to the State. **State v. Carlos**, 98-1366, pp. 6-7 (La. 7/7/99), 738 So.2d 556, 559. To meet this requirement, the State may rely on a contemporaneous record of the guilty plea proceeding, i.e., either the transcript of the plea or the minute entry. Everything that appears in the entire record concerning the predicate, as well as the trial judge's opportunity to observe the defendant's appearance, demeanor, and responses in court, should be considered in determining whether or not a knowing and intelligent waiver of rights occurred. **Boykin** only requires that a defendant be informed of the three rights enumerated above. The jurisprudence has been unwilling to extend the scope of **Boykin** to include advising the defendant of any other rights which he may have. **Henry**, 2000-2250 at 8-9, 788 So.2d at 541.

At the February 22, 2001 **Boykin** hearing, the court addressed the defendant, along with several other defendants. The defendant was represented by counsel, Robert Fleming. Following are the relevant portions of the hearing:

> The Court: Is anyone forcing you, threatening you, coercing you, intimidating you, or promising you anything in order to get you to plead guilty?
>
> . . . .
>
> Mr. Mentel: No, sir.
>
> . . . .
>
> The Court: I'm going to read to you the definition of the crimes that you're charged with. The reason for that is: When you plead guilty, you waive certain rights that you have under the law. . . .

After discussing the crimes each defendant was charged with, the court stated, "As I explained earlier, when you plead guilty, you waive certain rights that you have under the law." The court then discussed the **Boykin** triad of rights the defendants would be waiving. Following this, the court asked, "Now that you know what rights that

you are waiving by pleading guilty, does anyone want to change their plea to not guilty?" There was no response. The court then accepted the "pleas as being knowingly and intelligently made with a free and voluntary waiver" of their constitutional rights.

The record before us clearly establishes that the defendant's guilty plea was valid. As indicated above, the court on several occasions explained to the defendant the consequences of pleading guilty. The court also determined that the defendant could read, write, speak, and understand English, and that he was not under the influence of alcohol, drugs, or medication that would interfere with his ability to understand the proceedings. The record indicates that the defendant understood that he was pleading guilty to a DWI. While the defendant never used the magic words, "I plead guilty" to the DWI charge, it is evident he was fully informed that he was pleading guilty to the charge. See **State v. Brooks**, 38,963, pp. 6-7 (La. App. 2 Cir. 9/22/04), 882 So.2d 724, 728, writ denied, 2004-2634 (La. 2/18/05), 896 So.2d 30. This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues it was error for him to be tried before a twelve-person jury. Specifically, the defendant contends that both crimes that he was charged with required a six-person jury.

Under La. R.S. 14:98(E), on a DWI conviction of a fourth or subsequent offense, the offender shall be imprisoned with or without hard labor. However, under La. R.S. 14:98(E)(4)(a) & (E)(4)(b), a fourth or subsequent offender shall be imprisoned at hard labor.[1] Under La. R.S. 14:110(B), a person who commits the crime of simple escape shall be imprisoned with or without hard labor. Louisiana Code of Criminal Procedure article 782(A) provides, in pertinent part, as follows:

[1] The defendant is given a harsher sentence under sections (4)(a) and (4)(b), if, respectively, he has previously been required to participate in substance abuse treatment and home incarceration as a third offender, or has received the benefit of suspension of sentence, probation, or parole as a fourth offender.

> Cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Cases in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, all of whom must concur to render a verdict.

While it is not clear under which DWI provision the defendant was sentenced, such a determination is unnecessary since, under either scenario, a twelve-person jury was not improper. If the defendant was sentenced under La. R.S. 14:98(E), then the "with or without hard labor" language was applicable, and the case should have been tried by a six-person jury. However, the verdict in the instant matter was unanimous. The defendant's conviction by a unanimous twelve-person jury did not result in any prejudice to him and, therefore, the constitutional error was harmless beyond a reasonable doubt. See **State v. Jones**, 2005-0226, p. 4 (La. 2/22/06), 922 So.2d 508, 511-12. If the defendant was sentenced under La. R.S. 14:98(E)(4)(a) or (E)(4)(b), then the "hard labor" language was applicable, and the case was correctly tried by a twelve-person jury. Although a simple escape charge is to be tried by a six-person jury, since the charges were joined in a single bill of information, a twelve-person jury was proper for both charges. See La. Code Crim. P. art. 493.2. This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 3

In his third assignment of error, the defendant argues the trial court erred when it sentenced him prior to ruling on his post trial motions.

At sentencing, defense counsel informed the trial court that he filed a motion for new trial, a motion for postverdict judgment of acquittal, and a motion in arrest of judgment. Defense counsel further stated that "[w]e're prepared for the Court to rule in that matter, and we're going to waive any delays." Immediately following sentencing, the trial court stated, "I am being premature. I have not ruled on the motions." The trial court then denied all three of the defendant's motions.

Under La. Code Crim. P. art. 821(A), a motion for postverdict judgment of acquittal must be made and disposed of before sentence. Under La. Code Crim. P. art. 853, a motion for a new trial must be filed and disposed of before sentence. Under La.

Code Crim. P. art. 861, a motion in arrest of judgment must be filed and disposed of before sentence.

While the defendant objected to the trial court's rulings on the three motions, the defendant did not enter a contemporaneous objection to the trial court's failure to rule on the motions prior to sentencing. Therefore, the defendant's failure to enter a contemporaneous objection precludes him from complaining of this error on appeal. See La. Code Crim. P. art. 841(A). Moreover, the defendant waived any delays, which suggested he was prepared to be sentenced that day. In addition, the defendant has not cited any prejudice resulting from the trial court's ruling on the motions immediately following sentencing, nor have we found any indication that he was prejudiced. Thus, any error that occurred is not reversible. See **State v. Lindsey**, 583 So.2d 1200, 1205-1206 (La. App. 1 Cir. 1991), writ denied, 590 So.2d 588 (La. 1992).

ASSIGNMENT OF ERROR NO. 4

In his fourth assignment of error, the defendant argues that his DWI sentence was excessive.[2] He further argues the trial court gave "an improper reason" for imposing the sentence.

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

[2] The defendant is not challenging his simple escape sentence.

So.2d 1241, 1245 (La. App. 1 Cir. 1988). On appellate review of a sentence, the relevant question is "whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate." **State v. Thomas**, 98-1144, pp. 1-2 (La. 10/9/98), 719 So.2d 49, 50 (per curiam) (quoting **State v. Humphrey**, 445 So.2d 1155, 1165 (La. 1984)).

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.

In the instant matter, the trial court imposed a twenty-year sentence at hard labor. The trial court considered letters written on behalf of the defendant in mitigation of his sentence and noted the defendant was given multiple chances by other judges for his prior DWI convictions. It stated it had taken into consideration the provisions of Article 894.1 in determining what an appropriate sentence should be. The trial court noted that sentence should be imposed if there is an undue risk another crime will be committed if the defendant is placed on probation. In highlighting the particular facts of this case, the trial court further noted:

> Obviously, I have no discretion in this regard. There has to be some sentence imposed. The fact that you were still driving on the highways of the state, you had a head-on collision with another driver during this particular incident itself would lend anyone to believe that you need to be incarcerate[d] in this case, that you are in need of correctional treatment.

The trial court then opined that the problem it was faced with was an appropriate sentence for someone with this many DWIs. According to the trial court, the public blames the court system when someone keeps getting DWIs and remains on the street. In rhetorical fashion, the trial court then stated:

> How does somebody get this many DWIs and they're still driving? What's going to happen when you kill somebody? Who are they going to look to? Are they going to look to Mr. Farmer? Are they going to look to Mr. Oubre, or are they going to look to me for not giving you an appropriate sentence because something has happened to you that you're not able to make these controls yourself?

The defendant contends that the above-language by the trial court was an improper reason for imposing a twenty-year sentence. According to the defendant, "[n]o one should be sentenced to twenty years imprisonment to protect the sentencing judge from possible future public approbation [sic]."

We find nothing improper in the trial court's reasons for sentencing. To the contrary, the trial court provided a considered, thoughtful discussion of the problems society faces with DWI recidivism and the reasons for the sentence it was imposing. In crafting a sentence, the trial court discussed mitigating and aggravating circumstances, and specifically noted it considered the provisions of Article 894.1. The maximum sentence pursuant to La. R.S. 14:98(E)(1)(a) or (E)(4) is thirty years imprisonment. Considering the trial court's careful analysis of the circumstances, the defendant's repeated criminal behavior, and the fact that the instant DWI violation resulted in a head-on collision with an innocent victim, we find no abuse of discretion by the trial court. The sentence is not grossly disproportionate to the severity of the offense and, therefore, is not unconstitutionally excessive. This assignment of error is without merit.

CONVICTIONS AND SENTENCES AFFIRMED.