NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 1390

STATE OF LOUISIANA

VERSUS

JONATHAN JONES

DATE OF JUDGMENT: FEB 10 2012

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 02-09-0477 SEC. 2, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE RICHARD ANDERSON, JUDGE

* * * * * *

Hillar C. Moore, III DA
Dylan C. Alge, ADA
Baton Rouge, Louisiana

Counsel for Appellee
State of Louisiana

Frederick Kroenke
Baton Rouge, Louisiana

Counsel for Defendant-Appellant
Jonathan Jones

* * * * * *

BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

Disposition: CONVICTIONS AND SENTENCES AFFIRMED.

KUHN, J.

Defendant, Jonathan Jones, was charged by grand jury indictment with second degree murder (count one) and armed robbery (count two), violations of La. R.S. 14:30.1 and La. R.S. 14:64, respectively. Defendant entered a plea of not guilty. After a trial by jury, defendant was found guilty as charged on both counts. The trial court sentenced defendant to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence on count one; and to twenty years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence on count two. Defendant now appeals, asserting in two assignments of error the following: (1) the trial court erred in imposing an excessive sentence; and (2) trial counsel's failure to file a motion to reconsider sentence constitutes ineffective assistance of counsel should that failure preclude this court from considering the constitutionality of the sentence. For the following reasons, we affirm the convictions and sentences.

STATEMENT OF FACTS

On October 27, 2008, at approximately 6:30 p.m., Larb Singleton, III, the victim, was robbed and shot. The offenses took place in the parking lot of an apartment complex on Cadillac Street in Baton Rouge. Defendant was identified as the perpetrator by an eyewitness and physical evidence. Specifically, State witness Anthony Cann, who was personally familiar with both defendant and the victim, was sitting in the parking lot at the scene. He observed the victim drive into the parking lot in his Monte Carlo and then observed defendant as he approached and entered the victim's vehicle. Cann heard the vehicle's door slam just prior to hearing gunshots. Cann fled from the scene after hearing the second

gunshot. As Cann turned back, he observed the victim running and defendant "fiddling" with a gun. Cann heard two more gunshots. Defendant drove away from the scene in the victim's vehicle. The victim's vehicle, which had been set on fire, was recovered on Avocado Street. Cann identified defendant in a photographic lineup "within a minute" of viewing the photographs. Cann testified that defendant's face was not concealed during the incident. Defendant's fingerprints were found on the victim's vehicle. Further, defendant (unlike 80.7% of the population) could not be excluded from DNA evidence obtained from the interior of the victim's vehicle. The victim died, suffering four fatal gunshot wounds.

ASSIGNMENTS OF ERROR

In assignment of error number one, defendant contends the trial court erred in imposing an unconstitutionally excessive life sentence.[1] Noting that the evidence of his identification was weak and that he presented a strong alibi, defendant asserts that because he was only sixteen years old when the shooting occurred, a downward departure from the statutory minimum is constitutionally mandated.

In the second assignment of error, defendant points out that trial defense counsel failed to file a motion to reconsider the sentence. Thus, he urges that if this court cannot review the excessiveness of sentence due to the lack of a motion to reconsider sentence, the failure constitutes ineffective assistance of counsel.

[1] Defendant did not assign error to or challenge the constitutionality of the sentence imposed on count two.

The record does not contain an oral or written motion to reconsider sentence or objection to the sentence. One purpose of the motion to reconsider sentence is to allow the defendant to raise any errors that may have occurred in sentencing while the trial judge still has the jurisdiction to change or correct the sentence. The defendant may point out such errors or deficiencies, or may present argument or evidence not considered in the original sentencing, thereby preventing the necessity of a remand for resentencing. ***State v. Mims***, 619 So.2d 1059 (La. 1993) (per curiam). Under the clear language of La. C.Cr.P. art. 881.1(E), failure to make or file a motion to reconsider sentence precludes a defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. Accordingly, in this case defendant is procedurally barred from having his challenge to the sentence, raised in assignment of error number one, reviewed by this court on appeal. See ***State v. Felder***, 2000-2887 (La. App. 1st Cir. 9/28/01), 809 So.2d 360, 369, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173.

In the interest of judicial economy, however, we will review defendant's excessiveness argument in order to address the claim of ineffective assistance of counsel. See ***State v. Wilkinson***, 99-0803 (La. App. 1st Cir. 2/18/00), 754 So.2d 301, 303, writ denied, 2000-2336 (La. 4/20/01), 790 So.2d 631.

As a general rule, a claim of ineffective assistance of counsel is more properly raised in an application for post-conviction relief in the trial court than by appeal. This is because post-conviction relief provides the opportunity for a full evidentiary hearing under La. C.Cr.P. art. 930.[2] However, when the record is

[2] In order to receive such a hearing, defendant would have to satisfy the requirements of La. C.Cr.P. art. 924 – 930.9.

sufficient, this court may resolve this issue on direct appeal in the interest of judicial economy. ***State v. Lockhart***, 629 So.2d 1195, 1207 (La. App. 1st Cir. 1993), writ denied, 94-0050 (La. 4/7/94), 635 So.2d 1132.

The claim of ineffective assistance of counsel is to be assessed by the two-part test of ***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See ***State v. Fuller***, 454 So.2d 119, 125 n.9 (La. 1984). The defendant first must show that counsel's performance was deficient and that the deficiency prejudiced him. Counsel's performance is deficient when it can be shown that he made errors so serious that he was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. Secondly, counsel's deficient performance will have prejudiced the defendant if he shows that the errors were so serious as to deprive him of a fair trial. The defendant must make both showings to prove that counsel was so ineffective as to require reversal. ***Strickland***, 466 U.S. at 687, 104 S.Ct. at 2064. To carry his burden, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694, 104 S.Ct. at 2068.

The failure to file a motion to reconsider sentence in itself does not constitute ineffective assistance of counsel. ***Felder***, 809 So.2d at 370. 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. Thus, defendant must show that but for his counsel's failure to file a

motion to reconsider sentence, the sentence would have been changed, either in the district court or on appeal. ***Felder***, 809 So.2d at 370.

The Eighth Amendment of 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 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 (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 La. 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 (La. App. 1st 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. The failure to articulate reasons for the sentence as set forth in Article 894.1 when

imposing a mandatory life sentence is not an error, as articulating reasons or factors would be an exercise in futility since the court has no discretion. ***Felder***, 809 So.2d at 371.

Under La. R.S. 14:30.1(B), a person convicted of second degree murder shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. Courts are charged with applying a statutorily mandated punishment unless it is unconstitutional. To rebut the presumption that the mandatory minimum sentence is constitutional, the defendant must clearly and convincingly show that he is exceptional, which means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case. ***Felder***, 809 So.2d at 370.

Before imposing the sentences, the trial court noted the statutory sentencing exposure and the facts in this case. Although defendant was only sixteen at the time of the offenses, he has failed to show how his youth justified a deviation from the mandatory sentence. See ***State v. Crotwell***, 2000-2551 (La. App. 1st Cir. 11/9/01), 818 So.2d 34, 46; ***State v. Henderson***, 99-1945 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 760-61, writ denied, 2000-2223 (La. 6/15/01), 793 So.2d 1235. Defendant did not present any particular facts regarding his family history or unusual circumstances that would support a deviation from the mandatory sentence provided in La. R.S. 14:30.1(B). Based on the record before us, we find that defendant has failed to show that he is exceptional or that the mandatory life sentence is not meaningfully tailored to his culpability, the gravity of the offense,

and the circumstances of the case. Accordingly, we find that a downward departure from the presumptively constitutional, mandatory life sentence was not required in this case. See ***Henderson***, 762 So.2d at 761. The sentence imposed is not excessive. Thus, even if we were to conclude that defendant's trial counsel performed deficiently in not filing a motion to reconsider sentence, defendant failed to show that he was prejudiced in this regard. Therefore, defendant has failed to successfully raise an ineffective assistance of counsel claim. The assignments of error are without merit.

DECREE

For these reasons, the convictions and sentences imposed against defendant-appellant, Jonathan Jones, are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.