

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2008 KA 1528

STATE OF LOUISIANA

VERSUS

KRISTOFER ALLEN JOHNSON

Judgment Rendered: February 13, 2009.

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On Appeal from the
19th Judicial District Court,
in and for the Parish of East Baton Rouge
State of Louisiana
District Court No. 03-07-0819

The Honorable Louis Daniel, Judge Presiding

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Kristofer Allen Johnson

* * * * *

BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

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CARTER, C.J.

The defendant, Kristofer Allen Johnson, was charged by bill of information with armed robbery with the use of a firearm, in violation of La. R.S. 14:64 and La. R.S. 14:64.3 (firearm enhancement penalty). The defendant entered a plea of not guilty. After a trial by jury, the defendant was found guilty as charged. The defendant was sentenced to twelve years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence and an additional five years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence, for a total of seventeen years. The defendant now appeals, arguing that the trial court erred in imposing an unconstitutionally excessive sentence and that he received ineffective assistance of counsel should review of the sentence be precluded. For the forthcoming reasons, we affirm the conviction and sentence.

FACTS

On or about March 2, 2007, between 11:00 p.m. and 12:00 a.m. the next morning, a Domino's Pizza delivery man, Michael Camp (the victim), was assigned to make a pizza delivery to apartment number 405 at 5151 Highland Road in Baton Rouge. As Camp approached the apartment, someone wearing a mask ran up to him and struck him on the face with an object. The masked individual then stated, "Give me the money." Camp complied and gave the individual the money that he had on his person, between twenty and forty dollars. The individual then fired a gunshot toward Camp's feet and fled. Camp remained in the area and used his cellular telephone to contact the police and several officers responded. The

victim described the assailant as approximately five feet, ten inches to six feet tall with an average build. The victim further informed the police that the assailant was wearing dark clothing and had a deep voice. Within thirty minutes of the officers' arrival at the scene, the defendant was apprehended as a suspect and brought to the victim for identification. While the victim could not positively identify the defendant as the assailant because the assailant wore a mask, the victim stated that the defendant's size, build, height, and clothing were consistent with those of the assailant.

The defendant lived in the apartment complex at apartment number 405, within the immediate vicinity of where the robbery took place. The defendant gave the police officers consent to search his apartment. The defendant denied making a Domino's Pizza order or having any involvement in the robbery. Officer Paul Barbin of the Baton Rouge City Police Department checked the outgoing cellular telephone call history of the defendant's cellular telephone and confirmed it was used to call the Domino's Pizza restaurant.

The defendant was transported to the police station. A gunshot residue test was administered and the results were positive. After being confronted with the results of the test, the defendant began to weep and confessed to the robbery. The defendant claimed that the gun was fired unintentionally. After the verbal confession, the defendant agreed to provide a written confession to the offense.

ASSIGNMENTS OF ERROR NUMBERS ONE AND TWO

In his first assignment of error, the defendant argues that the trial court erred in imposing an unconstitutionally excessive sentence. The

defendant contends that he is a young man who was forced to come to Baton Rouge after Hurricane Katrina. The defendant further notes that he was unemployed at the time of the offense and was receiving assistance for rent and food. He contends that he was destitute and desperate when he committed the offense. The defendant notes that the gunshot did not harm the victim and that he does not have a prior criminal history. The defendant also notes that he had a difficult childhood, including foster care and separation from his siblings. While noting that some incarceration is called for in this case, the defendant contends that mercy and compassion call for a lighter sentence.

In the second assignment of error, the defendant notes that his trial counsel did not file a motion to reconsider sentence. Thus, the defendant argues that in the event this court finds that the sentence herein cannot be reviewed, his trial counsel was ineffective in not objecting to the sentence or filing a 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. **State v. Mims**, 619 So.2d 1059, 1059 (La. 1993) (per curiam). 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. **Id.** Under the clear language of La. Code Crim. P. art. 881.1E, failure to make or file a motion to reconsider sentence precludes a defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. Accordingly, in this case the defendant is

procedurally barred from having his challenge to the sentencing, raised in assignment of error number one, reviewed by this court on appeal. **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.

In assignment of error number two the defendant argues that his trial counsel was ineffective in failing to file a motion to reconsider sentence. Thus, in the interest of judicial economy, we choose to consider the defendant's excessiveness argument in order to 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 La. Code Crim. P. art. 930.¹ **State v. Lockhart**, 629 So.2d 1195, 1207 (La. App. 1st Cir. 1993), writ denied, 94-0050 (La. 4/7/94), 635 So.2d 1132. However, when the record is sufficient, this court may resolve this issue on direct appeal in the interest of judicial economy. See State v. Ratcliff, 416 So.2d 528, 530 (La. 1982).

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,

¹ The defendant would have to satisfy the requirements of La. Code Crim. P. art. 924 et seq., in order to receive such a hearing.

80 L.Ed.2d 674 (1984); **State v. Fuller**, 454 So.2d 119, 125 n. 9 (La. 1984). The defendant must show that counsel's performance was deficient and that the deficiency prejudiced him. **Strickland**, 466 U.S. at 687, 104 S. Ct. at 2064. 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. **Id.** 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. **Id.** The defendant must make both showings to prove that counsel was so ineffective as to require reversal. **Id.** 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 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. **Felder**, 2000-2887 at p. 11, 809 So.2d at 370. Thus, the defendant must show that but for his counsel's failure to file a motion to reconsider sentence, the sentence would have been changed, either in the district court or on appeal.

Louisiana Code of Criminal Procedure article 894.1 sets forth items that must be considered by the trial court before imposing sentence. **State v. Leblanc**, 2004-1032, p. 10 (La. App. 1 Cir. 12/17/04), 897 So.2d 736, 743,

writ denied, 2005-0150 (La. 4/29/05), 901 So.2d 1063, cert. denied, 546 U.S. 905, 126 S.Ct. 254, 163 L.Ed.2d 231 (2005). The trial court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the criteria. **Id.**

Article I, section 20 of the Louisiana Constitution explicitly prohibits excessive sentences. Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. In reviewing a sentence for excessiveness, the appellate court must consider the punishment and the crime in light of the harm to society and gauge whether the penalty is so disproportionate as to shock its sense of justice or that the sentence makes no reasonable contribution to acceptable penal goals and, therefore, is nothing more than the needless imposition of pain and suffering. See State v. Guzman, 99-1528, 99-1753, p. 15 (La. 5/16/00), 769 So.2d 1158, 1167.

The trial court has wide discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Loston**, 2003-0977, pp. 19-20 (La. App. 1 Cir. 2/23/04), 874 So.2d 197, 210, writ denied, 2004-0792 (La. 9/24/04), 882 So.2d 1167. Thus, 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 La. Code Crim. P. art. 894.1. **State v. Holmes**, 99-0631, p. 4 (La. App. 1 Cir. 2/18/00), 754 So.2d 1132, 1135, writ denied, 2000-1020 (La. 3/30/01), 788 So.2d 440.

In accordance with La. R.S. 14:64B, 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. The trial court imposed a sentence of twelve years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The dangerous weapon used in the commission of the armed robbery was a firearm. Louisiana Revised Statutes 14:64.3A states that when the dangerous weapon used in the commission of armed robbery is a firearm, the offender shall be imprisoned at hard labor for an additional five years. Accordingly, the trial court sentenced the defendant to an additional five years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence under La. R.S. 14:64.3.

Before the sentencing, the trial court reviewed a presentence investigation report and a letter written by the defendant. The trial court considered the circumstances of the offense and the defendant's background. The trial court noted that the defendant was a first felony offender. The trial court took note of the defendant's social history, including his migration to Baton Rouge from New Orleans after Hurricane Katrina and his receipt of financial assistance. The trial court further noted that the defendant was nineteen years of age at the time of the sentencing and eighteen years of age at the time of the offense. The trial court noted that the instant offense is a crime of violence. See La. R.S. 14:2B(21). The trial court further noted the dangerous circumstances created by the commission of the offense. The trial court also noted that the victim was struck in the face and that the firearm used by the defendant was discharged.

We find that the trial court adequately considered the facts of the case and the defendant's background. The record supports the sentence imposed

herein. The twelve-year sentence imposed by the trial court is a low-range sentence as the defendant was subject to a maximum imprisonment term of ninety-nine years. As to the mandatory minimum five-year firearm enhancement sentence, the defendant has failed to show that he is exceptional or that the sentence is not meaningfully tailored to his culpability, the gravity of the offense, and the circumstances of the case. See State v. Johnson, 97-1906, p. 8 (La. 3/4/98), 709 So.2d 672, 676. Thus, even if we were to conclude that the defendant's trial counsel performed deficiently in not filing a motion to reconsider sentence, the defendant fails to show that he was prejudiced in this regard. Thus, assignments of error numbers one and two lack merit.

CONVICTION AND SENTENCE AFFIRMED.