NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 1545

STATE OF LOUISIANA

VERSUS

JASON GAINEY

Judgment Rendered: MAR 2 5 2011

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On Appeal from the
the 22nd Judicial District Court,
In and for the Parish of St. Tammany,
State of Louisiana
Trial Court No. 451449

Honorable August J. Hand, Judge Presiding

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BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J.

The defendant, Jason Gainey, was charged by bill of information with armed robbery, a violation of LSA-R.S. 14:64. The defendant waived the reading of the bill, waived the random allotting of his case, and entered a plea of guilty. Following a **Boykin** examination, the defendant was found guilty as charged. Sentencing was deferred.[1] At the sentencing hearing on a later date, the defendant was sentenced to ninety-nine years imprisonment without benefit of parole, probation, or suspension of sentence. The defendant filed a motion to reconsider sentence, which was denied. The defendant now appeals, designating two assignments of error. We affirm the conviction and sentence.

FACTS

Because the defendant pled guilty, the facts were not developed. According to the bill of information, the defendant committed armed robbery on July 4, 2001. The versions of the facts were argued by counsel at the sentencing hearing. Defense counsel, Jerry Fontenot, stated the following:

> Also, I'd have the Court take notice of the fact that based on what I understand is the, essentially the State's case, what they're saying occurred and what seems to be on all the pre-trial hearings and statements played before this Court, that Mr. Gainey's involvement in this crime would be driving a car while under the impression that a robbery was going to take place.
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> It certainly doesn't excuse that action, but that as soon as he heard, I believe the State's case is that as soon as he heard a gunshot, he pretty much took off because that's not what he signed up for. So I would point out the relative view of the fact that he's has [sic] testified to as a follower as opposed to a leader, that he did plead guilty to the

[1] The defendant pled guilty pursuant to an agreement with the State to cooperate in the prosecution of his co-defendant (Dominic Robinson, who was being tried for first degree murder) for the murder of Samantha Jaume, which occurred during the instant armed robbery. Following Robinson's trial, the defendant filed a pro se motion to withdraw his guilty plea. Also, the State filed a motion to have the plea agreement set aside. Ultimately, both motions were withdrawn by their respective parties, and the defendant was sentenced under his original guilty plea.

armed robbery, but certainly never believed that such a horrible outcome was going to occur in terms of the murder and that the Court should take that into consideration when sentencing.

The Assistant District Attorney, Scott Gardner, stated the following:

> The moment that Gainey participated in this, in those moments both he and the shooter lived in Waggaman and they made a specific effort to come to a place where they thought that they would not be identified.
>
> They waited and lurked in a parking lot, and it was their choice of victims, which was just evil, waiting for a mom with kids who are so small as to be in strollers, and then following her into her neighborhood so that they wouldn't have to confront her in a parking lot. But they would, with Gainey as the driver, follow her to a suburb to get to her house and then Gainey waiting to make sure that the gunman got where he got so that they could join up later and share the proceeds of this woman's truck.
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> You have to know when you put somebody out of your car with a gun to go chase down a woman and her four small children, that nothing good could come of that. And for two years following that, Jason Gainey had it in his possession, the knowledge to put that family's fears to rest. . . .
>
> It's all him, [the defendant] knows the whole thing, he knows how it happened, and then he got . . . this golden opportunity in 2005 to at least try to do something right[.] . . . And up until the moment he hit that stand knowing he's going to recant, and knowing he's going to recant when jeopardy's attached, when he could do the most damage, I can't think of anything more sinister, anything that shows less regard for the court system, anything that shows less regard, because both Jason and his dad were sitting in court when Jason Gainey unloaded his little scheme to try to change the outcome and to walk a murderer.
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> So for nine years, in addition to the escape attempts, he showed nothing but contempt for society, nothing but contempt for this family, and nothing but self-interest. For that reason, we think that he deserves the maximum sentence.

At the sentencing hearing, as part of his victim impact statement, Henry Jaume, the father-in-law of the murder victim, stated that his daughter-in-law was shot behind the head in front of her children. Mr. Jaume further stated: "You're right, he was there for an armed robbery. They were going to steal my daughter-in-law's truck for drugs. And because she couldn't find the keys, they shot her in the back of the head, killed her, and for nine years, we've been going through this."

ASSIGNMENTS OF ERROR NOS. 1 and 2

In his first and second assignments of error, the defendant argues, respectively, that the trial court erred in denying the motion to reconsider sentence and that the sentence is unconstitutionally excessive.

The Eighth Amendment to the United States Constitution and Article I, § 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 the sense of justice. **State v. Andrews**, 94-0842 (La. App. 1st 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. 1st 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**, 02-2231 (La. App. 1st Cir. 5/9/03), 849 So.2d 566, 569.

The articulation of the factual basis for a sentence is the goal of LSA-C.Cr.P. art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary even where there has not been full compliance with LSA-C.Cr.P. art.

894.1. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982). The trial court should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than confinement. See **State v. Jones**, 398 So.2d 1049, 1051-52 (La. 1981).

In the instant matter, the defendant was sentenced to the maximum sentence of ninety-nine years. See LSA-R.S. 14:64B. As a general rule, maximum or near maximum sentences are to be reserved for the worst offenders and the worst offenses. **State v. James**, 02-2079 (La. App. 1st Cir. 5/9/03), 849 So.2d 574, 586. Also, maximum sentences permitted under a statute may be imposed when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. See **State v. Hilton**, 99-1239 (La. App. 1st Cir. 3/31/00), 764 So.2d 1027, 1037, writ denied, 00-0958 (La. 3/9/01), 786 So.2d 113. The defendant contends the trial court failed to consider mitigating factors, such as his relative youth (nineteen-years-old at the time of the offense), his minor role in the offense ("get away" [sic] driver), and his status as a first-felony offender.

At sentencing, the trial court stated in pertinent part:

> The Court has, to date, considered the sentencing guidelines as set forth under Article 894.1, and pursuant to those guidelines, the Court must consider whether there is an undue risk of entering the period of any suspended-type sentence or probation defendant would commit another crime, or the defendant is indeed in need of correctional treatment or custodial environment that can be provided most effectively by his confinement to an institution. And under Subsection 3, a lesser sentence would deprecate the seriousness of the defendant's crime.
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> The Court has had itself some involvement in this case, has heard testimony from investigating officers relative to how this crime took place. And given the severe nature of the type of crime that the ultimate outcome that came from the crime, which Mr. Gainey confessed to, the death of Ms. Jaume, the Court finds that a sentence of ninety-nine years without benefit of probation, parole, or

suspension of sentence is appropriate and that any other sentence would deprecate the seriousness of this offense.

The defendant complains that he requested a presentence investigation report (PSI) at the sentencing hearing, but the trial court did not order one. The State objected to the delay of ordering a PSI because the defendant waited until the day of sentencing to request a PSI. For almost two years, according to the prosecutor, a PSI was never contemplated by the trial court, the defense, or the State. Sentencing had been set on numerous previous occasions. Thus, the State argued that if the defendant wanted a PSI, "he had plenty of time to make that request and not have caused another additional delay to this case."

We find no error in the trial court's refusal to order a PSI. From the record, it appears the defendant is a first-felony offender. Moreover, ordering a PSI is discretionary with the trial court; there is no mandate that a PSI be ordered. **State v. Wimberly**, 618 So.2d 908, 914 (La. App. 1st Cir.), writ denied, 624 So.2d 1229 (La. 1993). See LSA-C.Cr.P. art. 875A(1).

The trial court adequately considered the factors set forth in Article 894.1. Considering the trial court's careful review of the circumstances, its familiarity with the case, and the nature of the crime, we find no abuse of discretion by the trial court. The trial court provided sufficient justification for the imposition of the maximum sentence allowed by law and this court finds, in particular, that the defendant poses a serious and grave risk to the public safety because of his refusal to conform to rules. See **State v. Mickey**, 604 So.2d 675, 679 (La. App. 1st Cir. 1992), writ denied, 610 So.2d 795 (La. 1993). See also **Hilton**, 764 So.2d at 1037-1038; **State v. Herrin**, 562 So.2d 1, 11 (La. App. 1st Cir.), writ denied, 565 So.2d 942 (La. 1990). As noted by the prosecutor in a presentence hearing, the State

initially sought to set aside the defendant's guilty plea because the defendant re-engaged in criminal conduct in escaping from the parish jail. Further, in an earlier hearing, the State indicated the defendant had two pending charges, one for escape and one for attempted escape. Accordingly, the sentence imposed is not grossly disproportionate to the severity of the offense and, therefore, is not unconstitutionally excessive. The trial court, therefore, did not err in denying the motion to reconsider sentence.

These assignments of error are without merit.

SENTENCING ERROR

Whoever commits the crime of armed robbery shall be imprisoned at hard labor for not less than ten years and for not more than ninety-nine years, without benefit of parole, probation, or suspension of sentence. LSA-R.S. 14:64B. In sentencing the defendant, the trial court failed to provide that the sentence was to be served at hard labor.[2] Inasmuch as an illegal sentence is an error discoverable by a mere inspection of the proceedings without inspection of the evidence, LSA-C.Cr.P. art. 920(2) authorizes consideration of such an error on appeal. Further, LSA-C.Cr.P. art. 882A authorizes correction by the appellate court.[3] We find that correction of this illegally lenient sentence does not involve the exercise of sentencing discretion and, as such, there is no reason why this court should not simply amend the sentence. See **State v. Price**, 05-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 124-125 (en banc), writ denied, 07-0130 (La. 2/22/08), 976 So.2d 1277. Accordingly, since a sentence at hard labor was the only sentence

[2] The minutes reflect the trial court sentenced the defendant to hard labor. When there is a discrepancy between the minutes and the transcript, the transcript prevails. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

[3] "An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review." LSA-C.Cr.P. art. 882A.

that could be imposed, we correct the sentence by providing that it be served at hard labor.

CONVICTION AFFIRMED; SENTENCE AMENDED TO PROVIDE THAT IT BE SERVED AT HARD LABOR, AND AFFIRMED AS AMENDED; REMANDED FOR CORRECTION OF COMMITMENT ORDER, IF NECESSARY.