NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 1128

STATE OF LOUISIANA

VERSUS

RICHARD McCULLOUGH

Judgment Rendered: DEC 2 1 2011

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On Appeal from the 22nd Judicial District Court
In and For the Parish of St. Tammany
Trial Court No. 462,641

The Honorable Martin E. Coady, Judge Presiding

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Walter P. Reed
District Attorney
Covington, Louisiana

and

Kathryn Landry
Special Appeals Counsel
Baton Rouge, Louisiana

Counsel for Appellee
State of Louisiana

R. Neal Wilkinson
Baton Rouge, Louisiana

Counsel for Defendant/Appellant
Richard McCullough

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

HUGHES, J.

The defendant, Richard McCullough, was charged by bill of information with one count of attempted second degree murder, a violation of LSA-R.S. 14:27 and 14:30.1, and initially pled not guilty. Thereafter, he withdrew his initial plea and pled guilty as charged. He was sentenced to thirty years at hard labor, without benefit of parole, probation, or suspension of sentence. He moved for reconsideration of sentence, but the motion was denied. He now appeals, contending: (1) the sentence is unconstitutionally excessive; and (2) the trial court erred in denying the motion to withdraw guilty plea because he pled guilty under the erroneous advice of ineffective counsel. For the following reasons, we affirm the conviction and sentence.

FACTS

Due to the defendant's guilty plea, there was no trial, and thus, no trial testimony concerning the offense. Testimony was presented, however, at a sentencing hearing held in the matter and revealed the following facts.

On Saturday January 3, 2009, the victim, Carol "Bunny" Giraud, was in the process of moving into a home that she had leased from the defendant. He lived on the top floor of the home. On that day, the defendant approached the victim and asked her if she would follow him in her vehicle to a repair shop so he could drop off his vehicle for repairs. The victim asked the defendant if they could possibly drop the vehicle off the next day. The defendant refused and insisted they drop the vehicle off that day. The victim wanted to stay in good favor with her landlord, so she agreed to his request.

The victim followed the defendant as he had requested, but he stopped in front of a wooded area. He claimed his vehicle had suddenly stopped and he would have to have it towed. The victim offered to push the defendant's vehicle into a nearby parking lot with her vehicle. The defendant agreed, and directed the victim to line-up

her vehicle's bumper with his vehicle's bumper. The victim thought the defendant was then going to get back into his vehicle. However, he tapped on the victim's window, and she pressed the button to automatically lower the window. Before the window finished going down, the defendant began shooting the victim. He shot her twice in the face, once in the back, and once across her neck. She laid down, motionless, in an effort to convince him she was dead. Thereafter, she used her cell phone to call for help.

EXCESSIVE SENTENCE

In his first assignment of error, the defendant argues the trial court imposed an unconstitutionally excessive sentence because, prior to the incident, he had no prior felony or misdemeanor convictions, he had a successful and distinguished career as a mechanical engineer in the aerospace industry, and he was a hard-working, model citizen.

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.

Whoever commits the crime of attempted second degree murder shall be imprisoned at hard labor for not less than ten years nor more than fifty years without benefit of parole, probation, or suspension of sentence. See LSA-R.S. 14:27(D)(1)(a) and LSA-R.S. 14:30.1(B). The defendant was sentenced to thirty years at hard labor without benefit of parole, probation, or suspension of sentence.

In imposing sentence, the trial court noted the defendant had a very long, successful, and distinguished career in the aerospace industry. There were "no blemishes on him, either in a civil sense." Further, at work, he had been an overachiever, acknowledged on numerous occasions for his exceptional work, and described as a "key member" of the team. He was regarded by his coworkers in a very positive light during his employment. The defendant's son also testified the defendant had done a good job raising him, instilled good values in him, and done "all what a father should do in guidance."

The court noted, however, the sentencing hearing also established that the defendant asked the victim to assist him in taking his car to be fixed, but then, along the way, shot her four times and left her to die. Due to the defendant shooting her, the victim's life has been permanently affected, both physically and mentally. The victim now fears people and fears for her safety. Her sense of taste, sense of smell, ability to eat, level of pain, and facial expressions have been permanently altered. She would also have to undergo medical procedures in the future.

The court found the aggravating circumstances were: the offender's conduct during the commission of the offense manifested deliberate cruelty to the victim; the offense resulted in significant permanent injury and significant economic loss to the victim; and the offender used a dangerous weapon in the commission of the offense. The court found the mitigating circumstances were: the defendant had no history of criminal activity and, apparently, had led a productive, law-abiding life. Additionally, the court indicated it had considered the defense motion to disregard the minimum sentence, under **State v. Dorthey**, 623 So.2d 1276 (La. 1993), but in light of the aggravating and mitigating circumstances, concluded that anything less than the sentence imposed would deprecate the seriousness of the offense.

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 LSA-C.Cr.P. art. 894.1 (A)(3), (B)(1), (B)(9), (B)(10), and (B)(28). Additionally, the sentence imposed was not grossly disproportionate to the severity of the offense, and thus, was not unconstitutionally excessive.

This assignment of error is without merit.

MOTION TO WITHDRAW GUILTY PLEA;
INEFFECTIVE ASSISTANCE OF COUNSEL

In his second assignment of error, the defendant argues the trial court erred in denying his motion to withdraw his guilty plea, as he pled guilty under the erroneous advice of ineffective counsel. The defendant claims his plea was not knowingly or intelligently made, because his attorney assured him that by pleading guilty he would receive a ten-year sentence. The State argues the defendant failed to preserve this issue for review, because he withdrew his motion.

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).

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 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).

A guilty plea is a conviction and, therefore, should be afforded a great measure of finality. A defendant may not withdraw a guilty plea simply because the sentence imposed is heavier than anticipated. It is not unreasonable for a trial court to deny a defendant the luxury of gambling on his sentence, then being able to withdraw his plea if and when he discovers the sentence is not to his liking. Nevertheless, a guilty plea is constitutionally infirm if a defendant is induced to enter the plea by a plea bargain, or what he justifiably believes to be a plea bargain, and that bargain is not kept. In such cases, the guilty plea was not given freely and knowingly. **State v.**

Roberts, 2001-3030 (La. App. 1 Cir. 6/21/02), 822 So.2d 156, 158, writ denied, 2002-2054 (La. 3/14/03), 839 So.2d 31.

On August 16, 2010 the defendant pled guilty, represented by counsel Ed LeBlanc and Hector Lopez. On August 17, 2010 he was sentenced, represented by the same counsel. On September 2, 2010, through counsel LeBlanc, the defendant moved for reconsideration of sentence alleging:

1. The sentence is, on its face, excessive;

2. The defendant accepted responsibility for his actions and pled guilty;

3. The defendant has no prior misdemeanor or felony convictions;

4. The defendant has a good work and family history;

5. The defendant has been responsible to his family obligations;

6. The defendant has no history of violence;

7. The defendant is willing to seek psychiatric treatment;

8. The defendant has strong family support;

9. The defendant has major family responsibilities;

10. The defendant is willing to provide and make restitution to the victim;

11. The defendant further adopts all other reasons orally argued before the court at the time of sentencing.

On September 16, 2010 the motion was denied.

On September 17, 2010, through counsel R. Neal Wilkinson, the defendant moved to amend the title of his motion to reconsider sentence to "**MOTION FOR RECONSIDERATION OF SENTENCE OR, IN THE ALTERNATIVE, FOR WITHDRAWAL OF PLEA.**" He also moved to add additional paragraphs to the motion, including the following:

> On the day of trial, counsel informed defendant that in return for a plea of guilty, defendant would receive a sentence of Ten (10) years or less (citing State vs. Dorothy [sic]). Under those conditions defendant agreed to enter said plea. Counsel failed to inform defendant that there

was no agreed upon plea. Had counsel so informed defendant, defendant would not have withdrawn his not guilty plea and would have proceeded to trial. As such, the plea entered by the defendant was not "knowing and voluntarily entered."

The motion was set for hearing on October 7, 2010. On that date, in the absence of the defendant, counsel Wilkinson withdrew the motion for amendment of the motion to reconsider sentence. The minutes do not indicate why the motion was withdrawn, and the record does not contain a transcript for October 7, 2010.

This assignment of error is not subject to appellate review. The defendant's claim, that he was induced to enter the guilty plea by assurances of his former counsel of a plea agreement for a ten-year sentence, can only be resolved by an evidentiary hearing, with counsel LeBlanc and Lopez, to determine if counsel acted strategically or ineffectively in this matter. The opportunity for such a hearing was lost when counsel Wilkinson withdrew the motion for amendment of the motion to reconsider sentence. The investigation of strategy decisions requires an evidentiary hearing[1] and, therefore, cannot possibly be reviewed on appeal. **State v. Allen**, 94-1941 (La. App. 1 Cir. 11/9/95), 664 So.2d 1264, 1271, writ denied, 95-2946 (La. 3/15/96), 669 So.2d 433. Further, under our adversary system, once a defendant has the assistance of counsel, the vast array of trial decisions, strategic and tactical, which must be made before and during trial, rest with an accused and his attorney. The fact that a particular strategy is unsuccessful does not establish ineffective assistance of counsel. **State v. Folse**, 623 So.2d 59, 71 (La. App. 1 Cir. 1993).

This assignment of error is without merit or otherwise not subject to review at this time.

CONVICTION AND SENTENCE AFFIRMED.

[1] The defendant would have to satisfy the requirements of LSA-C.Cr.P. art. 924, et seq., in order to receive such a hearing.