

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 0644

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STATE OF LOUISIANA

VERSUS

CLARENCE A. POSEY

Judgment Rendered: **DEC 21 2011**

On Appeal from the 19th Judicial District Court
In and For the Parish of East Baton Rouge
Trial Court No. 03-07-0742

The Honorable Trudy M. White, Judge Presiding

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Clarence A. Posey

Clarence A. Posey
Kinder, Louisiana

Defendant/Appellant
Pro Se

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

HUGHES, J.

The defendant, Clarence A. Posey, was charged by bill of information with one count of theft (value greater than \$500), a violation of LSA-R.S. 14:67(B)(1);¹ and one count of filing false public records, a violation of LSA-R.S. 14:133(A)(3).² He pled not guilty on both counts. He waived his right to a jury trial and, following a bench trial, was found guilty as charged on both counts. On Count 1, he was sentenced to ten years at hard labor. On Count 2, he was sentenced to five years at hard labor, to run concurrently with the sentence imposed on Count 1. He now appeals, designating the following counseled and pro se assignments of error:

Counseled:

1. The trial court erred in imposing a sentence herein which is unconstitutionally excessive.
2. The failure of trial counsel to file a motion to reconsider the sentence should not preclude this court [from] considering the constitutionality of the sentence; and, in the event that it does, then the failure of trial counsel constitutes ineffective assistance of counsel.

Pro Se:

1. The trial [c]ourt erred in denial of Defendant's motion to quash [the] Bill of Information. Defendant paid the victim back a portion of the money and worked out [a] civil agreement months prior to being charged by the [S]tate in an effort to return the victim¹'s lost money.
2. The trial [c]ourt erred in denial of arrest of judgment.

For the following reasons, we affirm the convictions and sentences.

¹ All references to LSA-R.S. 14:67(B)(1), herein, are to the statute as it existed prior to its amendment by 2010 La. Acts, No. 585, § 1, which became effective August 15, 2011.

² All references to LSA-R.S. 14:133(A)(3), herein, are to the statute as it existed prior to its amendment by 2010 La. Acts, No. 811, § 1, which became effective August 15, 2011.

FACTS

During the spring of 2006, the victim, Gabriel McAdams, met the defendant through an acquaintance, Bob Miller. Miller told the victim about a house that was for sale at 1347 Chariot Drive in Baton Rouge. Miller then contacted the defendant, and the defendant contacted the victim. The defendant claimed he had connections in the mortgage and banking industry that gave him early access to homes before they went to the sheriff's sale, but "there was a short time frame" if the victim wanted to purchase the house. The defendant told the victim that the house would cost \$170,000, and that the victim would have to pay half of that amount to the defendant "to get the process going" and pay the balance at the end of the deal. In reliance on the defendant's representations, on April 7, 2006, the victim wrote the defendant a check for \$85,000 toward the purchase of the house. On April 20, 2006 the victim wrote the defendant another check for \$85,000 toward the purchase of the house.

Thereafter, the victim had the electricity turned on at the home, paid for landscaping work at the home, and had the home painted. The victim became suspicious when the defendant failed to provide him with keys to the house and consistently delayed providing him with any papers identifying the victim as the owner of the home. The victim identified State Exhibit Number 10 as an April 20, 2006 "Cash Sale" between the defendant and himself for the property. The sale was filed in the East Baton Rouge Parish Clerk of Court's Office on May 1, 2006. He also identified State Exhibit Number 11 as an April 20, 2006 "Quitclaim Deed" between "Cap II Strategic Research & Consultant Services – Clarence Posey, Agent" and himself for the property. The quitclaim deed was filed in the East Baton Rouge Parish Clerk of Court's Office on May 1, 2006.

After the defendant was arrested in connection with the incident, he telephoned the victim and claimed he could get the victim's money back. The victim agreed to "drop charges," based on a verbal agreement that the defendant would try to repay the victim's money. The only money the victim ever received from the defendant, however, was the approximately \$11,000 or \$12,000 in the defendant's account when he was arrested.

Deputy Kevin Chenier, of the East Baton Rouge Parish Sheriff's Office, investigated the victim's complaint against the defendant and testified to the following facts. The property at issue was owned by Ann and John Sardisco. They had defaulted on a loan, secured by a mortgage on the property, and it was being seized by Deutsche Bank. The foreclosure proceedings, however, were postponed due to Hurricane Katrina. Deputy Chenier found no evidence that the defendant ever had any real interest in the property, participated in a sheriff's sale involving the property, or had any influence concerning the timing of the sheriff's sale.

The defendant told Deputy Chenier that he sold the property at issue to the victim for \$170,000. He also conceded that he filed State Exhibits 10 and 11 with the East Baton Rouge Parish Clerk of Court on May 1, 2006. He claimed that he purchased the property from "John Samasuchio," a representative of Deutsche Bank, for \$125,000 in February of 2006. The defendant, however, could provide no documentation for his claim. Further, Deutsche Bank indicated the property was still in foreclosure and that they had no employee named "John Samasuchio." Additionally, a search of the police database indicated "John Samasuchio" was a "non-existing person."

**EXCESSIVE SENTENCE;
INEFFECTIVE ASSISTANCE OF COUNSEL**

In his first counseled assignment of error, the defendant argues that the trial court erred in imposing an unconstitutionally excessive sentence on Count 1. In his second counseled assignment of error, the defendant argues that his trial counsel rendered ineffective assistance of counsel by failing to move for reconsideration of the sentence. The defendant does not challenge the sentence imposed on Count 2.

We will address the defendant's claim of excessive sentence, even in the absence of a timely motion to reconsider sentence or a contemporaneous objection, because it would be necessary to do so as part of the analysis of the ineffective assistance of counsel claim. See State v. Allen, 2005-1622 (La. App. 1 Cir. 3/29/06), 934 So.2d 146, 155; **State v. Bickham**, 98-1839 (La. App. 1 Cir. 6/25/99), 739 So.2d 887, 891-92.

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. 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. Hurst**, 99-2868 (La. App. 1 Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962.

Article I, Section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. 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. 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. 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. **Hurst**, 797 So.2d at 83.

A claim of ineffectiveness of counsel is analyzed under the two pronged test developed by the United States Supreme Court in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish that his trial attorney was ineffective, the defendant must first show that the attorney's performance was deficient, which requires a showing that counsel made errors so serious that he was not functioning as counsel guaranteed by the Sixth Amendment. Secondly, the defendant must prove that the deficient performance prejudiced the defense. This element requires a showing that the errors were so serious that the defendant was deprived of a fair trial; the defendant must prove actual prejudice before relief will be granted. It is not sufficient for the defendant to show that the error had some conceivable effect on the outcome of the proceeding. Rather, he must show that but for the counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different. Further, it is unnecessary to address the issues of both counsel's performance and prejudice to the defendant if the defendant makes an inadequate showing on one of the components. **State v. Serigny**, 610 So.2d 857, 859-60 (La. App. 1 Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993).

Whoever commits the crime of theft when the misappropriation or taking amounts to a value of five hundred dollars or more shall be imprisoned, with or without hard labor, for not more than ten years, or may be fined not more than three thousand dollars, or both. LSA-R.S. 14:67(B)(1). On Count 1, the defendant was sentenced to ten years at hard labor.

In imposing sentence, the trial court noted that it had ordered and reviewed a pre-sentence investigation report in the case. The trial court found: the defendant had committed a major economic offense; the victim had suffered a significant economic loss; the defendant's criminal history indicated he was a third-felony offender; his prior offenses were of a similar nature to that charged in Count 1; he had been given the opportunity of rehabilitation through parole, but had continued to commit crimes; and that he had expressed remorse.

A thorough review of the record reveals that the trial court adequately considered the criteria of Article 894.1 and did not manifestly abuse its discretion in imposing sentence on Count 1. See LSA-C.Cr.P. art. 894.1 (A)(1), (B)(9), (B)(12), (B)(14), (B)(21), and (B)(33). Additionally, the sentence imposed on Count 1 was not grossly disproportionate to the severity of the offense and, thus, was not unconstitutionally excessive. Maximum sentences may be imposed for the most serious offenses and the worst offenders, or when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. **State v. Miller**, 96-2040 (La. App. 1 Cir. 11/7/97), 703 So.2d 698, 701, writ denied, 98-0039 (La. 5/15/98), 719 So.2d 459. The defendant poses an unusual risk to the public safety due to his past conduct of repeated criminality. He has a demonstrated propensity to commit offenses similar to that charged in Count 1.

In regard to the defendant's ineffective assistance of counsel claim, we note, even assuming arguendo that his defense counsel performed deficiently in failing to timely move for reconsideration of the sentence, the defendant suffered no prejudice from the deficient performance, because this court considered the defendant's excessive sentence argument in connection with the ineffective assistance of counsel claim. See State v. Allen, 934 So.2d at 157; State v. Bickham, 739 So.2d at 892.

These assignments of error are without merit.

MOTION TO QUASH

In his first pro se assignment of error, the defendant argues that the trial court erred in denying his motion to quash, because he paid the victim back a portion of the money at issue and had a civil agreement to return the balance. The defendant claims that there was no allegation that he intended to, or actually, permanently deprived the victim of anything.

A motion to quash is essentially a mechanism used to raise pretrial pleas of defense, i.e., those matters that do not go to the merits of the charge. See LSA-C.Cr.P. arts. 531-534; State v. Beauchamp, 510 So.2d 22, 25 (La. App. 1 Cir.), writ denied, 512 So.2d 1176 (La. 1987). It is treated much like an exception of no cause of action in a civil suit. **Id.**

In considering a motion to quash, a court must accept as true the facts contained in the bill of information and in the bills of particulars and determine, as a matter of law and from the face of the pleadings, whether or not a crime has been charged. While evidence may be adduced, such may not include a defense on the merits. The question of factual guilt or innocence of the offense charged is not raised by a motion to quash. **Id.**

The defendant filed two motions to quash. The first motion complained that the State had failed to respond to his request for a bill of

particulars. The defendant had requested details concerning: the time of day when the offense was allegedly committed; where in the parish the offense was allegedly committed; the statutes under which the State was proceeding; and the particular portions, if any, of those statutes. The trial court ordered the State to respond, and the State complied. The second motion to quash alleged violation of the defendant's right to a speedy trial. The court set the motion for hearing on May 26, 2009, and indicated that if the motion was denied, the parties should be prepared for trial. On May 26, 2009 the defendant was tried without objection to the lack of ruling, if any, on the second motion to quash.

Initially, we note that the record indicates the defendant failed to present the instant argument (i.e., on the issue of restitution) to the trial court in his motions to quash. Accordingly, he failed to preserve the instant claim for review. See LSA-C.Cr.P. art. 841(A) ("An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence."). Moreover, the instant claim was a defense on the merits, and thus, could not properly be raised by a motion to quash.

This assignment of error is without merit.

MOTION IN ARREST OF JUDGMENT

In his second pro se assignment of error, the defendant argues that the trial court erred in denying his pro se motion in arrest of judgment, because neither the bill of information nor the bill of particulars state an essential element of the crime, i.e., an intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking.

The bill of information charged that the defendant committed Count 1, as follows: "[O]n or about April 6, 2006, the defendant committed theft of currency having a value of five hundred (\$500.00) dollars or more" We

conclude that the bill of information sufficiently charged Count 1. See LSA-Cr.P. art. 465(A)(44).³

This assignment of error is without merit.

CONVICTIONS AND SENTENCES AFFIRMED.

³ Louisiana Code of Criminal Procedure Article 465 provides, in pertinent part:

A. The following forms of charging offenses may be used, but any other forms authorized by this title may also be used:

* * *

44. Theft--A.B. committed theft of _____ (state property stolen) of a value of _____ dollars.