NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0644

STATE OF LOUISIANA

VERSUS

TYNORVIS T. ROGERS

Judgment Rendered: December 22, 2010

Appealed from the
Twenty-Second Judicial District Court
in and for the Parish of St. Tammany, State of Louisiana
Trial Court Number 466656

Honorable Reginald T. Badeaux, III, Judge Presiding

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Walter P. Reed
Covington, LA

Kathryn W. Landry
Baton Rouge, LA

Counsel for Appellee,
State of Louisiana

Stephen A. Yazbeck
Covington, LA

Frederick Kroenke
Baton Rouge, LA

Counsel for Defendant/Appellant,
Tynorvis T. Rogers

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McClendon, J. concurs and assigns reasons.

WHIPPLE, J.

The defendant, Tynorvis T. Rogers, was charged by bill of information with distribution of marijuana, a violation of LSA-R.S. 40:966(A)(1); and possession of a firearm by a convicted felon, a violation of LSA-R.S. 14:95.1.[1] The defendant pled not guilty. Subsequently, the defendant withdrew his prior pleas of not guilty and, at a Boykin hearing, entered a plea of guilty to one count of distribution of marijuana and a plea of guilty to possession of a firearm by a convicted felon. For the distribution-of-marijuana conviction, he was sentenced to ten years imprisonment at hard labor. For the possession-of-a-firearm-by-a- convicted-felon conviction, he was sentenced to ten years imprisonment at hard labor without benefit of probation, parole, or suspension of sentence. The sentences were ordered to run concurrently. The defendant now appeals, designating two assignments of error. We affirm the convictions and sentences.

FACTS

Because the defendant pled guilty, the facts were not fully developed at a trial. The factual basis for the guilty plea, provided by the prosecutor during the Boykin hearing, is as follows:

> [O]n February 3rd of 2009 after detectives in St. Tammany Parish had conducted about three undercover buys from Mr. Tynorvis Rogers at his house, they [executed] a search warrant at the location of his residence where the buys had been done. After searching the bedroom and finding a lot of marijuana, they also found two 12[-] gauge shotguns which were behind an entertainment center in the bedroom [in] which Mr. Rogers had all of his stuff located. And he was, in fact, a convicted felon by having a previous conviction for simple burglary on June 25, 2007 in St. Tammany Parish. All these things [occurred] in St. Tammany Parish.

[1]The distribution-of-marijuana charge was originally count 3, and the possession-of-a-firearm-by-a-convicted-felon charge was originally count 4 because the State had charged the defendant with two other counts of distribution of marijuana (counts 1 and 2). However, at the defendant's guilty plea hearing, the prosecutor dismissed two counts of distribution of marijuana. Also, counts 3 and 4 reflect the same date of offense. The defendant was also charged with illegal possession of stolen things (count 5), which was nol-prossed.

ASSIGNMENTS OF ERROR NOS. 1 and 2

In these related assignments of error, the defendant argues, respectively, that the sentence imposed for the distribution-of-marijuana conviction is excessive, and defense counsel's failure to file a motion to reconsider sentence constitutes ineffective assistance of counsel. The defendant does not challenge the sentence imposed for his conviction of possession of a firearm by a convicted felon.

The record does not contain an oral or written motion to reconsider sentence. Louisiana Code of Criminal Procedure article 881.1(E) provides that the failure to file or make a motion to reconsider sentence precludes the defendant from raising an excessive sentence argument on appeal. Ordinarily, pursuant to the provisions of this article and the holding of State v. Duncan, 94-1563, p. 2 (La. App. 1st Cir. 12/15/95), 667 So. 2d 1141, 1143 (en banc per curiam), we would not consider an excessive sentence argument. However, in the interest of judicial economy, we will consider the defendant's argument that his sentence is excessive, even in the absence of a motion to reconsider sentence, in order to address the defendant's claim of ineffective counsel. See State v. Wilkinson, 99-0803, p. 3 (La. App. 1st Cir. 2/18/00), 754 So. 2d 301, 303, writ denied, 2000-2336 (La. 4/20/01), 790 So. 2d 631.

In Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984), the United States Supreme Court enunciated the test for evaluating the competence of trial counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

In evaluating the performance of counsel, the inquiry must be whether counsel's assistance was reasonable considering all the circumstances. State v. Morgan, 472 So. 2d 934, 937 (La. App. 1st Cir. 1985). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. State v. Robinson, 471 So. 2d 1035, 1038-39 (La. App. 1st Cir.), writ denied, 476 So. 2d 350 (La. 1985).

Failure to file a motion to reconsider sentence in itself does not constitute ineffective assistance of counsel. 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. See State v. Felder, 2000-2887, p. 11 (La. App. 1st Cir. 9/28/01), 809 So. 2d 360, 370, writ denied, 2001-3027 (La. 10/25/02), 827 So. 2d 1173 (citing State v. Pendelton, 96-367, p. 30 (La. App. 5th Cir. 5/28/97), 696 So. 2d 144, 159, writ denied, 97-1714 (La. 12/19/97), 706 So. 2d 450).

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 the sense of justice. State v. Andrews, 94-0842, pp. 8-9 (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 the trial court adequately considered the criteria. State v. Brown, 2002-2231, p. 4 (La. App. 1st Cir. 5/9/03), 849 So. 2d 566, 569.

The articulation of the factual basis for a sentence is the goal of LSA-C.Cr.P. art. 894.1, not rigid or mechanical compliance with its provisions. 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 LSA-C.Cr.P. art. 894.1. State v. Lanclos, 419 So. 2d 475, 478 (La. 1982). The trial judge should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than confinement. See State v. Jones, 398 So. 2d 1049, 1051-52 (La. 1981).

The maximum sentence pursuant to LSA-R.S. 40:966(B)(3) is thirty years imprisonment at hard labor and a $50,000.00 fine. Considering that the defendant has a previous conviction for simple burglary, that two other counts of distribution of marijuana were dismissed, and that he was sentenced to only one-third of the maximum sentence, we find no abuse of discretion by the trial court in imposing a ten-year sentence without a fine. The sentence imposed is not grossly disproportionate to the severity of the offense and, therefore, is not unconstitutionally excessive.

Because we find the sentence is not excessive, defense counsel's failure to file or make a motion to reconsider sentence, even if constituting deficient performance, did not prejudice the defendant. See Wilkinson, 99-0803 at p. 3, 754 So. 2d at 303; State v. Robinson, 471 So. 2d at 1038-39. Therefore, the defendant's claim of ineffective assistance of counsel must fall.

These assignments of error are without merit.

SENTENCING ERROR

Under LSA-C.Cr.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, we have found a sentencing error. See State v. Price, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So. 2d 112 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So. 2d 1277.

For his conviction of possession of a firearm by a convicted felon, the defendant was sentenced to ten years at hard labor without benefit of probation, parole, or suspension of sentence. Whoever is found guilty of violating the possession of a firearm by a convicted felon provision shall be imprisoned at hard labor for not less than ten nor more than fifteen years without benefits and be fined not less than one thousand dollars nor more than five thousand dollars. LSA-R.S. 14:95.1(B). The trial court failed to impose the mandatory fine.[2] Accordingly, the defendant's sentence, which did not include the mandatory fine, is illegally lenient. However, since the sentence is not inherently prejudicial to the defendant, and neither the State nor the defendant has raised this sentencing issue on appeal, we decline to correct this error. See Price, 2005-2514 at pp. 21-22, 952 So. 2d at 124-25.

CONVICTIONS AND SENTENCES AFFIRMED.

[2]The minutes reflect no fine was imposed.

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McCLENDON, J., concurs and assigns reasons.

While I am concerned about the failure of the trial court to impose the legislatively mandated fine, given the state's failure to object and in the interest of judicial economy, I concur with the majority opinion.