NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 KA 0939

STATE OF LOUISIANA

VERSUS

SAMMIE BOETA, JR.

JEW

Judgment Rendered: February 9, 2007

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 09-04-498

Honorable Anthony J. Marabella, Jr., Judge

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Doug Moreau, District Attorney
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State – Appellee

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Attorney for
Defendant – Appellant
Sammie Boeta, Jr.

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

WELCH, J.

Sammie Boeta, Jr., the defendant, was charged by bill of information with one count of driving while intoxicated, third offense, a violation of La. R.S. 14:98(D). The defendant pled not guilty and was tried before a jury. The jury determined the defendant was guilty as charged. The trial court sentenced the defendant to five years at hard labor and suspended all but thirty days, then placed him on five years probation subject to terms and conditions. Shortly thereafter, the defendant requested that he receive prison time and not probation. In response to the defendant's request, the trial court amended the defendant's sentence to four years at hard labor, with credit for time served.[1]

The defendant appeals, arguing the trial court imposed an excessive sentence.

FACTS

On July 9, 2004 at approximately 10:20 p.m., Trooper Jessie Shelton of the Louisiana State Police was patrolling southbound on Louisiana Highway 67 just south of Baker. Trooper Shelton observed two vehicles pull out from a parking lot directly in front of him and another vehicle. The first vehicle pulled onto Louisiana Highway 67 with no problem; however, the second vehicle, a 1988 Oldsmobile, pulled out in such close proximity of Trooper Shelton and the other driver that both had to slam on their brakes to avoid colliding with the vehicle. That vehicle crossed the median and began traveling north on Louisiana Highway 67.

Trooper Shelton made a U-turn and began following the vehicle. Trooper Shelton observed the vehicle move from the inside to the outside lane of travel and

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[1] As mandated by La. C.Cr.P. art. 920(2), a review has been made of the record on appeal and a sentencing error has been found. Although the defendant was sentenced to four years at hard labor, the trial court failed to impose the mandatory fine of two thousand dollars for this offense. La. R.S. 14:98(D)(1)(a). Following our recent decision of **State v. Price**, 2005-2514 (La. App. 1st Cir. 12/28/2006), __ So.2d __ (en banc), we decline to correct such error.

then cross the dashed white line on the roadway. Trooper Shelton activated his lights and the vehicle immediately pulled into a convenience store parking lot at the intersection of Louisiana Highway 67 and Thomas Road.

After the vehicle came to a stop, the defendant exited. Trooper Shelton made contact with the defendant and noted that the defendant's movements were slow; he swayed as he walked; and as the defendant approached, the trooper could detect a smell of alcoholic beverages coming from the defendant's breath. Trooper Shelton also noted the defendant's eyes were red, glassy, and bloodshot, and his speech was slurred.

After speaking with the defendant, Trooper Shelton used his unit's computer to run a check on the defendant. The check revealed that the defendant had no insurance on his vehicle. Trooper Shelton then advised the defendant of his **Miranda** rights and proceeded to ask the defendant about his condition. The defendant stated that he had consumed two beers at J.D.'s Lounge.

Trooper Shelton then began to administer field sobriety tests to the defendant. Trooper Shelton noted that the defendant resisted portions of the horizontal nystagmus test because he turned his head so that Trooper Shelton could not observe his eyes. Trooper Shelton instructed the defendant to stop "playing games," explaining that this was an evaluation to determine whether the defendant was too impaired to drive. The defendant cooperated with the other field sobriety tests. The defendant failed the walk-and-turn portion and the one-leg stand portion of the evaluation.

Trooper Shelton placed the defendant under arrest and transported him to the Baker Police Department. While at the Baker Police Department, the defendant waived his rights and participated in a Breathalyzer test. The result of the defendant's Breathalyzer test indicated he had .133 grams percent of alcohol.

At the trial of this matter, Brenda Wood, a criminal records fingerprint analyst for the Louisiana State Police, was accepted by the trial court as an expert in known fingerprint identification. According to Wood, the fingerprints on State exhibits 7-B and 10 matched the fingerprints she had taken from the defendant on the morning of trial.[2]

ASSIGNMENTS OF ERROR

The defendant contends in his first assignment of error that the sentence imposed was excessive. In his second assignment of error he argues that defense counsel's failure to file a motion to reconsider sentence constituted ineffective assistance of counsel.

A review of the record indicates that defense counsel did not make a motion to reconsider sentence nor did he object to the 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 sentence shall preclude the defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. The defendant, therefore, is procedurally barred from having this assignment of error reviewed. However, we will examine the sentence for excessiveness because it is necessary to do so as part of the analysis of the ineffective counsel issue in the defendant's second assignment of error. **State v. Scott**, 2005-0325 (La. App. 1st Cir. 11/4/05), 927 So.2d 441, 444.

Although a claim of ineffective assistance of counsel is normally raised in an application for post-conviction relief, this court may address the merits of the claim when the record on appeal is sufficient. **Scott**, 927 So.2d at 445. In this instance, the record is sufficient and we will address the defendant's claim.

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[2] These exhibits were part of the State's case that showed the defendant had two prior convictions for DWI. The defendant's first conviction occurred on November 19, 1998, under docket number 44125 in Baker City Court; and the second conviction occurred on February 26, 2004, under docket number 10-03-617 in East Baton Rouge Parish.

In **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the United States Supreme Court enunciated the test for evaluating the competence of trial counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

In evaluating the performance of counsel, the inquiry is whether counsel's assistance was reasonable under the circumstances. In making the determination of whether the specific error resulted in an improper sentence, the inquiry must be directed to whether 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. Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. **Scott**, 927 So.2d at 445.

Article I, section 20 of the Louisiana Constitution prohibits 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 a sentence. While the entire checklist of Article 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. 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 to society, it shocks one's sense of justice. 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. **Scott**, 927 So.2d at 445.

The goal of La. C.Cr.P. art. 894.1 is the articulation of the factual basis for a sentence, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary, even where there has not been full compliance with La. C.Cr.P. art. 894.1. The trial judge should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than confinement. On appellate review of a sentence, the relevant question is whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate. **Scott**, 927 So.2d at 445-46.

The defendant argues that he is not the worst criminal to violate the DWI statute and his offense was factually not one of the worst incidents of DWI, third offense. However, the defendant's impaired driving nearly caused a collision with a state trooper and a second motorist.

The penalty for DWI third offense is imprisonment with or without hard labor for not less than one year nor more than five years and a two thousand dollar fine. La. R.S. 14:98(D)(1)(a). The defendant was originally sentenced to five years at hard labor, with all but thirty days suspended with conditions of probation. At his initial sentencing, the defendant explained to the trial court that he would prefer a term of imprisonment in lieu of probation because his job required him to travel and he would be unable to complete the conditions of probation and maintain his employment. The trial court accommodated the defendant and amended his sentence to four years at hard labor.

In addition to nearly causing an accident with two vehicles, the facts of this offense indicate that the defendant was initially uncooperative with Trooper Shelton during the field sobriety tests, and the defendant's blood-alcohol level an hour after he was stopped measured a level of .133 grams percent. Under these circumstances, we cannot say the trial court abused its discretion in sentencing the defendant to four years at hard labor. Accordingly, the sentence is not excessive and there was no ineffective assistance of counsel.

These assignments of error lack merit.

CONCLUSION

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

CONVICTION AND SENTENCE AFFIRMED.