

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 1422

STATE OF LOUISIANA

VERSUS

STEPHON GRAVES

Judgment Rendered: February 10, 2012.

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On Appeal from the
21st Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Trial Court Numbers 803291, 803292, 803524, 1-000458

Honorable Ernest G. Drake, Jr.

* * * * *

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* * * * *

BEFORE: CARTER, C.J., PARRO AND HIGGINBOTHAM, JJ.

Higginbotham, J., dissents in part and assigns reasons.

CARTER, C.J.

The defendant, Stephon Graves, was charged by bill of information in four separate cases in the Twenty-First Judicial District Court (combined on appeal) with three counts of simple burglary in violation of Louisiana Revised Statutes section 14:62 (docket numbers 803291, 803524, and 1-000458) and one count of unauthorized entry of a place of business in violation of Louisiana Revised Statutes section 14:62.4 (docket number 803292). The defendant initially entered pleas of not guilty, but later withdrew those pleas and pled guilty as charged on all four counts. On the simple burglary conviction in docket number 803524, the defendant was sentenced to ten years of imprisonment at hard labor. On each of the simple burglary convictions, in docket numbers 803291 and 1-000458, the defendant was sentenced to twelve years of imprisonment at hard labor. The trial court sentenced the defendant to six years of imprisonment at hard labor on the unauthorized entry of a place of business conviction in docket number 803292. The trial court ordered that all four sentences be served consecutively.

The defendant appeals, arguing the sentences are unconstitutionally excessive. For the following reasons, we affirm the convictions and sentences.

STATEMENT OF FACTS

The defendant entered guilty pleas to the charges in these cases; therefore, the facts were not fully developed. The following information is consistent with the bills of information and the factual bases presented in support of the guilty pleas. On August 3, 2008, the defendant entered Midtown Daiquiris in Amite, Louisiana, through a back window in an

attempt to steal liquor. On August 7, 2008, after he consumed beer, the defendant entered Marullo Motors in Hammond, Louisiana, where he entered a vehicle and fell asleep. As to the unauthorized entry of a place of business conviction, the defendant admitted entering Hot Wok in Amite, Louisiana, on August 13, 2008, through an open door. In December of 2009,¹ the defendant entered Hooked in Hammond, Louisiana, and stole eight boxes of shrimp that he planned to exchange for drugs. According to the defendant, he was pushing the shrimp in a baby stroller when approached by the police.

ASSIGNMENT OF ERROR

In the sole assignment of error, the defendant argues that the trial court erred in imposing unconstitutionally excessive sentences. The defendant notes that he was sentenced to a total of forty years. He further notes that, because of his age at the time of the sentencing, the forty-year total is equivalent to a life sentence. The defendant further contends that the trial court did not give adequate consideration to the sentencing guidelines. The defendant concludes that a forty-year sentence is grossly out of proportion to the severity of the crimes.

The Eighth Amendment to the United States Constitution and Article I, section 20, of the Louisiana Constitution prohibit the imposition of excessive or cruel 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 unconstitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a

¹ The bill of information for this charge indicates that the offense was committed on December 3, 2009, while the factual basis indicates that the offense occurred on December 31, 2009.

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. 1 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. *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 Article 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. *State v. Brown*, 02-2231 (La. App. 1 Cir. 5/9/03), 849 So. 2d 566, 569. The factors guiding the decision of the trial court are necessary for an appellate court to adequately review a sentence for excessiveness and, therefore, should be in the record. Otherwise, a sentence may appear to be arbitrary or excessive and not individualized to the particular defendant. *State v. Felder*, 00-2887 (La. App. 1 Cir. 9/28/01), 809 So. 2d 360, 371, *writ denied*, 01-3027 (La. 10/25/02), 827 So. 2d 1173.

Under Louisiana Revised Statutes section 14:62B, a person convicted of simple burglary shall be fined not more than two thousand dollars or imprisoned with or without hard labor for not more than twelve years, or both. Under Louisiana Revised Statutes section 14:62.4B, a person convicted of unauthorized entry of a place of business shall be fined not more than one thousand dollars or imprisoned with or without hard labor for not more than six years, or both. Thus, the trial court imposed the maximum

terms of imprisonment on three of the four counts. This court has stated that maximum sentences permitted under a statute may be imposed only 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. *State v. Hilton*, 99-1239 (La. App. 1 Cir. 3/31/00), 764 So. 2d 1027, 1037, writ denied, 00-0958 (La. 3/9/01), 786 So. 2d 113. We note that the defendant did not raise in his motion to reconsider sentence or at the hearing on said motion the argument that the trial court failed to adequately consider the sentencing guidelines in Article 894.1. A party is precluded from urging on appeal any ground that was not raised in the motion to reconsider. La. Code Crim. Proc. Ann. art. 881.1E. Thus, in the instant matter, the defendant's motion to reconsider sentence on the ground that the sentencing was excessive was insufficient to preserve his claim on appeal that the trial court failed to adequately consider the sentencing guidelines. Nonetheless, as further discussed below, we find that the record supports the sentences imposed by the trial court.

Before imposing the sentences, the trial court noted that it was aware of the sentencing factors in the Louisiana Code of Criminal Procedure. The parties noted that the State agreed not to file a habitual offender bill of information against the defendant in exchange for his guilty pleas. The defense attorney further noted the defendant's age, and that he had a drug problem for which he wanted help. The trial court noted its sympathy for the defendant's drug abuse problem. The trial court said it had obtained and reviewed a presentence investigation (PSI) for the defendant, which set forth the defendant's extensive criminal history, including the following convictions: aggravated battery in 1984 (originally charged as attempted

first degree murder); theft under one hundred dollars, theft between one hundred dollars and five hundred dollars, and illegal possession of stolen things in 1991; theft of goods, theft under one hundred dollars, second degree battery, and simple criminal damage to property in 1992 and 1993; battery of a police officer in 1992; shoplifting convictions in 1995 and 1996; a theft under one hundred dollars conviction in 1997; theft of goods and shoplifting convictions in 1998; illegal possession of stolen things in 1999; simple burglary in 2000; unauthorized entry of an inhabited dwelling, attempted unauthorized entry of an inhabited dwelling, and misdemeanor theft in 2003; and domestic abuse battery in 2006. The defendant also had several other arrests that did not result in convictions.

After reviewing the defendant's extensive criminal record, the trial court concluded that the defendant was a menace to society. The trial court further noted that the defendant's history included prior convictions for breaking into people's homes. Our review indicates that the trial court considered the guidelines of Article 894.1, as well as the factors cited by the defendant, including his age. The trial court articulated a more than ample basis for the imposition of the maximum sentences upon the defendant. As noted by the trial court, the defendant has decades of continuous criminal history. Over the years, he has received extensive leniency in sentencing and has failed to benefit from probationary opportunities. The defendant clearly poses an unusual risk to the public safety due to his past conduct of repeated criminality. The assignment of error is without merit.

CONVICTIONS AND SENTENCES AFFIRMED.

STATE OF LOUISIANA

VERSUS

STEPHON GRAVES

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BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J., AFFIRMS IN PART, DISSENTS IN PART, AND ASSIGNS WRITTEN REASONS.

HIGGINBOTHAM, J., affirming in part and dissenting in part.

I respectfully disagree in part with the majority opinion. While I would affirm the convictions, I find that the consecutive sentences imposed on this drug-addicted, forty-nine year old defendant are unconstitutionally excessive. The imposition of the equivalent of a forty-year imprisonment term, with the maximum terms of imprisonment for three of the four non-violent offenses, makes no measurable contribution to acceptable penal goals and are, therefore, nothing more than a needless imposition of pain and suffering. Thus, I conclude that the trial court abused its discretion in imposing the consecutive sentences herein, and I would vacate the sentences and remand the case for resentencing with instructions to the trial court to impose concurrent sentences. See LSA-C.Cr.P. art. 881.4(A). In all other respects, I agree with the majority opinion.

For these reasons, I respectfully affirm in part and dissent in part.

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