NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 KA 2552

STATE OF LOUISIANA

VERSUS

JOHN DEXTER ANDERSON

Judgment Rendered: May 2, 2008

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Appealed from the
16th Judicial District Court
In and for the Parish of St. Mary, Louisiana
Case No. 170,880

The Honorable William D. Hunter, Judge Presiding

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J. Phil Haney District Attorney Walter J. Senette, Jr. Assistant District Attorney Franklin, Louisiana	Counsel for Appellee State of Louisiana
Jane L. Beebe New Orleans, Louisiana	Counsel for Defendant/Appellant John Dexter Anderson
John Dexter Anderson Evergreen, Louisiana	Defendant/Appellant Pro Se

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BEFORE: GAIDRY, McDONALD, AND McCLENDON, JJ.

GAIDRY, J.

The defendant, John Dexter Anderson, was charged by grand jury indictment with six counts of aggravated rape, violations of La. R.S. 14:42, and five counts of sexual battery, violations of La. R.S. 14:43.1. Defendant originally entered a plea of not guilty, but subsequently entered into a plea agreement in which he agreed to plead guilty to one count of attempted aggravated rape, a violation of La. R.S. 14:27 and 14:42, with no sentence recommendation, and the state agreed not to institute habitual offender proceedings against defendant.

The trial court sentenced defendant to serve forty years at hard labor, to run concurrently with another sentence defendant was serving as a result of the revocation of his parole. The trial court denied defendant's motion for reconsideration of sentence. Defendant appeals. In his counseled brief, defendant argues that the trial court imposed an excessive sentence. Defendant also filed a *pro se* brief and urges that he never actually entered a guilty plea in this case, and that but for the ineffective assistance of counsel, he would never have entertained the notion of pleading guilty.

For the following reasons, we affirm defendant's conviction and sentence.

FACTS

Following defendant's guilty plea, the trial court held a sentencing hearing. Detective David Leonard, the assistant Chief of Police for the Berwick Police Department, testified as to his investigation of defendant. According to Leonard, defendant was a family friend of the minor victims and was on parole at the time of the incidents at issue. Leonard testified that one of the victims, who was twelve years old, had described how she would lock herself in her room when her mother was away, but defendant would

still gain access to her room. On one such occasion, this particular victim reported to Leonard that she attempted to hide underneath her bed, but defendant dragged her out, threw her onto her bed, and forced her to perform "some of the acts." The second victim told Leonard that defendant had slapped her at least once. Leonard testified that defendant admitted his role in the crimes for which he was arrested.

Christy Slack, the mother of the two victims, testified that defendant took advantage of their friendship to gain access to her children. The abuse set forth in the original bill of indictment went unreported for a period of time, and it was only after one of the victims told a friend that the allegations were investigated. According to Slack, one of her daughters was suicidal as a result of defendant's actions and her other daughter was so terrified of the residence that she no longer resided in the home.

Patrick Freyou, an officer with the Louisiana Department of Probation and Parole, testified as to defendant's criminal history. According to Freyou, defendant was convicted of armed robbery on September 29, 1983, and sentenced to eighteen years at hard labor. On January 11, 1993, defendant was released on parole, and while on parole, was arrested for indecent behavior with a juvenile. Freyou testified that as a result of that arrest, defendant's parole for armed robbery was revoked, and he was sentenced to four years at hard labor for indecent behavior and ordered to serve the remaining eight years for his armed robbery conviction. After defendant was again paroled, he was arrested for the present offenses.

Defendant testified, and apologized for his "infractions." During defendant's statement, he stated he had been sexually abused as a child and expressed hope that the present victims would be able to obtain help.

EXCESSIVE SENTENCE

In defendant's sole counseled assignment of error, he complains that the trial court's sentence of forty years is excessive.

Article I, Section 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. Even a sentence within statutory limits 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). 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); *State v. Lanieu*, 98-1260, p. 12 (La. App. 1st Cir. 4/1/99), 734 So.2d 89, 97, *writ denied*, 99-1259 (La. 10/8/99), 750 So.2d 962. 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. La. C.Cr.P. art. 894.1. 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. Herrin*, 562 So.2d 1, 11 (La. App. 1st 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. 1st 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).

For his conviction of attempted aggravated rape, defendant was eligible to receive a sentence of no less than ten nor more than fifty years at hard labor, without benefit of probation, parole, or suspension of sentence. La. R.S. 14:27(D)(1)(a) & 14:42(D). The trial court sentenced defendant to a term of forty years at hard labor.[1]

In sentencing defendant, the trial court noted that defendant, by his own admission, was a pedophile and drawn to sexual contact with these children in an uncontrollable way. The trial court concluded that defendant would probably commit this same crime again based on defendant's statements that society was "sick" with sex crimes. The trial court found defendant in need of correctional treatment and concluded any lesser sentence would deprecate the seriousness of the offense. Further, the trial court specifically recognized that defendant accomplished this crime by ingratiating himself into the family, then using those opportunities to harm both children. Finally, the trial court noted that defendant used violence in the commission of this crime when he overpowered one of the children.

Based on our review of the record, we cannot say the trial court abused its discretion. We further note that although defendant pleaded guilty to one count of attempted aggravated rape, he was originally charged with six counts of aggravated rape and five counts of sexual battery. Thus, defendant was originally exposed to counts that could have resulted in multiple life sentences. Defendant also benefitted from the state's

[1] The trial court's failure to indicate defendant's sentence is to be served without benefit of parole, probation, or suspension of sentence is addressed by La. R.S. 15:301.1.

agreement not to pursue habitual offender status. Considering the fragile emotional state of the victims, the state's reluctance to expose these children to a trial is abundantly clear. Based on the facts adduced at the sentencing hearing, we do not find the trial court abused its discretion in sentencing defendant to forty years at hard labor.

We note that the state's brief argues that defendant should be precluded from contesting his sentence because defendant entered into a plea agreement which included an agreement that the maximum sentence he could receive would be a "cap" of fifty years for the crime of attempted rape. Our review of the record indicates that there was no maximum sentence as part of defendant's plea agreement; rather, the "cap" the state references is the statutory maximum penalty to which defendant was exposed for his conviction of attempted aggravated rape. *See* La. R.S. 14:27(D)(1)(a) & 14:42(D).

This assignment of error is without merit.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his *pro se* brief, defendant argues that he never actually entered a guilty plea in this case; and except for the ineffective assistance of counsel, defendant would never have entertained the notion of pleading guilty.

The record in this matter indicates that although defendant never vocalized his desire to enter a guilty plea, his trial counsel confirmed to the trial court that defendant had entered into a plea agreement to the charge of attempted aggravated rape and that any sentence imposed would be served concurrently to defendant's sentence presently served for a parole violation. Moreover, we note that at the sentencing hearing, defendant was given the opportunity to address the court and never indicated that he did not wish to

plead guilty or that he wanted to withdraw any previous plea to the present charge.

Regarding defendant's claims of ineffective assistance of counsel, in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the United States Supreme Court enunciated the test for evaluating the competence of trial counsel. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Id.*

In evaluating the performance of counsel, the inquiry must be whether counsel's assistance was reasonable considering all the circumstances. *State v. Morgan*, 472 So.2d 934, 937 (La. App. 1st Cir. 1985). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *State v. Robinson*, 471 So.2d 1035, 1038-39 (La. App. 1st Cir.), *writ denied*, 476 So.2d 350 (La. 1985).

A claim of ineffective assistance of counsel is more properly raised by an application for postconviction relief in the district court, where a full evidentiary hearing may be conducted. However, where the record discloses sufficient evidence to decide the issue of ineffective assistance of counsel when raised by assignment of error on appeal, it may be addressed in the

interest of judicial economy. *State v. Carter*, 96-0337, p. 10 (La. App. 1st Cir. 11/8/96), 684 So.2d 432, 438.

In the instant matter, the allegations of ineffective assistance of counsel cannot be sufficiently investigated from an inspection of the record alone. Whether or not to enter into a plea bargain and to present any mitigating evidence at the sentencing hearing involved matters of preparation and strategy. Decisions relating to investigation, preparation, and strategy cannot possibly be reviewed on appeal. Only in an evidentiary hearing in the district court where the defendant could present evidence beyond what is contained in the instant record could these allegations be sufficiently investigated.[2] Accordingly, these allegations are not subject to appellate review. *See State v. Albert*, 96-1991, p. 11 (La. App. 1st Cir. 6/20/97), 697 So.2d 1355, 1363-64; *see also State v. Johnson*, 06-1235, p. 15 (La. App. 1st Cir. 12/28/06), 951 So.2d 294, 304.

REVIEW FOR ERROR

Defendant asks that this court examine the record for error under La C.Cr.P. art. 920(2). We routinely review the record for such errors, whether or not such a request is made by a defendant. Under La. 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 reversible errors. *See State v. Price*, 05-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112 (*en banc*), *writ denied*, 07-0130 (La. 2/22/08), ___ So.2d ___.

CONVICTION AND SENTENCE AFFIRMED.

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[2] Defendant would have to satisfy the requirements of La. C.Cr.P. art. 924, *et seq.*, in order to receive such a hearing.