NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 KA 1623

STATE OF LOUISIANA

VERSUS

JOHNNY L. MILTON

Judgment Rendered: February 9, 2007

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 10-01-149

Honorable Anthony J. Marabella, Jr., Judge

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Johnny L. Milton

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

WELCH, J.

The defendant, Johnny L. Milton, was charged by bill of information with 2 counts of vehicular homicide (counts 1-2) in violation of La. R.S. 14:32.1, one count of first degree vehicular negligent injuring (count 3) in violation of La. R.S. 14:39.2, and one count of hit-and-run driving where the victim suffers serious injury or death (count 4) in violation of La. R.S. 14:100(C)(3). He initially pled not guilty to all charges. Prior to trial, the defendant withdrew his not guilty plea and entered a plea of no contest to all of the charges. Following a thorough **Boykin** examination, the trial court accepted the plea of no contest on all counts. The defendant was sentenced to imprisonment for twenty years at hard labor without benefit of probation, parole, or suspension of sentence and a $5000.00 fine on each of counts 1 and 2; imprisonment at hard labor for five years and a $2000.00 fine on count 3; and imprisonment at hard labor for ten years on count 4. The court ordered that the sentences for counts 1-3 run concurrently and the sentence for count 4 be served consecutively. The defendant moved for reconsideration of the sentences. The trial court denied the motion. The defendant now appeals, urging the following assignments of error:

1. The trial court erred in failing to give weight to mitigating factors in sentencing the defendant.

2. The trial court erred in imposing excessive sentences when it sentenced the defendant to the maximum sentence on each charge, although there were several mitigating factors and the length of the sentences imposed amounted to a life sentence for the defendant, taking his age into consideration.

3. The trial court abused its discretion in denying the defendant's motion to reconsider the sentences where the sentences were excessive and were a needless imposition of pain and suffering.

FACTS

Because the defendant pled "no contest" and there was no trial, the facts of the offenses were not fully developed in the record. The following facts were set

forth in the factual basis recited by the prosecutor during the **Boykin** hearing:

> If the case were to proceed to trial, the State would be prepared to prove that on or about August 14, 2001, Johnny Milton was traveling in a pickup truck on Florida Boulevard – I'm sorry – just east of North 13th Street, and while under the influence of alcoholic beverages crossed into the opposite lane of travel, the westbound lane, and struck Alisha Jones and her two small children. The two children went flying into the air and landed several feet down the road. The two children died as a result of this collision, and the mother is paralyzed from the chest down. After Johnny Milton struck the family, he then pulled over to the side of the road and left the scene of the accident on foot. The police officers found him in Labor Ready at the North 14th Street and Convention [*sic*] several minutes after the accident occurred. Mr. Milton was taken to the substation where he blew .105 grams percent on the intoxilyzer.
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> ...Under 14:100(C)(3), one of the provisions was that the defendant had been previously convicted of either a DWI offense or vehicular homicide, and he did have another DWI first conviction.

ASSIGNMENTS OF ERROR

In his first assignment, the defendant contends the trial court erred in failing to consider any mitigating circumstances when imposing the sentences. Specifically, he alleges that the trial court failed to give adequate weight to the fact that: (1) the offenses were unintentional; (2) a psychological assessment revealed that the defendant expressed considerable remorse; (3) the defendant took responsibility for his actions by pleading no contest to all charges; (4) the defendant was 45 years old at the time of the offenses; (5) the defendant had been a law abiding citizen for a substantial period of time prior to the commission of the instant offenses; (6) the defendant was employed at the time of the offenses and was reported to be a "good worker" by his employer; and (7) the defendant is a caregiver for his daughter and grandchildren. In his second assignment of error, the defendant argues that in light of the foregoing mitigating factors, the trial court erred in imposing maximum sentences. The defendant asserts that, considering his age, the maximum sentences imposed herein, and the fact that one of the sentences was ordered to be served consecutively, amounted to a life sentence. In his third

assignment of error, the defendant argues the trial court erred in denying his motion to reconsider the sentences which he argues are excessive and exemplify a needless imposition of pain and suffering. In response, the State contends, under the facts and circumstances of this case, the sentences are constitutional and thus, the trial court was correct in refusing to reconsider them. Because all of the defendant's assignments of error relate to the excessiveness of the sentences, they will be addressed collectively.

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 (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 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) (quoting **State v. Lobato**, 603 So.2d 739, 751 (La. 1992)). 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. **Lobato**, 603 So.2d at 751.

As a general rule, maximum sentences are appropriate in cases involving the most serious violation of the offense and the worst type of offender. **State v. James**, 2002-2079 (La. App. 1st Cir. 5/9/03), 849 So.2d 574, 586. The maximum sentence permitted under a statute may also 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, 1037-38, writ denied, 2000-0958 (La. 3/9/01), 786 So.2d 113.

At the sentencing hearing, the trial court heard testimony from several witnesses. Damon Johnese, an eyewitness, testified that he was traveling on Florida Boulevard on the day in question when he observed a family, later identified as Alicia Jones,[1] her husband Edmon Harris, their seven-year-old twins, and another small child crossing the street. Harris was holding the small child on his neck. Johnese testified that he stopped his vehicle to allow the family to cross. Shortly thereafter, through his rearview mirror, Johnese observed what he initially thought were "boxes" flying through the air. Once he realized that the objects were actually the children, Johnese turned his vehicle around and went to help. The female and the two seven-year-old pedestrians (collectively referred to as "the victims") had been struck by the truck that had been directly behind Johnese's vehicle when he allowed the victims to cross the street. The truck, driven by the defendant, had crossed the double yellow lines that divided the lanes of travel on Florida Boulevard, and struck the victims.

Upon returning to the area of the impact, Johnese observed the bodies of the victims lying in the street. In an effort to protect them from other oncoming vehicles, Johnese used his vehicle to block the roadway. Johnese observed the defendant exit his truck and run. Johnese ran behind him while Johnese's mother and girlfriend attempted to provide medical assistance to the victims. According to Johnese, after running approximately two blocks, the defendant went into a building. When Johnese tried to enter the building, he was told that the defendant was not there. Johnese later returned with the police. The defendant was found inside the building and arrested.

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[1] In some parts of the record, the female victim's name is spelled "Alisha" and in others "Alicia," the latter of which we use herein.

Alicia Jones, who is paralyzed from her chest down, testified that as a result of the incident, she can no longer do anything for herself. She is totally dependent on others. She asked that the defendant be punished to the fullest extent of the law. Linda Jones, Alicia's mother, also testified regarding the impact the incident has had on her family. She explained that Alicia, who is now fed primarily through a feeding tube, cannot function independently. Ms. Jones further testified that she was forced to quit her job to care for Alicia and her two remaining children. Ms. Jones asked that the defendant be punished severely so that he could not "do this to nobody [*sic*] else's family." Alicia's husband, Edmon Harris, testified that the incident "hurt" him because now he and his wife are unable to do the things they used to enjoy doing, i.e., going to the movies, going out to eat, etc.

After hearing the testimony from the only surviving victim and the other witnesses, the trial court noted that it was "called upon to balance the conduct of [the defendant] with the death of these two little children, the paralyzed status of their mother, with the interest of society and the actions of [the defendant] and his lifestyle." Prior to imposing the sentences, the court specifically noted that the defendant did not intentionally harm the victims. The court further noted, however, that the defendant was "responsible for the fact that these children will never grow up and the fact that their mother will never walk again, the fact that their mother must be cared for on a daily basis now, having no money or means other than to rely upon the good of the people of our state and our community."

Thereafter, the trial court noted that it reviewed a psychological assessment performed on the defendant at his counsel's request. The assessment, which also contained information regarding the defendant's personal and criminal history, reflected that the defendant has had substance abuse problems in the past, has been arrested for significant offenses (without no definitive adjudication), served some time in the state penitentiary, and had a prior DWI conviction.

Considering the facts and circumstance surrounding the instant offenses, the court noted, as an aggravating factor, that the intoxicated defendant completely left his lane of travel before making contact with the victims. In support of the imposition of the maximum sentences the court placed much emphasis on the aggravating fact that the defendant left the scene immediately after striking the victims despite knowing that he had caused considerable harm to them. The court stated, "[b]ut for the humanitarian assistance of Mr. Johnese, realizing what had happened, seeing the destruction, takes his vehicle, pulls it in the highway, parks it and leaves to chase [the defendant], realizing what I can only imagine, these children lying in the street, and their mother, ... you thought of your own self first and would leave it to the business of others to pick these children up, and their mother, to try to give them some life-saving assistance."

At the time of the commission of these offenses, the crime of vehicular homicide was punishable by a fine of not less than two thousand dollars nor more than fifteen thousand dollars and imprisonment with or without hard labor for not less than two nor more than twenty years. La. R.S. 14:32.1(B) (prior to amendment by 2004 La. Acts No. 381, § 1 and 2006 La. Acts No. 294, § 1). The offense of first degree vehicular negligent injuring carries a possible penalty of a fine of not more than two thousand dollars, imprisonment with or without hard labor for not more than five years, or both. La. R.S. 14:39.2(D). Hit-and-run driving under La. R.S. 14:100(C)(2)[2] is punishable by a fine of not more than five thousand dollars, imprisonment with or without hard labor for not more than ten years, or both. The defendant was sentenced to the maximum term of imprisonment on each of the convictions. He received a $5000.00 fine on each of the vehicular homicide convictions and a $2000.00 fine on the first degree

[2] At sentencing, the trial court made a factual determination that the defendant had only one prior DWI conviction and, therefore, sentencing under La. R.S. 14:100(C)(3) would be improper. The trial court then sentenced the defendant under La. R.S. 14:100(C)(2).

vehicular negligent injuring conviction. No fine was imposed on the hit-and-run driving conviction.

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 to the maximum term of imprisonment on each of the convictions. While the defendant may not be the worst type of criminal offender found in the jurisprudence, the facts and circumstances of the offenses, wherein two young children were fatally injured and their mother seriously injured, by an intoxicated driver and left in the middle of a busy highway as he fled the scene, are egregious. Contrary to the defendant's assertions, the imposition of the maximum sentences for the senseless killing of two children and life-altering injuring of their mother by the intoxicated defendant (with a prior DWI conviction), are neither grossly disproportionate to the severity of the offenses, in light of the harm to the victims and their family, nor so disproportionate as to shock our sense of justice. Therefore, we conclude that the maximum sentences imposed in this case are not unconstitutionally excessive.

The defendant's contention that the trial court failed to give adequate weight to the mitigating circumstances also lacks merit. The record in this case clearly indicates that the trial court was aware of the relevant mitigating factors set forth by the defense in its brief before this court. The court specifically noted the defendant's age, that the offenses were not intentional, that the defendant expressed remorse, that the defendant had a daughter and grandchildren, and that the defendant was actively employed at the time of the offenses. Thus, it is clear that the trial court considered the mitigating evidence. There is no requirement that any specific mitigating factors be given any particular weight by the sentencing court. **State v. Dunn**, 30,767 (La. App. 2nd Cir. 6/24/98), 715 So.2d 641, 643.

Regarding the trial court's imposition of a consecutive, rather than concurrent, sentence on the hit-and-run driving conviction, we note the imposition of consecutive sentences is governed by La. C.Cr.P. art. 883, which provides, in pertinent part:

> If the defendant is convicted of two or more offenses based on the same act or transaction, or constituting parts of a common scheme or plan, the terms of imprisonment shall be served concurrently unless the court expressly directs that some or all be served consecutively.

This article specifically excludes from its scope sentences the court expressly directs are to be served consecutively. **State v. Rogers**, 95-1485 (La. App. 1st Cir. 9/27/96), 681 So.2d 994, 1000, writs denied, 96-2609, 96-2626 (La. 5/1/97), 693 So.2d 749. Thus, it is within a trial court's discretion to order sentences to run consecutively rather than concurrently. **State v. Berry**, 95-1610 (La. App. 1st Cir. 11/8/96), 684 So.2d 439, 460, writ denied, 97-0278 (La. 10/10/97), 703 So.2d 603. The imposition of consecutive sentences requires particular justification when the crimes arise from a single course of conduct. **State v. Johnson**, 99-0385 (La. App. 1st Cir. 11/5/99), 745 So.2d 217, 221, writ denied, 2000-0829 (La. 11/13/00), 774 So.2d 971. However, even if the convictions arise out of a single course of conduct, consecutive sentences are not necessarily excessive if the trial court considers appropriate factors when imposing sentences. **State v. Ferguson,** 540 So.2d 1116, 1123 (La. App. 1st Cir. 1989). Some of those factors include defendant's criminal history, the dangerousness of the offense, the viciousness of the crime, the harm done to the victim, the potential for defendant's rehabilitation, and the danger posed by the defendant to the public safety. **State v. Parker**, 503 So.2d 643, 646 (La. App. 4th Cir. 1987). Additional factors that may serve as justification for consecutive sentences include multiplicity of acts and lack of remorse. **State v. Lewis,** 430 So.2d 1286, 1290 (La. App. 1st Cir.), writ denied, 435 So.2d 433 (La. 1983).

Considering the harm done to the victims, and the fact that the defendant left the seriously injured victims in the middle of a busy highway as he attempted to avoid facing the consequences of his actions, we do not find the consecutive sentences excessive. Through his actions at the time of the offenses, the defendant showed no regard for the lives of the victims. Furthermore, the defendant, who was intoxicated at the time of the commission of these offenses (blood-alcohol level of .105 grams percent), had a prior conviction for DWI. Clearly, this defendant poses a substantial risk to public safety.

Accordingly, these assignments of error lack merit.

For the foregoing reasons, the defendant's convictions and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.