NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 KA 0471

STATE OF LOUISIANA

VERSUS

DANNA MARIE TREADWAY RHODES

Judgment Rendered: September 14, 2007

Appealed from the
Twenty-Second Judicial District Court
in and for the Parish of St. Tammany, State of Louisiana
Trial Court Number 395957

Honorable Donald M. Fendlason, Judge Presiding

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BEFORE: WHIPPLE, GUIDRY AND HUGHES, JJ.

WHIPPLE, J.

The defendant, Danna Marie Treadway Rhodes, was charged by bill of information with driving while intoxicated, third offense, a violation of LSA-R.S. 14:98. The defendant pled not guilty. Following a jury trial, the defendant was found guilty as charged. The defendant was sentenced to five (5) years imprisonment at hard labor with all but ninety days of the sentence suspended. The court ordered thirty of those days to be without benefit of probation, parole, or suspension of sentence and that upon release from prison, the defendant be placed on probation for five years. The court also ordered special conditions of probation and that defendant pay a $2,000.00 fine. The defendant filed a motion to reconsider sentence, which was denied. The defendant now appeals, designating two assignments of error. We affirm the conviction and sentence.

FACTS

On April 5, 2005, at about 11:30 a.m., the defendant picked up her four-year old son from Head Start in Slidell. While driving home on Thompson Road, the defendant's vehicle struck Isabel Dumolio, who was riding her bicycle on the shoulder of the road. Ms. Dumolio was thrown from her bicycle and landed face-down in a ditch. Ms. Dumolio was badly injured and taken to the hospital. Louisiana State Trooper Patrick Dunn conducted a field sobriety test on the defendant, which she failed. According to the defendant, at 7:00 a.m. on the day of the accident, she had taken "ultram" and Xanax, prescription medication for back pain and anxiety, respectively. According to the defendant, when she hit Ms. Dumolio, she was distracted because she was looking down to reach for a soft drink for her son.

ASSIGNMENTS OF ERROR NUMBERS 1 AND 2

In these two assignments of error, the defendant challenges the sentence imposed by the trial court, contending that the trial court erred in imposing an excessive sentence, and in denying the motion to reconsider sentence. Specifically, the defendant contends that the trial court did not consider any mitigating factors in favor of leniency when it sentenced her to the maximum term of incarceration allowed by law.

The Eighth Amendment to the United States Constitution and Article I, section 20, of the Louisiana Constitution prohibit the imposition of excessive punishment. 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. 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 one's 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).

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. Even where there has not been full compliance with LSA-C.Cr.P. art. 894.1, a remand is unnecessary if the record clearly shows an adequate factual basis for the sentence

imposed. State v. Lanclos, 419 So. 2d 475, 478 (La. 1982). The trial judge should review the defendant's personal history and prior criminal record, the seriousness of the offense, the likelihood that the defendant will commit another crime, and the defendant's potential for rehabilitation through correctional services other than confinement. State v. Jones, 398 So. 2d 1049, 1051-1052 (La. 1981).

In the instant matter, the trial court specifically informed the defendant that she was being sentenced in accordance with the sentencing provisions under LSA-C.Cr.P. art. 894.1, and that it was aware of the sentencing guidelines, as well as the sentence for DWI, third offense. The defendant contends the trial court did not consider mitigating factors, such as the fact that she is the mother of young children dependent upon her for care, and she is a former alcoholic and drug addict who "has struggled diligently to recover." The defendant had her four-year-old son in the back seat of the car when she struck Ms. Dumolio. Further, the defendant testified at trial that she took both "ultram" and Xanax on the morning of the accident before she picked up her son. The defendant admitted at trial that both of these medications came with contraindications warning the user to be careful about driving an automobile and operating heavy machinery. On review, we find the trial court properly considered these purported mitigating factors in imposing sentence. Given the defendant's behavior, we find no merit to these arguments. As the trial court noted at the sentencing hearing, "[T]he court vividly recalls that the child did not sustain any injury but could have."

The defendant has three prior DWI convictions which occurred within a period of only three years. As a result of the defendant's instant DWI offense, an innocent victim was seriously injured. Despite receiving a maximum sentence, the defendant is required to serve only thirty days in jail without the benefit of probation, parole, or suspension of sentence. Under these circumstances, the sentence imposed by the trial court is not grossly disproportionate to the severity of

the offense and, therefore, is not unconstitutionally excessive. Thus, we likewise find the trial court did not err in denying the defendant's motion to reconsider sentence.

These assignments of error are without merit.

SENTENCING ERROR

In this case, the defendant was sentenced to five years with all but ninety days of the sentence suspended. Upon release from prison, the trial court ordered that the defendant be placed on probation for five years. However, LSA-R.S. 14:98(D)(1)(a) provides that if any portion of the sentence is suspended, the defendant shall be placed on supervised probation "for a period of time equal to the remainder of the sentence of imprisonment." Thus, the five years of probation is illegally excessive.[1] If the defendant serves (or served) ninety days, her entire probationary period should be five years minus ninety days, or four years and nine months.

Pursuant to State v. Price, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So. 2d 112, 124-125 (en banc) because this error is inherently prejudicial, we will correct the sentence under LSA C.Cr.P. art. 882(A). Accordingly, we amend the probationary period to four years and nine months. The case is remanded for correction of the minutes, and the commitment order, if necessary.

CONVICTION AFFIRMED; SENTENCE AMENDED AND AFFIRMED, AS AMENDED; REMANDED FOR CORRECTION OF MINUTES AND COMMITMENT ORDER, IF NECESSARY.

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[1]While the defendant argues excessive sentence on her appeal, she does not address this particular issue. The defendant's specific argument on appeal is that the trial court did not consider any mitigating factors in favor of leniency.