NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0924

STATE OF LOUISIANA

VERSUS

KELVIN W. KAIGLER

Judgment Rendered: December 22, 2010

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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 417797, DIVISION "C"

THE HONORABLE RICHARD A. SWARTZ, JUDGE

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McDONALD, J.

The defendant, Kelvin W. "Dreads" Kaigler, was charged by bill of information with one count of possession of cocaine, a violation of La. R.S. 40:967(C), and pled not guilty. Following a jury trial, he was found guilty as charged. He was sentenced to five years at hard labor. He now appeals, contending the trial court imposed an unconstitutionally excessive sentence upon him, and trial counsel rendered ineffective assistance of counsel by failing to move for reconsideration of sentence. For the following reasons, we affirm the conviction and sentence.

FACTS

On August 6, 2006, St. Tammany Parish Sheriff's Department Deputy Ryan Terrebonne conducted a traffic stop of a vehicle on Peters Road in St. Tammany Parish. Sonya Nores was driving the vehicle, the defendant was the front-seat passenger, and Corey Paige and Monique Florane were rear-seat passengers. Deputy Terrebonne ordered Nores to exit the vehicle and, as she exited, he observed a clear glass tube with a burnt wire mesh and a white residue substance on the driver's-side floor of the vehicle. Based on his experience as a police officer, Deputy Terrebonne recognized the pipe as a "crack pipe." He also subsequently recovered a rock of cocaine from the driver's-side floor of the vehicle. Deputy Terrebonne also ordered the defendant to exit the vehicle and, after he exited, Deputy Terrebonne observed another crack pipe on the passenger's-side floor of the vehicle. The State introduced both crack pipes and the rock of cocaine into evidence at trial. Scientific analysis detected the presence of cocaine in the crack pipes.

St. Tammany Parish Sheriff's Department Lieutenant Randy Smith was also present at the traffic stop involving the defendant. The vehicle was a stolen new car and was "very clean" inside. Lieutenant Smith testified he saw a glass-tube pipe on the floorboard of the front-passenger's seat where the defendant had been sitting.

Nores testified she was driving the vehicle that was stopped on the day in question. She indicated she and her passengers, including the defendant, had been "smoking cocaine, looking for cocaine, talking about cocaine." She testified she saw the defendant smoking crack with a crack pipe in the vehicle. According to Nores, when the police signaled her to stop the vehicle, the defendant stated, "[e]verybody be cool; get rid of your stuff[.]"

Corey Paige testified he was in the vehicle that was stopped on the day in question. According to Paige, Nores and the defendant were both smoking drugs on the front seat of the vehicle.

The defendant conceded he was in the vehicle that was stopped on the day in question. He also conceded he and Nores, "both used cocaine together." He denied, however, that there were any crack pipes in the vehicle when he got into the vehicle. Thereafter, he testified Nores may have been truthful about her own smoking of cocaine in the vehicle, but she was lying about his smoking of cocaine in the vehicle. He also claimed Paige was lying about him smoking drugs in the vehicle. The defendant indicated he sold drugs at the Port of New Orleans.

EXCESSIVE SENTENCE; INEFFECTIVE ASSISTANCE OF COUNSEL

In assignment of error number 1, the defendant concedes he possessed cocaine by possessing the cocaine residue in the crack pipe, but argues possession of

such a small amount does not justify or explain the harsh sentence he received. In assignment of error number 2, he argues trial counsel rendered ineffective assistance of counsel by failing to move for reconsideration of his sentence.

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. Bickham**, 98-1839, pp. 7-8 (La. App. 1st Cir. 6/25/99), 739 So.2d 887, 891-92.

The Louisiana Code of Criminal Procedure sets forth items which must be considered by the trial court before imposing sentence. La. Code Crim. 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, p. 10 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962. Remand for full compliance with Article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. **State v. Harper**, 2007-0299, p. 15 (La. App. 1st Cir. 9/5/07), 970 So.2d 592, 602, writ denied, 2007-1921 (La. 2/15/08), 976 So.2d 173.

The Louisiana Constitution of 1974, art. I, § 20 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**, 99-2868 at pp. 10-11, 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 counsel's 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. 1st Cir. 1992), writ denied, 614 So.2d 1263 (La. 1993).

Any person who violates La. R.S. 40:967(C)(2) as to any controlled dangerous substance classified in Schedule II, other than pentazocine, shall be imprisoned with or without hard labor for not more than five years and, in addition, may be sentenced to pay a fine of not more than five thousand dollars. La. R.S. 40:967(C)(2). Cocaine is a controlled dangerous substance classified in Schedule II. See La. R.S. 40:964, Schedule II, (A)(4). The defendant was sentenced to five years at hard labor. He was not fined.

In imposing sentence, the trial court noted: there was an undue risk that during a period of suspended sentence or probation, the defendant would commit another crime; and a lesser sentence than the sentence the court would impose would deprecate the seriousness of the offense. Thereafter, the defense requested that the sentence imposed run concurrently with "[the defendant's other conviction[.]"[1]

A thorough review of the record reveals the trial court adequately considered the criteria of Article 894.1 and did not manifestly abuse its discretion in imposing sentence. See La. Code Crim. P. art. 894.1 (A)(1) & (A)(3). Further, under La. Code Crim. P. art. 894.1(B)(12), the fact that "[t]he offender was persistently involved in similar offenses not already considered as criminal history or as a part of a multiple offender adjudication[,]" was also an aggravating factor.

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[1] The record does not provide details concerning the conviction referenced by the defense. The minutes, however, indicate the defendant faced charges under seven different docket numbers. Additionally, the trial transcript reflects that following the defendant's conviction for the instant offense, the State indicated it was "going forward with trial 2."

Additionally, the sentence imposed 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, p. 4 (La. App. 1st 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 candidly testified he was a drug dealer at the Port of New Orleans. In regard to the defendant's ineffective assistance of counsel claim, we note, even assuming arguendo, 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 has considered the defendant's excessive sentence argument and found that his sentence was not excessive.

Finding no merit in the defendant's arguments, the sentence is affirmed.

CONVICTION AND SENTENCE AFFIRMED.