NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0369

STATE OF LOUISIANA

VERSUS

CORNELIA PERNELL

Judgment Rendered: SEP 10 2010

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On Appeal from the Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Docket No. 800794

Honorable Ernest G. Drake, Jr., Judge Presiding

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Cornelia Pernell

* * * * * *

BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McCLENDON, J.

The defendant, Cornelia Pernell, was charged by bill of information with one count of possession with intent to distribute hydrocodone, a violation of LSA-R.S. 40:967(A)(1). He pled not guilty. The defendant was tried by a jury and convicted as charged. He was sentenced to imprisonment at hard labor for ten years. The defendant now appeals, urging eight assignments of error as follows:

1. The trial court erred by denying the motion for mistrial after the prosecutor referred to Mr. Pernell's failure to protest his innocence at the scene during her opening argument.

2. The trial court erred by denying the motion for mistrial after the prosecutor expressed her opinion as to Mr. Pernell's guilt in her closing argument.

3. The trial court erred by denying the motion for mistrial after the prosecutor referred to Mr. Pernell's failure to take the stand in her closing argument.

4. The evidence is insufficient to support the conviction.

5. The trial court erred by denying the motion[s] in arrest of judgment, for a new trial[,] and for post verdict judgment of acquittal.

6. The trial court abused its discretion in sentencing Mr. Pernell to the maximum sentence as the sentence is constitutionally excessive.

7. The failure of trial counsel to file a motion to reconsider the sentence after he objected to the sentence should not preclude this court considering the constitutionality of the sentence; and, in the event that it does, then the failure of trial counsel constitutes ineffective assistance of counsel.

8. The trial court erred in sentencing defendant immediately after ruling on his post trial motions without an express waiver of sentencing delays.

FACTS

On December 3, 2007, the defendant was arrested after a traffic stop on Interstate 12 in Tangipahoa Parish. Louisiana State Police Trooper Jason Lamarca stopped the defendant after he observed the red Ford Explorer the defendant was driving cross the fog line and leave the roadway. Trooper Lamarca approached the defendant and generally conversed with him regarding his identification, the reason for the traffic stop, and his intended destination. During the conversation, Trooper Lamarca noticed that the defendant appeared

to be extremely nervous and attempted to avoid eye contact. Trooper Lamarca also noticed that the spare tire beneath the Explorer hung unusually low. Trooper Lamarca conducted a pat down search of the defendant and John Teemer, the passenger in the vehicle, for weapons. He also asked the defendant for permission to search the vehicle. The defendant agreed to allow the search and executed a written consent-to-search form.

Shortly thereafter, Deputy Matt Schliegelmeyer, of the Tangipahoa Parish Sheriff's Office, arrived on the scene to serve as back-up. Trooper Larmarca then searched the interior of the vehicle. During the search, Trooper Lamarca noticed that the carpet in the cargo area of the vehicle appeared to have been removed and "stuffed back." Trooper Lamarca removed the carpeting and observed an orange duffle bag under the vehicle on top of the spare tire. Through a hole in the duffle bag, Trooper Lamarca observed a large quantity of pills. The duffle bag was removed from beneath the vehicle and two clear plastic bags of pills (approximately 13,377 hydrocodone tablets) were recovered from it. Trooper Lamarca took John Teemer into custody. However, the defendant was not immediately apprehended. When Deputy Schliegelmeyer attempted to take the defendant into custody, the defendant struck him. Trooper Lamarca grabbed the defendant and a brief struggle ensued. The three men rolled onto the ground and fell into the ditch. The defendant got up and fled on foot, running eastward down the side of the interstate. Trooper Lamarca pursued the defendant but later lost sight of him in a nearby wooded area. A National Crime Information Center (NCIC) warrant was issued for the defendant's arrest. The defendant remained at large for several days. He was later apprehended in Bibb County, Alabama.

ASSIGNMENTS OF ERROR 1, 2 & 3
DENIAL OF MISTRIAL MOTIONS

In these assignments of error, the defendant argues that the trial court erred in denying his motion for a mistrial on three separate occasions. All three motions were made based upon allegedly improper comments by the prosecutor.

The first mistrial motion was made during the state's opening statement when the prosecutor mentioned that the defendant fled the scene after the illegal drugs were discovered, rather than remaining and professing his innocence. The second motion for a mistrial occurred when the prosecutor, during closing argument, expressed her personal opinion regarding the defendant's guilt. The third, and final, mistrial motion at issue was made during closing argument after the prosecutor mentioned the defendant's exercise of his right to not testify at the trial.

It is well settled that LSA-C.Cr.P. art. 770, with its mandatory mistrial provisions, does not apply to references to a defendant's post-arrest silence by the prosecutor or by witnesses, but only applies to references to defendant's failure to testify at trial. **State v. Smith**, 336 So.2d 867, 868-69 (La. 1976). Louisiana Code of Criminal Procedure article 771 is the applicable provision concerning the proper remedy where references are made to a defendant's post-arrest silence. **State v. Kersey,** 406 So.2d 555, 560 n.2 (La. 1981).

The Louisiana Supreme Court has indicated that under LSA-C.Cr.P. art. 771, when the prosecutor or a witness makes a reference to a defendant's post-arrest silence, the trial court is required, upon the request of the defendant or the state, promptly to admonish the jury. In such cases where the court is satisfied that an admonition is not sufficient to assure the defendant a fair trial, upon motion of the defendant, the court may grant a mistrial. **State v. Kersey**, 406 So.2d at 560.

Mistrial is a drastic remedy which is warranted only if substantial prejudice results that would deprive the defendant of a fair trial, and the ruling of the trial court will not be disturbed absent an abuse of discretion. **State v. Welch**, 448 So.2d 705, 710 (La. App. 1 Cir.), writ denied, 450 So.2d 952 (La.1984); **State v. Clay**, 441 So.2d 1227, 1231 (La. App. 1st Cir. 1983), writ denied, 446 So.2d 1213 (La. 1984). The trial judge is given wide discretion to determine whether a fair trial is impossible, or if an admonition is adequate to assure a fair trial. **State v. Belgard**, 410 So.2d 720, 724 (La. 1982).

Doyle violation

During the opening statement and recitation of the facts the state intended to prove at the trial in this matter, the prosecutor told the jury, "You will learn that Mr. Pernell never stopped to say these drugs weren't mine." The defendant moved for a mistrial based upon this comment and the trial court denied the motion. On appeal, the defendant argues the trial court erred in failing to grant this mistrial motion. He asserts the aforementioned comment constituted an impermissible reference to his decision to exercise his right to remain silent, in violation of **Doyle v. Ohio**, 426 U.S. 610, 619, 96 S.Ct. 2240, 2245, 49 L.Ed.2d 91 (1976). He argues that the prosecutor's comment prevented him from receiving a fair trial and warranted a mistrial. In response, the state asserts that the prosecutor's comment regarding the defendant's actions of fleeing the scene and failing to provide an explanation and/or claim of innocence regarding the illegal narcotics found during the traffic stop was a permissible reference to the defendant's pre-arrest and/or pre-**Miranda** silence.

Doyle v. Ohio precludes the state from impeaching a defendant's testimony at trial with evidence that he remained silent immediately after his arrest and after receiving the warnings required by **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The decision in **Doyle** rests on the premise that **Miranda** warnings render the subsequent silence of a defendant "insolubly ambiguous," and thereby make later use of that silence to impeach his or her exculpatory testimony at trial fundamentally unfair. **Doyle v. Ohio**, 426 U.S. at 617-18, 96 S.Ct. at 2244-45. In the case of pre-arrest silence, in which "[t]he failure to speak occur[s] before the petitioner [is] taken into custody and given **Miranda** warnings," and in which "no governmental action induce[s] petitioner to remain silent," "the fundamental unfairness present in **Doyle** is not present[.]" **Jenkins v. Anderson**, 447 U.S. 231, 240, 100 S.Ct. 2124, 2130, 65 L.Ed.2d 86 (1980). Neither **Doyle** specifically, nor the Due Process Clause generally, bars the inquiry. **Jenkins**, 447 U.S. at 239-41, 100 S.Ct. at 2129-30.

In the instant case, the prosecutor's opening remark regarding the defendant's failure to state that the illegal narcotics found inside the vehicle did not belong to him before fleeing the scene was a permissible reference to his silence before being arrested and/or advised of his **Miranda** warnings. Since the rationale used by the Supreme Court in **Doyle** was that the **Miranda** warnings carry with them an implicit assurance by the government that it will not use the defendant's exercise of the right to remain silent against him, the proscription clearly does not restrict any references to the defendant's silence prior to recitation of the **Miranda** warnings. See **State v. Richards**, 99-0067 (La. 9/17/99), 750 So.2d 940 (per curiam). Therefore, the aforementioned comment by the prosecutor was not improper. The comment at issue did not violate **Doyle** or any constitutional rights of the defendant. The trial court did not err in failing to grant the defendant's request for a mistrial on this ground.

Personal opinion by prosecutor

Next, the defendant challenges the trial court's ruling on his motion for a mistrial in response to the prosecutor's expression of her personal opinion regarding the defendant's guilt. The record reflects that, during her closing argument, the prosecutor stated to the jury:

> I'm confident that you know the facts in this case. I'm confident that you can look at the facts and determine who is telling the truth. Cornelia Pernell knows one thing right now. He knows one thing. He knows that he's guilty. I know he's guilty. Law enforcement knew he was guilty. The only question is whether or not you think he's guilty.

In response to this comment, counsel for the defendant urged an objection. Counsel argued that the prosecutor's personal opinion regarding the defendant's guilt was improper and moved for a mistrial. (R. p. 461). The trial court denied the motion.

While it is generally considered error for a prosecutor to state an individual belief concerning the accused's guilt when that remark is made in such a way that the jury may conclude that the prosecutor's belief is based on evidence outside the record, the expressing of an opinion based on evidence

within the record is permissible. See **State v. Motton**, 395 So.2d 1337, 1346 (La. 1981), cert. denied, 454 U.S. 850, 102 S.Ct. 289, 70 L.Ed.2d 139 (1981). Upon review of the record in this case, we find that this challenged comment was based only on matters in the record, and thus, was permissible. As the state correctly notes in its brief, the prosecutor's comment regarding her opinion of the defendant's guilt was made during closing argument immediately following a summation of the evidence presented at the trial. We find no error in the trial court's refusal to grant a mistrial on this ground. This assignment of error lacks merit.

Failure to testify at trial

The defendant also argues that a mistrial should have been granted when the prosecutor, during closing argument, mentioned the fact that he did not testify at the trial. The prosecutor stated to the jury, "Let me make one thing absolutely clear. I know, I've tried tons and tons of cases, I know you can't infer anything from him not taking the stand. Everybody said when we picked this jury that he has a right not to take the stand. My focus is on the fact that he knew when he was at the crime scene—" Defense counsel immediately objected and moved for a mistrial on the grounds that this remark by the prosecutor constituted an impermissible reference to defendant's failure to testify. At a bench conference, the prosecutor explained that her comment was designed only to reiterate to the jury that no inferences are to be made from the fact that the defendant chose not to testify. In denying the mistrial motion, the court noted, "It's throughout the examination on voir dire. I mean, it's in there, three, four, five, ten times already." Defense counsel did not request an admonition.

On appeal, the defendant argues the trial court erred in denying the motion for a mistrial. He argues the remark was a direct reference to his failure to testify in violation of LSA-C.Cr.P. art. 770(3). Based on our review, we conclude the remark objected to was a mere enumeration of the accused's

constitutional rights previously discussed in detail during voir dire.[1] It is clear the prosecutor's intent was not to focus attention on the defendant's failure to testify or to have the jury draw a negative inference from same. In fact, the prosecutor specified that no inferences were to be made based upon the defendant's failure to testify.

Further, even if we were to consider the mere mention of the fact that the defendant did not testify to be improper, the remark constitutes harmless error. Although LSA-C.Cr.P. art. 770 is couched in mandatory terms, it is a rule for trial procedure and is subject to harmless-error review. See **State v. Johnson**, 94-1379, pp. 16-17 (La. 11/27/95), 664 So.2d 94, 101-02. Trial error is considered to be harmless where the verdict rendered is "surely unattributable to the error." **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 1124 L.Ed.2d 182 (1993). Additionally, in order for an improper argument by the state to constitute reversible error, it must be shown that the remark influenced the jury or contributed to the verdict. See **State v. Wessinger**, 98-1234, pp. 30-31 (La. 5/28/99), 736 So.2d 162, 187, cert. denied, 528 U.S. 1050, 120 S.Ct. 589, 145 L.Ed.2d 489 (1999).

In the instant case, there is sufficient evidence in the record to support the jury's verdict. Trooper Lamarca testified regarding the defendant's demeanor during the traffic stop. The defendant behaved nervously and was not truthful when questioned about his intended destination. The defendant also struggled with the officers and fled the scene (and the state) once the illegal narcotics were discovered. Considering the overall weight of the state's evidence against defendant (which will be discussed in further detail in the sufficiency assignment of error), we find that the guilty verdict in this case was surely unattributable to any reference to the defendant's exercise of his right to remain silent. See **Sullivan**, 508 U.S. at 279, 113 S.Ct. 2078 at 2081. Accordingly, we

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[1] This case is distinguishable from **State v. Fullilove**, 389 So.2d 1282, 1284 (La. 1980), wherein the prosecutor, in closing argument, "did more than objectively state for the jury the rights that any criminal defendant has" and actually sought to have the jury draw a negative inference.

find no error in the trial court's refusal to grant a mistrial based on this particular remark.

As previously noted, mistrial is a drastic remedy that should be granted only when the defendant suffers such substantial prejudice that he has been deprived of any reasonable expectation of a fair trial. While we believe the prosecutor's comment comes perilously close to warranting a mistrial, we find no error or abuse of discretion in the trial court's denial of the defendant's motions for a mistrial on the grounds raised in these assignments of error.

ASSIGNMENTS OF ERROR 4 & 5
SUFFICIENCY OF EVIDENCE

In these assignments of error, the defendant contends the evidence presented at the trial was insufficient to support his conviction of possession with intent to distribute hydrocodone. Specifically, he asserts the state failed to prove that he knowingly possessed the narcotics found under the vehicle.[2] He contends the trial court should have granted his motions in arrest of judgment, for a new trial, and for post-verdict judgment of acquittal because there was no physical evidence or testimony to indicate who hid the drugs in the vehicle and there was no direct evidence indicating that the defendant knew the drugs were hidden in the vehicle. The defendant further argues that the hypothesis of innocence that the passenger was the actual possessor of the drugs cannot be excluded on the evidence presented.

The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the state proved the essential elements of the crime beyond a reasonable doubt. See LSA-C.Cr.P. art. 821(B). The **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. In conducting this review, we also must be expressly mindful

[2] The defendant does not contest the fact that the large quantity of pills found was sufficient to prove the requisite element of intent to distribute.

of Louisiana's circumstantial evidence test, i.e., "assuming every fact to be proved that the evidence tends to prove," every reasonable hypothesis of innocence is excluded. LSA-R.S. 15:438. See **State v. Northern**, 597 So.2d 48, 50 (La. App. 1 Cir. 1992). The reviewing court is required to evaluate the circumstantial evidence in the light most favorable to the prosecution and determine if any alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilt beyond a reasonable doubt. **State v. Fisher**, 628 So.2d 1136, 1141 (La. App. 1 Cir. 1993), writs denied, 94-0226, 94-0321 (La. 5/20/94), 637 So.2d 474, 476.

The crime of possession with intent to distribute hydrocodone is defined as follows: "it shall be unlawful for any person knowingly or intentionally ... [t]o ... possess with intent to ... distribute ... a controlled dangerous substance ... classified in Schedule II[.]" LSA-R.S. 40:967(A)(1). Thus, in order to support a conviction, the state must prove beyond a reasonable doubt that the defendant possessed the drugs with the intent to distribute them. The prosecution is not required to prove actual possession, but needs only to show the defendant exercised dominion or control over the illegal substance. Mere presence of a defendant in the area of the contraband or other evidence seized alone does not prove that he exercised dominion and control over the evidence and therefore had it in his constructive possession. See **State v. Walker**, 369 So.2d 1345, 1346 (La. 1979).

Guilty knowledge is an essential element of the crime of drug possession. **State v. Harris**, 94-0696, p. 3 (La. App. 1 Cir. 6/23/95), 657 So.2d 1072, 1074, writ denied, 95-2046 (La. 11/13/95), 662 So.2d 477. Evidence of flight or furtive behavior by the defendant may support a finding of guilty knowledge sufficient to prove defendant's knowing possession of cocaine. **State v. Sylvia**, 01-1406, p. 4 (La. 4/9/03), 845 So.2d 358, 361.

On the issue of whether the evidence sufficiently proved possession, it is well settled that a person is considered to be in constructive possession of a controlled dangerous substance if it is subject to his dominion and control,

regardless of whether or not it is in his physical possession. Also, a person may be in joint possession of a drug if he willfully and knowingly shares with another the right to control the drug. However, as previously noted, the mere presence in the area where narcotics are discovered or mere association with the person who does control the drug or the area where it is located is insufficient to support a finding of constructive possession. **State v. Smith**, 03-0917, pp. 5-6 (La. App. 1 Cir. 12/31/03), 868 So.2d 794, 799.

The evidence in this case establishes defendant knowingly possessed the drugs found in the vehicle. The state's evidence included Trooper Lamarca's testimony regarding the circumstances surrounding the traffic stop that led to the discovery of the hydrocodone pills. The defendant was the driver of the vehicle. The defendant exhibited nervous behavior during his interaction with Trooper Lamarca following his exit from his vehicle. The defendant later fled after the drugs were discovered. As previously noted, evidence of flight or furtive behavior by the defendant may support a finding of guilty knowledge sufficient to prove defendant's knowing possession of illegal drugs. **Sylvia**, 01-1406 at p. 4, 845 So.2d at 361.

Viewed in the light most favorable to the prosecution, the evidence presented at the trial of this matter was sufficient for a rational trier of fact to conclude beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of every essential element of the crime of possession of hydrocodone with intent to distribute. In reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **State v. Ordodi**, 06-0207, p. 14 (La. 11/29/06), 946 So.2d 654, 662. The facts and circumstances of this case support the inference that the defendant intentionally and knowingly possessed, with the intent to distribute, the hydrocodone pills in question. The evidence sufficiently supports the inference that the defendant behaved extremely nervously and later fled the scene to avoid detection because of his guilty knowledge that he was in possession of the large quantity of illegal

narcotics. Furthermore, an appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. **State v. Calloway**, 07-2306, pp. 2-3 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). Thus, the trial court did not err in denying the defendant's motion for post verdict judgment of acquittal. These assignments of error lack merit.

ASSIGNMENTS OF ERROR 6 & 7
EXCESSIVE SENTENCE & INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO FILE A MOTION TO RECONSIDER SENTENCE

In his sixth assignment of error, the defendant contends the trial court erred in imposing an unconstitutionally excessive sentence. Specifically, he argues the trial court failed to mention or explain any of the information contained in the presentence investigation report. He further asserts the trial court failed to give adequate consideration to the sentencing factors provided in LSA-C.Cr.P. art. 894.1. In the seventh assignment of error, the defendant argues that the failure of his trial attorney to file a motion to reconsider sentence should not preclude our review. He contends that if review is so precluded, this failure constitutes ineffective assistance of trial counsel.

A defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, § 13 of the Louisiana Constitution. To prove ineffective assistance of counsel, a defendant must establish not only that the performance of his counsel was deficient, but also that the deficient performance prejudiced his defense. The prejudice element requires a showing of a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. See **Strickland v. Washington**, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). A failure to file a motion to reconsider sentence does not in itself constitute ineffective assistance of counsel. 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.

State v. Felder, 00-2887, pp. 10-11 (La. App. 1 Cir. 9/28/01), 809 So.2d 360, 370, writ denied, 01-3027 (La. 10/25/02), 827 So.2d 1173.

By orally moving for reconsideration of the sentence on the ground of excessiveness, counsel for the defendant properly preserved the right to a bare bones appellate review of the defendant's sentence for excessiveness. See **State v. Mims**, 619 So.2d 1059, 1059-60 (La. 1993)(per curiam). In the interest of judicial economy, we will entertain the defendant's argument that his sentence is excessive in full, even in the absence of a more specific motion to reconsider sentence, in order to address the defendant's claim of ineffective counsel. See **State v. Mance**, 2000-1903, p. 3 (La. App. 1 Cir. 5/11/01), 797 So.2d 718, 720.

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, pp. 8-9 (La. App. 1 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. Wilkinson**, 99-0803, p. 4 (La. App. 1 Cir. 2/18/00), 754 So.2d 301, 303, writ denied, 2000-2336 (La. 4/20/01), 790 So.2d 631.

Louisiana Code of Criminal Procedure article 894.1 sets forth items that should be considered by the trial court before imposing sentence. Although a trial court need not recite the entire checklist of article 894.1, the record must reflect that it adequately considered the criteria. **State v. Herrin**, 562 So.2d 1, 11 (La. App. 1 Cir.), writ denied, 565 So.2d 942 (La. 1990). However, even in the absence of adequate compliance with article 894.1, it is not necessary to remand the matter for resentencing when the sentence imposed is not

apparently severe in relation to the particular offender or the particular offense. Thus, a sentence imposed without the assignment of reasons will be set aside on appeal and remanded for resentencing only if the record is inadequate, or the record clearly indicates the sentence is excessive. See **State v. Harris**, 601 So.2d 775, 778-79 (La. App. 1 Cir. 1992).

The transcript of the sentencing hearing reflects there was some confusion as to whether the maximum sentence defendant could receive for possession with intent to distribute hydrocodone was 30 years under LSA-R.S. 40:967(B)(1) or 10 years under LSA-R.S. 40:967(B)(5). Following an off-the-record discussion with counsels regarding the applicable penalty provision, the court stated, "they've convinced me. The two heads on the DA side is saying it's a 10-year deal, and the – choice is between 2 to 30 or 10 years, and I suspect you would not object." The defendant was sentenced to the maximum 10-year sentence under subsection (B)(5).

Our review of the record in this case reveals that the trial judge did not articulate, in detail, the reasons for the sentence. The record reflects that at the November 10, 2009 sentencing hearing, prior to imposing the sentence, the trial court stated:

> All right. Even though it's probatable [sic]. The Court is concerned and I have – believe it or not, I've read all of the letters you've sent me, Mr. Pernell. I hope you were sincere and you weren't just running a scam on me. I mean, I believe you were. But, by the same token, I feel that I'm duty bound to try to convince you, in fear that perhaps you were not as sincere as I believe you to be.
>
> I'm going to sentence you to serve 10 years with the Department of Corrections.

After a thorough review of the record, and considering the facts and circumstances of the instant offense, we do not find that the trial judge abused his discretion in imposing the ten-year sentence in this case. Even considering the defendant's classification as a first offender and assuming that ten years was the maximum sentence that could be imposed,[3] in light of the extremely large

[3] We note that the Louisiana State Police Crime Laboratory Scientific Analysis Report reflects that the hydrocodone tablets at issue were "not more than 15 milligrams per dosage unit" and

amount of narcotics involved and given the specific circumstances of this case, we do not find that the sentence constitutes the needless imposition of pain and suffering. Although the trial court did not articulate all of the sentencing factors considered, the sentence is supported by the record and thus, remand for full compliance with article 894.1 is unnecessary. In light of the harm to society, the ten-year sentence is not so grossly disproportionate to the severity of the crime as to shock the sense of justice, nor is it needless infliction of pain and suffering. Thus, contrary to the defendant's claim, the sentence is not unconstitutionally excessive.[4]

Accordingly, even if the defendant's trial counsel's failure to give more specific grounds for the reconsideration of the sentence constituted deficient performance, the defendant suffered no resulting prejudice since the sentence imposed was not excessive and is fully supported by the record. Consequently, this ineffective-assistance-of-counsel claim must fall. These assignments of error lack merit.

ASSIGNMENT OF ERROR 8
PREMATURITY OF SENTENCING

In his final assignment of error, the defendant argues that his sentence was illegally imposed as it failed to comply with LSA-C.Cr.P. art. 873. Article 873 provides, "[i]f a motion for new trial, or in arrest of judgment, is filed, sentence shall not be imposed until at least twenty-four hours after the motion is overruled." However, a defendant may waive this delay.

A review of the record in the instant case reveals that the trial judge failed to observe the mandatory 24-hour delay required by LSA-C.Cr.P. art. 873. Prior to sentencing, counsel for the defendant filed motions in arrest of judgment, for a new trial and for post-verdict judgment of acquittal. Before sentencing, the

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included a "nonnarcotic ingredient." Accordingly, it appears that the defendant could have been billed under LSA-R.S. 40:968 for possession with intent to distribute a Schedule III drug. See LSA-R.S. 40:964, Schedule III (D)(1)(d). The maximum penalty for intent to distribute a Schedule III drug is imprisonment at hard labor for not more than ten years. LSA-R.S. 40:968(B).

[4] *A fortiori*, the ten-year sentence is not unconstitutionally excessive if thirty years is the maximum sentence that could have been imposed under LSA-R.S. 40:967(B)(1). However, under the circumstances herein, we need not determine whether the ten-year or thirty-year sentence was the maximum sentence allowed by law.

trial court denied all three motions. Immediately thereafter, the defendant was sentenced.

However, the transcript shows that after the trial court denied the defendant's post trial motions, defense counsel stated, "That gets us to the issue of sentence." At that time defendant's counsel began the sentencing hearing by noting that the defendant "is eligible, or should be, for a probated sentence. He's a first offender. He has never been convicted of any other felony according to the presentence investigation." The trial court proceeded to note that the matter had previously been set for sentencing. After a brief discussion with the defendant regarding his failure to attend the previous sentencing hearing, the court proceeded with sentencing.

This court has determined that the defense counsel's affirmative response to a question by the trial judge as to whether the defendant was ready to proceed with sentencing constitutes a waiver. Although there may be no express waiver, in announcing his readiness to proceed with sentencing, a defendant may implicitly waive the twenty-four hour delay period. See **State v. Lindsey**, 583 So.2d 1200, 1206 (La. App. 1 Cir. 1991), writ denied, 590 So.2d 588 (La. 1992); **State v. Steward**, 95-1693, p. 23 (La. App. 1 Cir. 9/27/96), 681 So.2d 1007, 1019. In the instant case, by announcing his readiness to proceed with sentencing immediately after the denial of the post-trial motions, counsel for the defendant implicitly waived the delay period. This assignment of error is without merit.

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

CONVICTION AND SENTENCE AFFIRMED.