NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 1885

STATE OF LOUISIANA

VERSUS

LEONARD EMANUEL BLACKBURN

DATE OF JUDGMENT: MAY - 2 2012

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 08-CR10-97839, DIVISION J, PARISH OF WASHINGTON
STATE OF LOUISIANA

HONORABLE WILLIAM J. KNIGHT, JUDGE

* * * * * *

Walter P. Reed, DA
Lewis V. Murray, III, ADA
Franklinton, Louisiana

Counsel for Appellee
State of Louisiana

Kathryn Landry
Special Appeals Counsel
Baton Rouge, Louisiana

Gwnedolyn K. Brown
Baton Rouge, Louisiana

Counsel for Defendant-Appellant
Leonard Emanuel Blackburn

Leonard E. Blackburn
Jackson, LA

Pro se

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

Disposition: SENTENCE AFFIRMED.

KUHN, J.

Defendant, Leonard Emanuel Blackburn, was charged by bill of information with possession with intent to distribute cocaine, a violation of La. R.S. 40:967(A)(1) (count one), and possession of hydrocodone, a violation of La. R.S. 40:967(C) (count two).[1] Defendant pled not guilty and, following a jury trial, was found guilty as charged on both counts. Defendant was sentenced to fifteen years at hard labor. The state subsequently filed an habitual offender bill of information, and defendant was adjudicated a fourth-felony habitual offender on his conviction for possession with intent to distribute cocaine. The trial court vacated the previously imposed fifteen-year sentence, and sentenced defendant to twenty years at hard labor. Defendant appealed.

On June 12, 2009, in an unpublished opinion, this Court affirmed defendant's conviction for possession of cocaine with intent to distribute, his habitual offender adjudication, and the habitual offender sentence imposed, and remanded the matter to the trial court for imposition of sentence on the possession of hydrocodone conviction. ***State v. Blackburn***, 09-0178 (La. App. 1st Cir. 6/12/09), 11 So.3d 1244 (unpublished). On remand, the trial court sentenced defendant to five years at hard labor for the possession of hydrocodone conviction. The trial court ordered that the sentence be served concurrently with the sentence on count one. The trial court also denied defendant's motion for a new trial. Defendant appealed.

On December 22, 2010, in an unpublished opinion, this Court rendered judgment affirming defendant's conviction for possession of hydrocodone and

[1] According to the bill of information, defendant also was charged with possession of marijuana. Although it is not clear from the bill of information, this charge apparently was dropped. Prior to opening statements, the trial court instructed the clerk to read aloud the actual charges against defendant, and the clerk set forth only counts one and two.

remanding the matter to the trial court for resentencing. In that opinion, we noted that the trial court had failed to rule on defendant's motion for new trial until after defendant was sentenced and that defendant challenged his newly imposed sentence on appeal. ***State v. Blackburn***, 10-1075 (La. App. 1st Cir. 12/22/10), 57 So.3d 604 (unpublished), ***writ denied***, 10-2509 (La. 11/4/11), 75 So.3d 916. On remand, the trial court again sentenced defendant to five years at hard labor for his possession of hydrocodone conviction and ordered the sentence to be served concurrent with the sentence imposed on count one.

Defendant now appeals, raising three counseled and six *pro se* assignments of error.[2] For the following reasons, we affirm defendant's sentence for possession of hydrocodone.

FACTS[3]

On the night of January 21, 2008, Jasmine Brown was driving her vehicle on Sullivan Drive in Bogalusa in Washington Parish. Defendant was Brown's passenger. There was an outstanding attachment for Brown's arrest. Police officers in the area recognized Brown's vehicle and conducted a traffic stop. Brown was placed under arrest. When Officer Charles McDaniel of the Bogalusa City Police Department opened the passenger-side door, he smelled a strong odor of burnt marijuana. Officer McDaniel advised defendant to exit the vehicle. He patted the defendant down and found a plastic bag of cocaine in defendant's front pants pocket. Brown's vehicle was subsequently searched. In the center console, inside two Styrofoam cups, officers found a small bag of cocaine, a bag of marijuana, and four hydrocodone tablets. A Nissan key chain with keys and a small metal canister attached to it was also found on the passenger seat. The

[2] The six assignments of error raised in defendant's *pro se* brief are numbered sequentially as assignments 1 to 3(D).

[3] This recitation of facts is taken from the opinion in defendant's first appeal.

canister contained two pieces of crack cocaine. According to Sergeant Kendall Bullen of the Bogalusa City Police Department, Brown drove a Chevy Impala. Neither Brown nor defendant claimed ownership of the Nissan key chain.

COUNSELED ASSIGNMENTS OF ERROR NUMBERS ONE AND TWO

In his first counseled assignment of error, defendant argues that the five-year sentence at hard labor for his possession of hydrocodone conviction is unconstitutionally excessive. In his second counseled assignment of error, he argues that the trial court failed to comply with La. C.Cr.P. art. 894.1 when it failed to state for the record the considerations taken into account and the factual basis for the sentence imposed. However, a thorough review of the record indicates that defendant's attorney did not file a written or oral motion to reconsider sentence in the trial court. Under La. C.Cr.P. arts. 881.1(E) and 881.2(A)(1), the failure to make or file a motion to reconsider the sentence precludes a defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. Accordingly, defendant is procedurally barred from having the instant assignments of error reviewed. See ***State v. Duncan***, 94-1563 (La. App. 1st Cir. 12/15/95), 667 So.2d 1141, 1143 (*en banc per curiam*).

These assignments of error are without merit.

COUNSELED ASSIGNMENT OF ERROR NUMBER THREE

In his third counseled assignment of error, defendant contends that the failure of his trial counsel to file a motion to reconsider sentence should not preclude this Court from reviewing his sentence and, in the event that it does, his counsel's failure to file a motion to reconsider sentence constitutes ineffective assistance of counsel. Having determined that defendant filed no motion to reconsider sentence, we elect to address defendant's claim of ineffective assistance of counsel in the interest of judicial economy, because the record discloses the

evidence needed to address this issue. See ***State v. Bickham***, 98-1839 (La. App. 1st Cir. 6/25/99), 739 So.2d 887, 891-92.

Whether or not defense counsel's assistance was so defective as to require reversal of a defendant's sentence is subject to a two-part test established by the United States Supreme Court in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). First, the defendant must show that counsel's performance was deficient. Second, the defendant must show that this deficiency prejudiced the outcome of the trial. The failure to file a motion to reconsider sentence in itself does not constitute ineffective assistance of counsel. ***State v. Felder***, 00-2887 (La. App. 1st Cir. 9/28/01), 809 So.2d 360, 370, ***writ denied***, 01-3027 (La. 10/25/02), 827 So.2d 1173. 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.

Article I, Section 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may fall within statutory limits, it may nevertheless 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). Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. ***State v. Reed***, 409 So.2d 266, 267 (La. 1982). A trial judge is given wide discretion in the

imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of a manifest abuse of discretion. ***State v. Lanclos***, 419 So.2d 475, 478 (La. 1982). See also ***State v. Savario***, 97-2614 (La. App. 1st Cir. 11/6/98), 721 So.2d 1084, 1089, ***writ denied***, 98-3032 (La. 4/1/99), 741 So.2d 1280.

Louisiana Code of Criminal Procedure article 894.1 sets forth items that must be considered by the trial court before imposing sentence. The trial court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the guidelines. ***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). However, remand for full compliance with Article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown in the record. ***Lanclos***, 419 So.2d at 478.

Defendant's conviction for possession of hydrocodone was punishable by imprisonment, with or without hard labor, for not more than five years and a fine of not more than five thousand dollars. La. R.S. 40:967(C)(2). Therefore, defendant was sentenced to the maximum possible term of imprisonment for this conviction.

We note that the trial court did not, on either remand for resentencing, state its reasons under La. C.Cr.P. art. 894.1 for imposing a five-year sentence for defendant's possession of hydrocodone conviction. However, during defendant's first sentencing hearing, the trial court stated that there was a likelihood, based on defendant's record, that he would commit another crime if he was given probation

or a suspended sentence. Further, the trial court found that defendant was in need of correctional treatment or a custodial environment. Finally, the trial court observed that defendant had five prior criminal convictions.[4] Although these factors were articulated in relation to the imposition of sentence for defendant's conviction for possession with intent to distribute cocaine, we find that they were equally relevant to defendant's instant sentence and that there was no need for the trial court to restate them, given this Court's ability to review the record as a whole.

Defendant alleges as mitigating factors that the instant offense was not one of the worst class of offenses and that he is not in the worst class of offenders. Defendant also argues that his five-year sentence was excessive because the offense did not occur while he was in the company of children, in the act of driving while under the influence, or in a situation where he was likely to be distributing drugs.

The fact that defendant's five-year sentence was the maximum possible for the instant offense does not in itself raise a presumption that defendant's sentence was excessive. We note that maximum sentences may only be imposed for the most serious offenses and the worst offenders, or when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. See ***State v. Miller***, 96–2040 (La. App. 1st Cir. 11/7/97), 703 So.2d 698, 701, ***writ denied***, 98–0039 (La. 5/15/98), 719 So.2d 459. Further, a trial court is entitled to consider the defendant's entire criminal history in determining the appropriate sentence to be imposed. See ***State v. Ballett***, 98–2568 (La. App. 4th Cir. 3/15/00),

[4] The trial court did not recite defendant's prior convictions, but the habitual offender bill of information filed by the state sets forth a prior conviction for possession of a Schedule II controlled dangerous substance (cocaine) with intent to distribute and three prior convictions for possession of a Schedule II controlled dangerous substance (cocaine). It is unclear from the record whether or not defendant was convicted of any additional crimes.

756 So.2d 587, 602, ***writ denied***, 00–1490 (La. 2/9/01), 785 So.2d 31. In the instant case, it is clear from the facts articulated by the trial court that it considered defendant's criminal history and concluded that he posed a risk of repeated criminality.

Considering the trial court's previously stated reasons for sentencing defendant, the nature of defendant's crime, and defendants past conduct of repeated criminality, we find that no abuse of the trial court's sentencing discretion occurred in this case. The five-year sentence imposed by the trial court is not grossly disproportionate to the severity of the offense, and it does not shock the sense of justice. Therefore, we conclude that defendant did not receive ineffective assistance of counsel when his trial counsel failed to file a motion to reconsider sentence. Defendant has not shown that his sentence was excessive and would have been changed, either in the district court or on appeal, had such a motion been filed. We further note that, even if defendant had made a showing of ineffective assistance of counsel in relation to this sentence, the error would be harmless in light of the fact that defendant was sentenced to twenty years at hard labor as a habitual offender in connection with his conviction for possession with intent to distribute cocaine, and the instant sentence is to be served concurrent with that sentence.

This assignment of error is without merit.

PRO SE ASSIGNMENTS OF ERROR

Defendant filed a *pro se* brief in which he asserts six assignments of error. In his first *pro se* assignment of error, defendant asserts that the affidavit of probable cause in his case was "too vague and general." In his second *pro se* assignment of error, defendant argues that the trial court erred in failing to suppress evidence obtained from what defendant characterizes as an illegal search and seizure. In his third *pro se* assignment of error, defendant contends that his due process rights were violated because he was denied a preliminary examination, because the prosecutor committed misconduct during trial, and because "he was never arrested for any evidence recovered from the vehicle driven by Jasmine Brown." In a *pro se* assignment of error labeled "3(A)," defendant alleges that the prosecutor committed misconduct by relying on, and conspiring to produce, perjured testimony by state witnesses to secure defendant's conviction. In assignment of error "3(B)," defendant alleges that his rights to confront and cross-examine the witnesses against him were violated. In assignment of error "3(C)," defendant states that a crime lab report was not made available to him before trial. Finally, in assignment of error "3(D)," defendant argues that he was unable to prepare a defense because the bill of information was repeatedly changed. Thus, all of defendant's *pro se* assignments of error relate to the validity of his convictions and not to the sentence imposed for possession of hydrocodone.

This Court has previously addressed and affirmed defendant's convictions on appeal. See ***State v. Blackburn***, 09-0178 (La. App. 1st Cir. 6/12/09), 11 So.3d 1244 (unpublished); ***State v. Blackburn***, 10-1075 (La. App. 1st Cir. 12/22/10), 57 So.3d 604 (unpublished), ***writ denied***, 10-2509 (La. 11/4/11), 75 So.3d 916. Thus, defendant's conviction for possession of cocaine with intent to distribute became final on June 27, 2009, when defendant did not apply to this Court for rehearing or

to the Louisiana Supreme Court for review. See La. C.Cr.P. art. 922(B). Defendant's conviction for possession of hydrocodone became final on November 4, 2011, when the Louisiana Supreme Court denied defendant's writ. See La. C.Cr.P. art. 922(D). Therefore, only defendant's resentencing for possession of hydrocodone was subject to review in this appeal. See ***State v. Lewis***, 350 So.2d 1197, 1198 (La. 1977) (*per curiam*). The alleged errors raised in defendant's *pro se* brief should have been raised in his first or second appeal, when his convictions were still at issue. Because all of the issues raised in defendant's *pro se* brief relate to his convictions, which are final, these *pro se* assignments of error are not subject to review in the instant appeal taken from his resentencing.

For the foregoing reasons, defendant's sentence for his conviction of possession of hydrocodone is affirmed.

SENTENCE AFFIRMED.