NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 KA 1446

STATE OF LOUISIANA

VERSUS

YILVER MORADEL PONCE

Judgment Rendered: March 25, 2011

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 444,364

Honorable Richard A. Swartz, Judge

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

WELCH, J.

The defendant, Yilver Moradel Ponce, was charged by bill of information with one count of fourth offense driving while intoxicated (DWI), a violation of La. R.S. 14:98, and pled not guilty.[1] Following a jury trial, he was found guilty as charged by unanimous verdict.[2] He was sentenced to fifteen years at hard labor, to be served consecutively to any other sentence he was serving.[3] His motion for reconsideration of sentence was denied. He now appeals, contending: (1) the State failed to sufficiently prove Deputy Chiasson was certified to operate the intoxilyzer on the date of the arrest as required by La. R.S. 32:661 *et seq.*; and (2) the trial court erred in imposing an unconstitutionally excessive sentence. For the following reasons, we affirm the conviction and sentence.

FACTS

On February 25, 2008, at approximately 11:30 p.m., St. Tammany Parish Sheriff's Office Deputy Steve Chiasson investigated a report of a white van with two males inside that had been parked for some time on Louisiana Highway 36, near Covington. While riding eastbound on Highway 36, Deputy Chiasson noticed a white vehicle he believed to be a Ford Explorer backing up with its headlights on. Deputy Chiasson observed two males sitting in the front seats of the vehicle. As soon as Deputy Chiasson slowed down to pass the vehicle, the driver drove off

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[1] Predicate #1 was set forth as the defendant's August 4, 2005 conviction, under Twenty-Second Judicial District Court Docket #400040, for DWI. Predicate #2 was set forth as the defendant's July 12, 2005 conviction, under Twenty-Second Judicial District Court Docket #333821, for DWI. Predicate #3 was set forth as the defendant's August 4, 2005 conviction, under Twenty-Second Judicial District Court Docket #398788, for DWI.

[2] The trial minutes are inconsistent with the trial transcript and verdict form concerning the conviction. When there is a discrepancy between the minutes and the transcript, the transcript must prevail. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

[3] In connection with predicate #1, the State introduced into evidence documentation which established the defendant was sentenced to twenty years at hard labor and was placed on probation. The sentence imposed for predicate #1 indicates that offense was a fourth offense DWI, in connection with which the defendant received the benefit of probation. Accordingly, the sentence for the instant offense is deemed to contain the provisions of La. R.S. 14:98(E)(4)(b) that, "no part of the sentence may be imposed with benefit of suspension of sentence, probation, or parole." See La. R.S. 15:301.1(A).

quickly, prompting the deputy to immediately turn around and follow the vehicle. When Deputy Chiasson pulled in behind the vehicle, it made an immediate left turn into a trailer park. Deputy Chiasson parked at an angle behind the vehicle. He had a clear view of the passenger, but not the driver. Deputy Chiasson used his public address system to order the driver out of the vehicle. Deputy Chiasson identified the defendant as the person who exited the vehicle.

Deputy Chiasson testified that when the defendant exited the vehicle, he was swaying, and when the defendant arrived at the deputy's vehicle, the deputy could smell alcohol on the defendant's breath and person. Deputy Chiasson stated that he asked the defendant for his driver's license, registration, and proof of insurance, and asked him if anyone else was in the vehicle. According to Deputy Chiasson, the defendant replied that the documents were in the vehicle and that there was a passenger in the vehicle. The officer again used the public address system to order the passenger out of the vehicle, who complied and came over to the front of the vehicle. Deputy Chiasson then went to the passenger side of the vehicle to get the paperwork, and was told by the defendant that he did not have his license. According to Deputy Chiasson, while standing on the side of the vehicle, he observed two open beer bottles on the floor, asked the defendant whether they were his, and the defendant answered affirmatively. At the scene, the defendant did not indicate that anyone else had been driving the vehicle.

The defendant subsequently failed the horizontal-gaze nystagmus and one-leg stand field sobriety tests, and he refused to perform the walk-and-turn test. Deputy Chiasson testified that the defendant told him he had a couple of beers, that the defendant had glassy eyes, and that the defendant's speech was slurred. Believing defendant to be intoxicated, Deputy Chiasson arrested the defendant and advised him

of his **Miranda**[4] rights. At 12:36 a.m., the defendant's breath registered .161 on the Intoxilyzer 5000.

The defendant testified at trial. He conceded, in addition to the three predicate DWI offenses charged against him, in case #320427, on June 21, 2000, he pled guilty to DWI; and in case #400717, on August 19, 2005, he pled guilty to DWI, fourth offense. He claimed he lived in the mobile home on Highway 36 with two of his children and their mother. He indicated the vehicle in question was his cousin's Ford Expedition, that he had been a passenger in the vehicle, and denied having driven the vehicle that night. The defendant testified that after the police arrived, he exited the truck to go into his trailer, then went to talk to one of the officers to see what was going on. He denied that he had been drinking on the night in question.

DOCUMENTATION OF CERTIFICATION TO USE INTOXILYZER

In assignment of error number one, the defendant argues the State failed to prove Deputy Chiasson was certified to operate the intoxilyzer machine on the day of the incident because he did not produce documentation showing he was certified on the day of the arrest. The State argues this issue was not preserved for appeal.

At trial, out of the presence of the jury, the defense argued the intoxilyzer operation checklist, the reading from the intoxilyzer, and the form completed after use of the intoxilyzer, were only admissible if the State laid the proper foundation. Thereafter, the jury returned to the courtroom, and Deputy Chiasson continued his testimony. He indicated he was certified to use the intoxilyzer; he was certified in St. Tammany Parish; and he was certified on the day of the incident. The jury was excused again, and the defense questioned Deputy Chiasson concerning the rights relating to the chemical test for intoxication form he read to the defendant. The defense then asked Deputy Chiasson if he had his certificate of operation with him,

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[4] **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

so it could be copied and placed in the record to show he was qualified to operate the intoxilyzer on the day of the incident. Deputy Chiasson replied, "Yes, I did." The defense asked Deputy Chiasson, "What is the period of time on there that you were allowed to do the test?" Deputy Chiasson replied he was currently licensed to operate the Intoxilyzer 5000, and his license was "good for two years." The court asked Deputy Chiasson what period of time the certification covered, to which the officer responded, "3-26-09 through 3-26-11." The defense then questioned Deputy Chiasson concerning whether he complied with methods that had been approved and promulgated by the Department of Public Safety in administering the test and whether the machine he used had been properly calibrated. Thereafter, the court asked the defense if it had anything further. The defense replied:

> Again, I still think the position that the foundation has not been laid for the introduction of the intoxilyzer results based upon [La. R.S. 32:661(C)(1),] which requires an [sic] order for that to come in[,] each officer's name has to be on the certificate that was involved in the stop, the arrest, the detention and the investigation of the person.
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> In addition to that, rules promograted [sic] by the Department of Corrections to say that the testing methods used in this particular case were followed. That's my objection to the introduction of all of the evidence or the predicate to the introduction of the blood alcohol results.

The defendant's argument regarding Deputy Chiasson's failure to produce documentation indicating he was certified to operate the intoxilyzer machine on the day of the incident was not preserved for appeal. The defense asked Deputy Chiasson if he had his certificate of operation with him, but failed to object to the documentation he produced, which indicated he was currently licensed. An irregularity or error cannot be availed of after verdict unless, at the time the ruling or order of the court was made or sought, the party made known to the court the action which he desired the court to take, or of his objections to the action of the court, and the grounds therefor. La. C.Cr.P. art. 841; La. C.E. art. 103(A)(1).

This assignment of error is without merit.

EXCESSIVE SENTENCE

In assignment of error number two, the defendant argues the trial court failed to adequately consider the guidelines of La. C.Cr.P. art. 894.1 and imposed an unconstitutionally excessive sentence.

The Louisiana Code of Criminal Procedure sets forth items which must be considered by the trial court before imposing sentence. La. C.Cr.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. 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. Hurst**, 99-2868, p. 10 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962. Remand for full compliance with Article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. **State v. Harper**, 2007-0299, p. 15 (La. App. 1st Cir. 9/5/07), 970 So.2d 592, 602, writ denied, 2007-1921 (La. 2/15/08), 976 So.2d 173.

Louisiana Constitution Article I, Section 20 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 of manifest abuse of discretion. **Hurst**, 99-2868 at pp. 10-11, 797 So.2d at 83.

Except as otherwise provided in La. R.S. 14:98(E)(4)(b), on a conviction of a fourth or subsequent offense DWI, notwithstanding any other provision of law to the contrary and regardless of whether the fourth offense occurred before or after an earlier conviction, the offender shall be imprisoned with or without hard labor for not less than ten years nor more than thirty years and shall be fined five thousand dollars. Sixty days of the sentence of imprisonment shall be imposed without benefit of probation, parole, or suspension of sentence. The court in its discretion, may suspend all or any part of the remainder of the sentence of imprisonment. La. R.S. 14:98(E)(1)(a) (prior to amendment by 2010 La. Acts No. 801, § 1 & 2008 La. Acts No. 161, § 1). The defendant was sentenced to fifteen years at hard labor, to be served consecutively to any other sentence he was serving. He was not fined.

At sentencing, the trial court stated it would impose sentence in accordance with the provisions of La. C.Cr.P. art. 894.1. The court found the imposition of a suspended sentence would deprecate the seriousness of the offense because the defendant had a "propensity for drinking." The court noted that although the defendant was tried for fourth offense DWI, he had several other DWI convictions. The court found there was an undue risk that during the period of suspended sentence or probation, the defendant would commit another crime. The court also found the defendant was in need of correctional treatment or a custodial environment that could be provided most "efficiently" by his commitment to an institution.

A thorough review of the record reveals the trial court adequately considered the criteria of Article 894.1 and did not manifestly abuse its discretion in imposing the sentence. See La. C.Cr.P. art. 894.1 (A)(1), (A)(2), (A)(3) & (B)(12). Additionally, the sentence imposed was not grossly disproportionate to the severity of the offense and thus, was not unconstitutionally excessive.

This assignment of error is without merit.

REVIEW FOR ERROR

Initially, we note that our review for error is pursuant to La. C.Cr.P. art. 920, which provides that the only matters to be considered on appeal are errors designated in the assignments of error and "error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." La. C.Cr.P. art. 920(2).

The trial court failed to impose the mandatory fine of five thousand dollars. See La. R.S. 14:98(E)(1)(a). Although the failure to impose the fine is error under La. C.Cr.P. art. 920(2), it certainly is not inherently prejudicial to the defendant. Because the trial court's failure to impose the fine was not raised by the State in either the trial court or on appeal, we are not required to take any action. As such, we decline to correct the illegally lenient sentence. See **State v. Price**, 2005-2514, pp. 18-22 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

CONCLUSION

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.