NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 2239

STATE OF LOUISIANA

VERSUS

LARRY MURRAY

Judgment Rendered: June 10, 2011

Appealed from the
Nineteenth Judicial District Court
in and for the Parish of East Baton Rouge, State of Louisiana
Trial Court Number 07-08-0469

Honorable Trudy White, Judge Presiding

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

WHIPPLE, J.

The defendant, Larry Murray, was charged by grand jury indictment with second degree murder, in violation of LSA-R.S. 14:30.1. The defendant pled not guilty, but was found guilty as charged after a jury trial. The defendant was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The defendant now appeals, challenging the constitutionality of the sentence imposed and the effectiveness of counsel. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

On or about April 29, 2008, Matthew Trahan (the victim) contacted his close friend Walter Alexander, a resident of the Lafayette area, and asked him to accompany him to Baton Rouge, Louisiana to purchase forty ecstasy pills. The next day, Alexander agreed to take the trip with Trahan. When they arrived in Baton Rouge, the victim unsuccessfully attempted to contact a pill supplier by telephone.

The victim encountered Jeremiah Pate when they stopped at a convenience store to get something to drink. Pate, who did not know the victim or Alexander at the time, agreed to direct the victim to a location Pate was aware of where the victim could purchase marijuana. Pate and the defendant (known to Pate from the neighborhood by his nickname, "Duke") entered the victim's vehicle along with Alexander. The victim was driving; Alexander was the front passenger; Pate was the left-rear passenger (seated behind the victim); and the defendant was the right-rear passenger. They made a brief stop at a house in the area, where only the defendant exited the vehicle and re-entered approximately five minutes later.

After Pate called a marijuana supplier, the defendant pointed a gun at the victim and began firing it, striking the victim. Alexander grabbed his seatbelt and tried to exit the vehicle, but the defendant threatened to shoot him if he exited.

The defendant then started demanding money. Alexander stated that he did not have the money. As the victim began shaking while still pressing the gas pedal, Alexander grabbed the steering wheel and the vehicle landed on the sidewalk and hit a stop sign. When the vehicle finally slowed down, Alexander and Pate jumped out of the vehicle and attempted to flee. However, the defendant stopped Alexander at gunpoint and ordered him to retrieve the cash that was hanging out of the victim's back left pocket. Alexander grabbed the money and tossed it toward the defendant. At that point, the defendant fled from the scene. The victim sustained three gunshot wounds to the right upper back or shoulder. The lethal wound was the shot that travelled through his aorta, causing him to bleed to death.

ASSIGNMENTS OF ERROR NUMBERS ONE AND TWO

In assignment of error number one, the defendant contends that the trial court erred in imposing an unconstitutionally excessive punishment. The defendant cites State v. Johnson, 97-1906 (La. 3/4/98), 709 So. 2d 672, 676-77, and notes that while the minimum sentence provided by the legislature for the instant offense is life imprisonment, the trial court must consider the individual circumstances of the case and the individual defendant and impose the longest sentence which is not constitutionally excessive. The defendant argues that the trial court did not make the considerations set forth in Johnson before imposing a life sentence in this case. The defendant notes that he was less than twenty years old when the shooting occurred and that his criminal record consists of only one prior conviction. The defendant contends that he may be rehabilitated during his incarceration. In the second assignment of error, the defendant argues that in the event this court finds that the excessive sentence argument raised in assignment of error number one cannot be reviewed due to the lack of a motion to reconsider sentence, the failure of his trial counsel to file the motion constitutes ineffective assistance of counsel.

One purpose of the motion to reconsider sentence 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. 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. State v. Mims, 619 So. 2d 1059 (La. 1993) (per curiam). Under the clear language of LSA-C.Cr.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. As noted by the defendant, a motion to reconsider sentence was not filed in this case. Accordingly, the defendant is procedurally barred from having his challenge to the sentence, raised in assignment of error number one, reviewed by this court on appeal. State v. Felder, 2000-2887 (La. App. 1st Cir. 9/28/01), 809 So. 2d 360, 369, writ denied, 2001-3027 (La. 10/25/02), 827 So. 2d 1173.

However, in assignment of error number two, the defendant argues that his trial counsel was ineffective in failing to file a motion to reconsider sentence. In the interest of judicial economy, we elect to consider the defendant's excessiveness argument in order to address the claim of ineffective assistance of counsel herein. See State v. Wilkinson, 99-0803 (La. App. 1st 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 on appeal. This is because post-conviction relief provides the opportunity for a full evidentiary hearing under LSA-C.Cr.P. art. 930.[1] However, when the record is sufficient, we are empowered to resolve the issue on direct appeal in the interest of

[1]The defendant would have to satisfy the requirements of LSA-C.Cr.P. art. 924 *et seq.*, to receive such a hearing.

judicial economy. 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.

The claim of ineffective assistance of counsel is to be assessed by the two-part test for reasonable effectiveness set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The defendant must show that counsel's performance was deficient and that the deficiency prejudiced him. 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. Counsel's deficient performance will be deemed to have prejudiced the defendant if he shows that the errors were so serious as to deprive him of a fair trial. The defendant must make both showings to prove that counsel was so ineffective as to require reversal. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. 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, 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. 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. Felder, 809 So. 2d at 370.

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 (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 that the trial court adequately considered the criteria. State v. Brown, 2002-2231(La. App. 1st Cir. 5/9/03), 849 So. 2d 566, 569.

In State v. Dorthey, 623 So. 2d 1276, 1280-81 (La. 1993), the Louisiana Supreme Court recognized that if a trial judge determines that the punishment mandated by the Habitual Offender Law makes no measurable contribution to acceptable goals of punishment or that the sentence amounts to nothing more than the purposeful imposition of pain and suffering and is grossly out of proportion to the severity of the crime, he is duty bound to reduce the sentence to one that would not be constitutionally excessive. However, the holding in Dorthey was made only after, and in light of, express recognition by the court that the determination and definition of acts that are punishable as crimes is purely a legislative function. It is the Legislature's prerogative to determine the length of the sentence imposed for crimes classified as felonies. Moreover, courts are charged with applying these punishments unless they are found to be unconstitutional. Dorthey, 623 So. 2d at 1278.

In Johnson, the Louisiana Supreme Court reexamined the issue of when Dorthey permits a downward departure from a mandatory minimum sentence, albeit in the context of the Habitual Offender Law. The Court held that to rebut the presumption that the mandatory minimum sentence was constitutional, the defendant had to "clearly and convincingly" show that:

> [he] is exceptional, which in this context means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case.

Johnson, 709 So.2d at 676. While both Dorthey and Johnson involve the mandatory minimum sentences imposed under the Habitual Offender Law, the Louisiana Supreme Court has held that the sentencing review principles espoused in Dorthey are not restricted in application to the penalties provided by LSA-R.S. 15:529.1. See State v. Fobbs, 99-1024 (La. 9/24/99), 744 So. 2d 1274 (per curiam); State v. Henderson, 99-1945 (La. App. 1st Cir. 6/23/00), 762 So. 2d 747, 760 n.5, writ denied, 2000-2223 (La. 6/15/01), 793 So. 2d 1235; State v. Davis, 94-2332 (La. App. 1st Cir. 12/15/95), 666 So. 2d 400, 408, writ denied, 96-0127 (La. 4/19/96), 671 So. 2d 925.

In imposing sentence herein, the trial court listened to an impact statement by the victim's mother, Sharon Price. Price stated, in part, that although the victim made a poor choice that day, the victim was scheduled to go to Japan and Iraq and was "scheduling himself" so as to attend medical school before the defendant's actions cost him his life. Before imposing sentence, the defendant and the State declined the trial court's offer to make a statement.

In the instant matter, the defendant committed a violent brutal murder by shooting the victim multiple times at close range. The defendant has not presented any particular facts regarding his family history, or any special circumstances that would support a deviation from the mandatory sentence provided in LSA-R.S.

14:30.1B. Although the defendant was eighteen at the time of the offense, he has failed to show how his age justified a deviation from the mandatory sentence. See State v. Crotwell, 2000-2551 (La. App. 1st Cir. 11/9/01), 818 So. 2d 34, 46; Henderson, 762 So. 2d at 760-61. Additionally, the record reflects that at the time of the instant offense the defendant was on active, supervised probation for his conviction of illegal use of weapons or dangerous instrumentalities, a violation of LSA-R.S. 14:94. Based on the record before us, we find that the defendant has failed to show that he is exceptional or that the mandatory life sentence is not meaningfully tailored to his culpability, the gravity of the offense, and the circumstances of the case. Thus, we do not find that a downward departure from the mandatory life sentence was required in this case. The sentence imposed is not excessive. Thus, assignment of error number one lacks merit.

Moreover, even if we were to conclude that the defendant's trial counsel performed deficiently in not filing a motion to reconsider sentence, the defendant has failed to show that he was prejudiced in this regard. Thus, the ineffective-assistance-of-counsel argument raised in assignment of error number two likewise is without merit.

Accordingly, we affirm the defendant's conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED.