NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 1384

STATE OF LOUISIANA

VERSUS

RICHARD S. HENDERSON

Judgment Rendered: February 10, 2012

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APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ST. TAMMANY
STATE OF LOUISIANA
DOCKET NUMBER 474324, DIVISION "B"

THE HONORABLE AUGUST J. HAND, JUDGE

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

McDONALD, J.

Defendant, Richard S. Henderson, was charged by bill of information with one count of fourth-offense driving while intoxicated (DWI), a violation of La. R.S. 14:98.[1] Defendant pled not guilty and, after a jury trial, was found guilty of the responsive offense of attempted fourth-offense DWI. He was sentenced to ten years at hard labor, all without benefit of parole, probation, or suspension of sentence, and he was fined $2,500.00. Defendant now appeals, alleging three assignments of error. For the following reasons, we affirm the conviction and sentence.

FACTS

On August 7, 2009, at approximately 10:49 p.m., St. Tammany Parish Sheriff's Office Lieutenant Wharton Muller received a dispatch that a silver "Ford Ranger" truck was observed by an anonymous tipster to be striking some traffic cones along eastbound Interstate 12, near milepost 83 in Slidell. The caller advised a 911 operator that this silver truck appeared to be headed towards westbound Interstate 10 via exit 85, and this information was also relayed to Lieutenant Muller. As Lieutenant Muller took exit 85 off of eastbound Interstate 12, he observed a silver, full-size GMC Sierra parked on the shoulder of the road where exit 85 merges into westbound Interstate 10. Believing it to be possible that this vehicle was the one reported for erratic driving, Lieutenant Muller parked his vehicle behind the truck, activated his emergency lights, and radioed in the license plate number and location of the vehicle. Because of the silver truck's proximity to the roadway, Lieutenant Muller exited his vehicle and approached the passenger's side of the truck. Lieutenant Muller identified defendant as the person in the driver's seat of the truck.

[1] Predicate #1 was set forth as defendant's September 2, 2004 conviction, under Twenty-Second Judicial District Court Docket #379458, for DWI. Predicate #2 was set forth as defendant's February 8, 1996 conviction, under Twenty-Second Judicial District Court Docket #247477, for DWI. Predicate #3 was set forth as defendant's June 1, 1998 conviction, under Twenty-Second Judicial District Court Docket #277276, for DWI.

Lieutenant Muller testified that when he approached defendant's vehicle, he looked inside to see defendant looking confused and peering into his driver's side rearview mirror. Lieutenant Muller stated that he tapped on the passenger's side window to get defendant's attention, but defendant merely glanced over at him and then continued to look in his rearview mirrors and out of his driver's side window. According to Lieutenant Muller, defendant appeared disoriented and unaware of his surroundings, and he had to illuminate himself with his flashlight to show defendant that he was a law enforcement officer. Once defendant was able to roll down his passenger's side window, he told Lieutenant Muller that he stopped his vehicle to look for his cologne. Lieutenant Muller observed that defendant's speech was slurred, and he believed that defendant might be under the influence of some type of alcohol or narcotics. As a result, Lieutenant Muller made sure that the roadway was safe, and he asked defendant to exit his vehicle. As defendant exited his vehicle and approached the rear of it, Deputy Trinity Graves of the St. Tammany Parish Sheriff's Office arrived on the scene. Deputy Graves is a certified instructor in standardized field sobriety testing, so Lieutenant Muller informed Deputy Graves about the circumstances of his encounter with defendant, and Deputy Graves assumed the lead role in the DWI investigation. Lieutenant Muller remained on the scene as backup, but he had no further involvement with defendant.

Deputy Graves testified that he made contact with defendant, and that defendant told him that he had pulled over to find his shaving kit. Deputy Graves stated that he observed defendant to be leaning against the rear of his truck to maintain his balance, and he observed that defendant's speech was slurred and that his pupils appeared pinpoint and constricted when compared to Lieutenant Muller's pupils. However, Deputy Graves did not detect any odor of suspected alcoholic beverages on defendant's breath. Deputy Graves read defendant his

Miranda[2] rights and further questioned him, noting that his responses were hesitant and slurred. In response to questioning, defendant stated that he had no medical conditions and that he had not consumed alcoholic beverages in five years, but that he had taken Xanax and other medications which were prescribed to him. As a result of his own observations of defendant's behavior, Deputy Graves decided to perform a standardized field sobriety test on defendant. Based on his responses to the officer's questioning, his performance on the standardized field sobriety test, and his performance on additional field sobriety tests, defendant was ultimately arrested for DWI.

ASSIGNMENT OF ERROR #1

In his first assignment of error, defendant asserts that the trial court erred in failing to grant his motion to suppress. Specifically, defendant contends that Lieutenant Muller had no reasonable suspicion to conduct an investigatory stop of defendant due to a lack of corroboration of the anonymous tip. Defendant further argues that Lieutenant Muller's subjective intent at the time of the encounter would prevent the state from relying on the argument that Lieutenant Muller made contact with defendant to inquire whether there was an emergency requiring his assistance.

When a motion to suppress is denied, the trial court's factual and credibility determinations will not be reversed on appeal in the absence of a clear abuse of the trial court's discretion, i.e., unless such ruling is not supported by the evidence. **State v. Green**, 94-0887 (La. 5/22/95), 655 So.2d 272, 281. However, a trial court's legal findings are subject to a *de novo* standard of review. See **State v. Hunt**, 2009-1589 (La. 12/1/09), 25 So.3d 746, 751.

The Fourth Amendment to the United States Constitution and Article I, § 5, of the Louisiana Constitution protect people against unreasonable searches and seizures. Subject only to a few well-established exceptions, a search or seizure

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

conducted without a warrant issued upon probable cause is constitutionally prohibited. Once a defendant makes an initial showing that a warrantless search or seizure occurred, the burden of proof shifts to the state to affirmatively show it was justified under one of the narrow exceptions to the rule requiring a search warrant. See La. C.Cr.P. art. 703(D); **State v. Lowery**, 2004–0802 (La. App. 1st Cir. 12/17/04), 890 So.2d 711, 717, writ denied, 2005–0447 (La. 5/13/05), 902 So.2d 1018.

The decision to stop an automobile is reasonable if the police have probable cause to believe a traffic violation has occurred. **Whren v. United States**, 517 U.S. 806, 810, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89 (1996). As the Louisiana Supreme Court indicated in **State v. Smith**, 2000–1838 (La. 5/25/01), 785 So.2d 815, 816 (per curiam), "[a]n anonymous tip may provide probable cause for an arrest, **Illinois v. Gates**, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), or reasonable suspicion for an investigatory stop, **Alabama v. White**, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), if it accurately predicts future conduct in sufficient detail to support a reasonable belief that the informant had reliable information regarding the suspect's illegal activity."

Defendant contends that the facts in this case do not support a finding that Lieutenant Muller had reasonable suspicion to conduct a traffic stop of defendant because Lieutenant Muller had not observed defendant engage in any illegal activity. Defendant also argues that the anonymous tip, which described the erratically-driven vehicle as a silver "Ford Ranger," was not sufficiently corroborated by Lieutenant Muller when he chose to investigate defendant's silver GMC Sierra.

As we recognized in **State v. Barras**, 2009-0014 (La. App. 1st Cir. 6/19/09), 20 So.3d 1100, 1105, writ denied, 2009-1660 (La. 6/4/10), 38 So.3d 292, a survey of other jurisdictions reveals that other courts have recognized that an intoxicated

person behind the wheel of a car presents an imminent danger to the public that is difficult to thwart by means other than a **Terry**[3] stop. **People v. Shafer**, 372 Ill. App. 3d 1044, 311 Ill. Dec. 359, 868 N.E.2d 359, 365 (4th Dist. 2007). Other jurisdictions have recognized that the danger presented to the public by an impaired driver is so great that it would be against the public interest to impose verifiable conditions on an anonymous tip prior to allowing an investigatory stop on the basis of such a tip. See **United States v. Wheat**, 278 F.3d 722, 732 n.8 (8th Cir. 2001), cert. denied, 537 U.S. 850, 123 S.Ct. 194, 154 L.Ed.2d 81 (2002); **State v. Tucker**, 19 Kan. App. 2d 920, 931, 878 P.2d 855, 864 (1994); **State v. Stolte**, 991 S.W.2d 336, 343 (Tex. App. 1999).[4]

The totality of the circumstances must be considered in determining whether reasonable suspicion exists. **Lowery**, 890 So.2d at 718. Public safety requires some flexibility for police officers to investigate and prevent crime. **Id.** In reviewing the totality of the circumstances, the officer's past experience, training, and common sense may be considered in determining if his inferences from the facts at hand were reasonable. **Id.**

In **Barras**, we held that the strong interest in public safety supersedes any expectation of privacy and justifies an investigatory stop of a vehicle based solely on an anonymous tip that the driver may be driving under the influence. **Barras**, 20 So.3d at 1105. An intoxicated or erratic driver poses a significant risk of death or injury to himself and to the public and, as such, that factor is substantial in evaluating the reasonableness of the stop itself. **Id.** In **Barras**, the investigating officer received a tip from an anonymous caller which reported the in-time movement of the suspected driver, along with identification of the vehicle being driven by make, model, color, and license plate number. **Id.** Here, Lieutenant

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[3] **Terry v. Ohio**, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).
[4] Senior Judge Karl B. Grube, *Stopping Drunk Drivers Based on Anonymous Tips: Emerging and Helpful Trends in Appellate Decisions*, **Highway to Justice**, Winter 2009, at 3.

Muller received a dispatch containing information from an anonymous caller which reported the in-time movement of the suspected driver, along with identification of the truck being driven by make, model, and color. We note that the make and model of the vehicle reported by the anonymous caller ultimately did not match the characteristics of defendant's vehicle, but Lieutenant Muller testified at the defendant's suppression hearing that it was his experience that motorists often make mistakes when reporting the make and model of suspicious vehicles. While Lieutenant Muller was unable to corroborate the caller's tip as to the make and model of the vehicle being erratically driven, he did observe a pick up truck the same color provided by the caller in an area where the caller indicated the vehicle would be located. Given the significant risks posed by a potentially-impaired driver, combined with Lieutenant Muller's partial corroboration of the anonymous caller's tip, we find that the investigatory stop of defendant's vehicle was reasonable.

In his brief, defendant alternatively argues that Lieutenant Muller actually had the subjective intent of investigating a possible DWI offense when he approached defendant's truck, as opposed to the intent to assist a motorist involved in a potential emergency situation, which was offered by the state in its brief as an additional justification for Lieutenant Muller's actions. At the motion to suppress hearing, Lieutenant Muller testified that his primary reason for pulling to the shoulder and approaching defendant's truck was to determine if defendant's vehicle was the vehicle that had been reported as driving erratically. Lieutenant Muller also stated that his secondary reason for approaching defendant's truck was to offer assistance in what he believed to be a possible emergency situation. A reviewing court is not constrained by a law enforcement officer's characterization of a detention or search, nor is the court's analysis of the facts circumscribed by that characterization. See **State v. Surtain**, 2009-1835 (La. 3/16/10), 31 So.3d

1037, 1045. Because we have already concluded that there were facts sufficient to support reasonable suspicion for an investigative stop in this case, we pretermit any discussion of defendant's alternative argument.

Based on our review of the record, we find no error or abuse of discretion in the trial court's ruling denying defendant's motion to suppress. This assignment of error lacks merit.

ASSIGNMENT OF ERROR #2

In his second assignment of error, defendant argues that his sentence of ten years at hard labor, without benefit of parole, probation, or suspension of sentence, is unconstitutionally excessive. A thorough review of the record indicates that defendant's attorney below did not make a written or oral motion to reconsider sentence. Under La. C.Cr.P. arts. 881.1(E) and 881.2(A)(1), the failure to make or file a motion to reconsider the sentence shall preclude a defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. Accordingly, defendant is procedurally barred from having the instant assignment of error reviewed. **State v. Duncan**, 94-1563 (La. App. 1st Cir. 12/15/95), 667 So.2d 1141, 1143 (en banc per curiam). This assignment of error is without merit.

ASSIGNMENT OF ERROR #3

In his third assignment of error, defendant contends that the failure of his trial counsel to file a motion to reconsider sentence should not preclude this court from considering the constitutionality of the sentence and, in the event that it does, the failure of trial counsel to file a motion to reconsider constitutes ineffective assistance of counsel. Having determined that the constitutionality of defendant's sentence is unreviewable, we will address defendant's claim of ineffective assistance of counsel.

A claim of ineffective assistance of counsel is generally relegated to post-conviction proceedings unless the record permits definitive resolution on appeal.

State v. Miller, 99-0192 (La. 9/6/00), 776 So.2d 396, 411, cert. denied, 531 U.S. 1194, 121 S.Ct. 1196, 149 L.Ed.2d 111 (2001). Whether or not defendant's counsel's assistance was so defective as to require reversal of his sentence is subject to a two-part test established by the United States Supreme Court in **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). First, the defendant must show that counsel's performance was deficient. Second, the defendant must show that this deficiency prejudiced the outcome of the trial. The failure to file a motion to reconsider sentence in itself does not constitute ineffective assistance of counsel. **State v. Felder**, 2000-2887 (La. App. 1st Cir. 9/28/01), 809 So.2d 360, 370, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173. 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. **Id.** Thus, the 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. **Id.**

Article I, Section 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may fall within statutory limits, it may nevertheless 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). 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. **State v. Reed**, 409 So.2d 266, 267 (La. 1982). 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. **State**

v. Lanclos, 419 So.2d 475, 478 (La. 1982). See also **State v. Savario**, 97-2614 (La. App. 1st Cir. 11/6/98), 721 So.2d 1084, 1089, writ denied, 98-3032 (La. 4/1/99), 741 So.2d 1280.

Article 894.1 of the Louisiana Code of Criminal Procedure sets forth items that must be considered by the trial court before imposing sentence. The trial court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the guidelines. **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. **Lanclos**, 419 So.2d at 478.

We note that defendant's present conviction was for an attempted fourth-offense DWI, and he had received the benefit of parole for a previous fourth-offense DWI conviction. Therefore, under La. R.S. 14:27(D)(3), 14:98(E)(1)(a) and (E)(4)(b), defendant could have been punished by imprisonment with or without hard labor for a term of up to fifteen years, without benefit of parole, probation, or suspension of sentence, or fined up to $2,500.00, or both. See **State v. Patterson**, 259 La. 508, 250 So.2d 721 (1971). The trial court sentenced defendant to a term of ten years imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence, and ordered him to pay a $2,500.00 fine.

In sentencing defendant, the trial court noted "the history [and] the record of the defendant" and stated "that in light of that record he poses an undue risk to the community and that he would potentially reoffend, as his history dictates." The trial court also noted at defendant's sentencing hearing that it considered the

contents of a presentence investigation report, which detailed defendant's extensive criminal and substance-abuse history.

Defendant cites as mitigating factors the assertions that he had been sober since 2005, that he had been the sole provider for his daughter, and that his intoxication was not proven beyond a reasonable doubt. Defendant also argues that the imposition of his sentence without benefit of parole, probation, or suspension of sentence is grossly out of proportion to the seriousness of the offense.

Considering the trial court's careful review of the circumstances and the nature of defendant's crime, we find no abuse of the trial court's sentencing discretion in this case. Despite defendant's contention to the contrary, this offense presented a great danger to the public. Further, defendant's criminal history already included a fourth-offense DWI conviction at the time he was convicted of the instant offense of attempted fourth-offense DWI. The sentence imposed by the trial court is not grossly disproportionate to the severity of the offense, and it does not shock the sense of justice. As such, we conclude that defendant did not receive ineffective assistance of counsel when his trial counsel failed to file a motion to reconsider sentence because defendant has not shown that his sentence was excessive and would have been changed, either in the district court or on appeal, had such a motion been filed. This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.