

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 KA 1021

*WDM
B/C
by PDD
TDD*

STATE OF LOUISIANA

VERSUS

MELVIN DRAKE

Judgment Rendered: October 31, 2008

**Appealed from the
Nineteenth Judicial District Court
in and for the Parish of East Baton Rouge, State of Louisiana
Trial Court Number 05-02-0279**

Honorable Anthony Marabella, Judge Presiding

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BEFORE: CARTER, C.J., WHIPPLE, AND DOWNING, JJ.

WHIPPLE, J.

The defendant, Melvin Drake, was charged by grand jury indictment with second degree murder, a violation of LSA-R.S. 14:30.1. He pled not guilty. The defendant was tried by a jury and convicted of the responsive offense of manslaughter, a violation of LSA- R.S. 14:31. The defendant was sentenced to serve twenty years imprisonment at hard labor. The defendant moved for reconsideration of the sentence. The trial court denied the motion. The defendant now appeals, challenging the sentence as excessive. Finding no merit in this assignment of error, we affirm defendant's conviction and sentence.

FACTS

On February 23, 2002, the body of the victim, Louis Johnson, was found inside his home in Baton Rouge. An investigation into the circumstances surrounding the victim's death revealed that the victim had been involved in a violent physical altercation with the defendant. During the altercation, the defendant pulled the victim down a flight of stairs and repeatedly stomped and kicked him in the head. An autopsy listed the cause of death as multiple, blunt trauma to the head.

At the trial, Charmaine Vernell testified that she and the victim, with whom she was romantically involved and cohabitating, had been involved in a physical altercation on February 20, 2002, three days before his death. In response, Vernell left the residence and went to stay with Laverne Jackson and the defendant. On February 23, 2002, Vernell accompanied Jackson and the defendant to the victim's apartment to retrieve some money the victim owed Jackson. According to Vernell, when the victim did not pay the debt in full, the defendant became enraged. The defendant and the victim engaged in a physical struggle that ended with the defendant pulling the victim down a flight of stairs by his leg. After the victim was

on the ground at the bottom of the stairway, the defendant continued to beat him, kicking and stomping him in the head.

The defendant, Jackson, and Vernell fled the area leaving the victim lying on the ground. Before they departed, Vernell removed the victim's wallet from his pocket. Later, when attempts to contact the victim by telephone were unsuccessful, Vernell, Jackson and the defendant returned to the area to find the victim's lifeless body in the same position. They moved his body up to his apartment, where it was later discovered.

ASSIGNMENT OF ERROR **EXCESSIVE SENTENCE**

In his sole assignment of error, the defendant contends the trial court erred in imposing an unconstitutionally excessive sentence. Specifically, he asserts the trial court erroneously concluded that he had an "extensive" criminal history. He argues that the PSI reflects that most of his criminal history occurred between the youthful ages of 17 and 26. The defendant notes that he was suffering with drug addiction during this period. He further notes that for the ten-year period immediately preceding the incident in question, he was drug free and had no subsequent criminal history. Thus, he asserts that the twenty-year sentence provided by the trial court is excessive under the facts and circumstances of this case.

Article I, § 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. A sentence is constitutionally excessive if it is grossly disproportionate to the severity of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. State v. Dorthey, 623 So. 2d 1276, 1280 (La. 1993). A sentence is 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. Hogan, 480 So. 2d 288, 291 (La. 1985). 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. State v. Sepulvado, 367 So. 2d 762, 767 (La. 1979); State v. Lanieu, 98-1260, p. 12 (La. App. 1st Cir. 4/1/99), 734 So. 2d 89, 97, writ denied, 99-1259 (La. 10/8/99), 750 So. 2d 962. However, a trial court is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed by it should not be set aside as excessive in the absence of manifest abuse of discretion. State v. Lobato, 603 So. 2d 739, 751 (La. 1992).

The Louisiana Code of Criminal Procedure sets forth items that must be considered by the trial court before imposing sentence. LSA-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. State v. Herrin, 562 So. 2d 1, 11 (La. App. 1st Cir.), writ denied, 565 So. 2d 942 (La. 1990). 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. Watkins, 532 So. 2d 1182, 1186 (La. App. 1st Cir. 1988). Remand for full compliance with article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. State v. Lanclos, 419 So. 2d 475, 478 (La. 1982).

The penalty provision of LSA-R.S. 14:31(B) provides that punishment for a manslaughter conviction shall be imprisonment at hard labor for not more than forty years. Thus, the defendant's sentence of twenty years at hard labor was within the statutory requirements.

In sentencing the defendant, although the trial judge did not list every aggravating or mitigating circumstance, the court indicated that it considered the sentencing guidelines set forth in LSA-C.Cr.P. art. 894.1. Prior to imposing sentence, the trial court observed:

This court has taken into account the trial that I presided over, the facts that were brought out in that trial, that the victim in this case was beaten severely, was left alone and at some point died alone upstairs in that garage apartment. The court has reviewed the record of Mr. Drake which is extensive. The court has reviewed the presentence report, the recommendation of The Office of Probation and Parole in discussing this matter. They indicate – although the statement today may belie that a little bit, they indicate that this defendant has not taken responsibility for his action. He claims that he and the victim were simply involved in a small scuffle which this court knows, from the testimony in this case, it was not a small scuffle. After reviewing the guidelines as outlined in 894.1, the court finds that there's an undue risk that, during a period of probation or suspension of sentence, this defendant would commit more crimes, that the defendant is need – in need of correctional treatment or a custodial environment which can be provided most effectively by his commitment to an institution and that clearly a lesser sentence would deprecate the seriousness of this defendant's crime. It is, therefore, the sentence of this court that Mr. Drake be sentenced to the Department of Corrections at hard labor for a period of 20 years. He'll be given any credit that he served from the date of his arrest until his sentence.

Considering the above-stated reasons for sentence provided by the trial court and the circumstances of the instant offense, we find no abuse of sentencing discretion in this case. Despite the defendant's claim that the trial court erred in considering his criminal history to be extensive, our review of the record reveals that the sentence imposed in this case is adequately justified. The defendant's argument that the trial court erroneously concluded that his criminal history was “extensive” is unconvincing, as the PSI reflects that, although classified a second felony offender, the defendant has numerous arrests and convictions dating back to 1984. Therefore, upon considering the facts and circumstances of the instant offense, particularly the violent and brutal nature of the continued attack upon the victim even after he lay helpless on the ground, we cannot conclude that the trial judge abused his discretion in imposing the twenty-year sentence, which is well below the maximum sentence that could have been imposed on the manslaughter conviction. In light of the harm to society and to the victim involved, the sentence

does not constitute the needless imposition of pain and suffering, nor does it shock our sense of justice.

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

CONVICTION AND SENTENCE AFFIRMED.