NOT DESIGNATED FOR PUBLICATION

COURT OF APPEAL

STATE OF LOUISIANA

FIRST CIRCUIT

2008 KA 1122

STATE OF LOUISIANA

VERSUS

RAYMOND MATOS

Judgment rendered: DEC 2 3 2008

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On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, State of Louisiana
Number: 418693-4; "A"
The Honorable Raymond S. Childress, Judge Presiding

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Walter P. Reed
District Attorney
Covington, LA

Kathryn W. Landry
Baton Rouge, LA

Counsel for Appellee
State of Louisiana

Jane L. Beebe
New Orleans, LA

Counsel for Appellant
Raymond Matos

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

DOWNING, J.

Defendant, Raymond Matos, was charged by bill of information with one count of possession with intent to distribute MDMA, a violation of La. R.S. 40:966(A)(1), (Count 1), and one count of possession with intent to distribute methamphetamine, a violation of La. R.S. 40:967(A)(1), (Count 2).[1] In a separate bill of information, defendant was also charged with one count of possession of a firearm while in possession of cocaine, a violation of La. R.S. 14:95(E), (Count 3).

Defendant pled not guilty and proceeded to trial before a jury.[2] The jury determined defendant was guilty as charged on Count 1, guilty of the responsive offense of possession of methamphetamine on Count 2, and not guilty on Count 3. The trial court subsequently sentenced defendant to a term of fifteen years at hard labor for his conviction of possession with intent to distribute MDMA (Count 1), with the first five years of that sentence to be served without benefit of probation, parole, or suspension of sentence. The trial court also sentenced defendant to serve two and one-half years at hard labor for his conviction of possession of methamphetamine. (Count 2) The trial court ordered the sentences to be served consecutive to each other. Defendant's motion to reconsider sentence was denied.

Defendant appeals, asserting the following as assignments of error:

1. The trial court erred in failing to grant the defense motion to reconsider the sentence as excessive.

2. The prosecutor made an improper statement during closing argument.

FACTS

On July 7, 2006, members of the St. Tammany Parish Narcotics Task Force executed a search warrant at 108 Rue Chateau in Slidell, Louisiana. The property was owned by defendant and was comprised of three structures, including the main

[1] Joshua K. McCraney, Rene E. Jaunet, III, Samuel F. Sokolowski, Lynnlee C. Vires, and Chau Duc Duong were charged as codefendants in this same bill of information; however, only defendant was tried in the present proceeding.

[2] The separate bills of information were consolidated into a single trial.

residence, a FEMA trailer, and a pool house. Because of the multiple structures on the property, the task force members were organized into three separate teams, which simultaneously entered the structures.

Detective Allen Schulkens of the St. Tammany Parish Sheriff's Office was one of the five officers assigned to the team that entered the pool house. According to Detective Schulkens, the team executed a "dynamic entry," wherein entry is made as quickly as possible before the occupants can dispose of or destroy evidence. Detective Schulkens testified there were six or seven occupants inside the pool house when the raid began.

As the team entered, the officers shouted orders for the occupants to get on the ground. Lieutenant Kevin Swann of the Slidell Police Department alerted Detective Schulkens to defendant, who was ignoring the officers' orders and running towards the kitchen area. Detective Schulkens observed defendant ripping several plastic bags open and attempting to empty the contents down the sink. Despite the repeated commands of the officers directing defendant to stop his activities, get on the floor, and show his hands, defendant persisted in emptying the contents of the bags (orange-colored pills) into the sink.

Detective Schulkens and Lieutenant Swann proceeded to physically subdue defendant and take him to the floor; however, defendant resisted and failed to cease throwing the pills into the sink. Eventually, the officers overpowered defendant, placed him under arrest, and handcuffed him.

After defendant was handcuffed, Lieutenant Swann attempted to retrieve the orange-colored pills defendant had thrown into a bowl of water in the sink. Meanwhile, Detective Schulkens performed a pat down of defendant that revealed a large bulge in defendant's right-pants pocket. After retrieving the contents of defendant's pocket composing the bulge, Detective Schulkens observed two small film canisters, a large amount of cash, and defendant's driver's license. Crystal

methamphetamine and cocaine were discovered inside the canisters, and the amount of cash was determined to be $11,500.00.[3] The two plastic bags recovered from the sink were later determined to contain seventy-three tablets of MDMA and two grams of crushed MDMA. A gun was also seized from the pool house along with a separate plastic bag containing cocaine.

Defendant did not testify at trial.

EXCESSIVE SENTENCES

In his first assignment of error, defendant argues the trial court erred in failing to grant his motion to reconsider sentence. Defendant supports this assignment of error by arguing that the trial court failed to order a presentence investigative report (PSI) and it imposed consecutive sentences totaling seventeen and one-half years when the two counts arose out of the same facts and circumstances. Defendant further contends the trial court gave no justification for the harshness of the sentences.[4]

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. 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. 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

[3] The parties stipulated that $250.00 in marked currency used in an earlier controlled purchase of illegal narcotics from defendant was included in the $11,500.00 seized from his pocket.

[4] A PSI is conducted at the option of the trial court. La. Code Crim. P. art. 875(A)(1). The Louisiana Supreme Court stated in **State v. Lockwood**, 439 So.2d 394, 395 (La. 1983), that a defendant has no constitutional or other right to demand a PSI.

of manifest abuse of discretion. **State v. Hurst**, 99-2868, pp. 10-11 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83.

The Louisiana Code of Criminal Procedure sets forth items that must be considered by the trial court before imposing sentence. La. Code Crim. 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. 1990). In light of the criteria expressed in La. Code Crim. P. Art. 894.1, a review for individual excessiveness should consider the circumstances of the crime, the trial court's stated reasons, and its factual basis for sentencing. **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).

During the sentencing hearing, the trial court stated that the facts adduced at trial and the pretrial hearings indicated defendant was involved in a "significant drug distribution endeavor." The trial court referenced the fact that marked currency used in a controlled narcotics transaction earlier that day was found on defendant at the time of his arrest. Moreover, multiple defendants were present at the time of the raid, and defendant tried to destroy some of the evidence in order to conceal his involvement in these crimes.

The trial court further indicated defendant's criminal conduct was likely to recur if significant prison time was not given and that these offenses involved controlled substances from which defendant derived substantial income.

After reviewing the record and considering the facts of the instant case, we are unable to say that the trial court abused its discretion in sentencing defendant. For his conviction of possession with intent to distribute MDMA, defendant was eligible to receive a sentence of five to thirty years at hard labor without benefit of

parole, probation, or suspension of sentence. La. R.S. 40:966(B)(2). The trial court sentenced defendant to a term of fifteen years, which was half of the maximum sentence for which he was eligible. For his conviction for possession of methamphetamine, defendant was eligible for a sentence of not more than five years at hard labor. La. R.S. 40:967(C)(2). The trial court sentenced defendant to two and one-half years, which was half of the maximum penalty.

Defendant also claims that his sentences should have been imposed concurrently. La. Code Crim. P. art. 883 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.

The imposition of consecutive sentences requires particular justification when the crimes arise from a single course of conduct. However, even if the convictions arise out of a single course of conduct, consecutive sentences are not necessarily excessive. Other factors must be taken into consideration in making this determination. For instance, consecutive sentences are justified when the offender poses an unusual risk to the safety of the public due to his past conduct or repeated criminality. **State v. Spradley**, 97-2801, p. 19 (La. App. 1st Cir. 11/6/98), 722 So.2d 63, 73.

In our view, the trial court was justified in imposing consecutive sentences in this case. Defendant not only had a small quantity of methamphetamine seized from his person, but the police seized a larger amount of MDMA from plastic bags that defendant was attempting to destroy at the time of the raid. Furthermore, defendant repeatedly defied the officers' commands to stop and physically resisted the officers until he was subdued. Finally, the trial court specifically noted that defendant's criminal conduct was likely to recur if significant prison time was not

given. Considering these circumstances, we cannot say the imposition of consecutive sentences in this matter is excessive.

This assignment of error is without merit.

IMPROPER STATEMENT

In his second assignment of error, defendant alleges the prosecutor violated La. Code Crim. P. art. 774[5] in his closing argument by stating:

[PROSECUTOR]:

> [Defendant] told them, he told this officer that he gives [illegal drugs] to friends. He told them that. For you to return anything short of a guilty verdict on this case would be to, to an indictment of these officers.

[DEFENSE COUNSEL]:

> I, I object to that, to that statement, Judge.

THE COURT:

> I'll sustain that.

In brief, defense counsel contends that the prosecutor continued to imply that this was something the police may be found to be lying about, if defendant was not convicted. However, the record indicates defense counsel failed to lodge another objection during the prosecutor's closing argument.

If an objection is sustained, the defendant cannot on appeal complain of the alleged error unless at the trial level he requested and had been denied either an admonition to disregard or a mistrial. **State v. Robertson**, 97-0177, p. 40 (La. 3/4/98), 712 So.2d 8, 42, cert. denied, 525 U.S. 882, 119 S.Ct. 190, 142 L.Ed.2d 155 (1998). The record indicates defendant failed to request an admonition or a mistrial. Accordingly, there is no merit in this assignment of error.

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[5] La. Code Crim. P. art. 774 provides, "The argument shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case."

REVIEW FOR ERROR

The defendant asks that this court examine the record for error under La. Code Crim. P. art. 920(2). This court routinely reviews the record for such errors, whether or not such a request is made by a defendant. Under La. Code Crim. 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, pp. 18-22 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 07-0130 (La. 2/22/08), 976 So.2d 1277.

DECREE

For the above stated reasons, we affirm the defendant's convictions and sentences.

CONVICTIONS AND SENTENCES AFFIRMED