

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 KA 0824

STATE OF LOUISIANA

VERSUS

SHANE MICHAEL PASCHAL

Judgment Rendered: November 3, 2006

**Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Case No. 10-05-0153**

**The Honorable Wilson Fields and The Honorable Leon Cannizzaro, Jr.,
Judges Presiding**

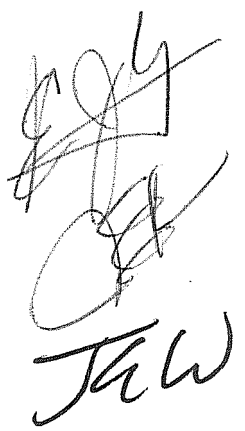
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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.



GAIDRY, J.

The defendant, Shane Michael Paschal, was charged by bill of information with aggravated criminal damage to property, a violation of La. R.S. 14:55. Upon arraignment, counsel was appointed to represent him, but he expressed his desire to waive the right to counsel. Defendant subsequently entered a plea of guilty as charged. Defendant was later sentenced to eight years imprisonment at hard labor. The trial court denied defendant's motion to reconsider sentence. Defendant now appeals, raising the following assignments of error:

(1) The trial court erred by allowing defendant to proceed without the assistance of counsel without first ascertaining that his waiver of the right to counsel was being knowingly and intelligently made;

(2) The trial court erred in imposing an excessive sentence;

(3) The trial court erred in denying the motion to reconsider sentence.

For the following reasons, we affirm the conviction and sentence.

FACTS

As defendant entered a guilty plea to the charge, the facts of the offense were not fully developed in the record. The following factual basis for defendant's guilty plea was presented by the state at the *Boykin* hearing:

Your honor, the defendant smashed the windows of, it appears a home with a crowbar. It looks like he attempted to hit the victim of the home with the crowbar. I think it was in an apartment complex, and it appears that they were neighbors that were involved, or acquaintances. Nobody was injured.

...

I will point out that in this instance, the defendant appeared to be intoxicated as well.

...

I have not been able to speak with the victim directly. According to the police report, it's unclear if he entered. It appears that he was trying to enter into the house. There was a dispute between him and the person inside.

The state then added the following factual account:¹

Judge, I'm going to give you his statements to the police. He stated that he did break the windows into the apartment trying to get at the other subject who punched him earlier for no reason. The defendant advised that he was not intending to hurt anyone else and only picked up the iron pry bar because he felt he would be outnumbered. I will point out that when the police arrived, it was so immediate that he saw the crowbar in his hand. He did have a swollen lip, but at this point in time, there is no accusation -- well, there was [*sic*] no other arrests. The person at [*sic*] which [*sic*] he was trying to get at [*sic*] was not arrested. The victim stated that while the defendant was busting out the windows, he got hit in the chest by the iron pry bar. That when he threw the iron pry bar through one of the windows, it hit him in the chest after it came through the windows. He stated that his chest and ribs hurt, and he felt like he was okay. E.M.S. came to the scene and treated the victim, but they did not transport him. Again, because the facts are not clear as to exactly how this happened, I didn't charge him with that.

Despite the trial court's recommendation that he defer pleading at that time, defendant entered a plea of guilty as charged after consulting with counsel, who was re-appointed to represent him before he entered the plea. Upon being advised that he would not be sentenced until after a pre-sentence investigation report was prepared, defendant attempted to withdraw his plea of guilty, but the trial court denied his oral motion. On February 7, 2006, defendant was sentenced to eight years imprisonment at hard labor.

FIRST ASSIGNMENT OF ERROR

In his first assignment of error, defendant argues that the trial court erred by allowing him to proceed without the assistance of counsel.

¹ These additional facts were recited after the trial court observed that the described offense committed by defendant seemed to constitute simple (rather than aggravated) criminal damage to property. The trial court specifically questioned whether it was foreseeable that human life might be endangered in the commission of the offense based on the initial facts presented by the State.

Specifically, defendant argues that the trial court neglected its obligation to ensure that his waiver of counsel was knowingly and intelligently made, noting that the trial court did not discuss the dangers and pitfalls inherent in self-representation. Defendant concludes that the trial court erred in allowing him to enter his guilty plea and to proceed with the sentencing proceeding and the filing of the motion to reconsider sentence, unrepresented by counsel.

An accused has a constitutional right to the assistance of counsel at every stage of criminal proceedings. La. Const. art. I, § 13 (1974); *State v. Flowers*, 598 So.2d 1144, 1146 (La. App. 1st Cir. 1992). Likewise, the constitutional right to the assistance of counsel provided by the Sixth Amendment of the United States Constitution mandates the right, unless waived, to the assistance of counsel at every critical stage of the proceedings, including an initial or deferred sentencing. *State v. White*, 325 So.2d 584, 585 (La. 1976). Sentence imposed without the presence of the defendant's attorney is illegal and of no effect, for certain vital issues cannot be raised and important rights may be lost if not raised or exercised prior to this stage of the proceedings. *State v. Austin*, 255 La. 108, 113, 229 So.2d 717, 718 (La. 1969); *State v. Lefeure*, 01-1003, p. 4 (La. App. 5th Cir. 1/15/02), 807 So.2d 922, 923-924. Unless a defendant has made a knowing and intelligent waiver of his right to counsel, any sentence imposed in the absence of counsel is invalid and must be set aside. *State v. Williams*, 374 So.2d 1215, 1217 (La. 1979); *State v. Hall*, 99-2887, p. 16 (La. App. 4th Cir. 10/4/00), 775 So.2d 52, 62-63.

The determination of whether there has been an intelligent waiver of the right to counsel depends upon the facts and circumstances surrounding the case, including the background, experience, and conduct of the accused.

Thus, before a trial judge can allow a defendant to represent himself, he must determine whether the defendant's waiver of counsel is intelligently and voluntarily made, and whether his assertion of his right to represent himself is clear and unequivocal. *State v. Carpenter*, 390 So.2d 1296, 1298 (La. 1980). A competent election by the defendant to represent himself and to decline the assistance of counsel once made before the court carries forward through all further proceedings in that case unless the defendant expressly requests that counsel be appointed for subsequent proceedings or circumstances suggest that the defendant's waiver was limited to a particular stage of the proceedings. *Id.* at 1299.

The correctness of granting a defendant the right to represent himself is judged by the record made in recognizing his right to do so, not by what happens in the course of his self-representation. *State v. Dupre*, 500 So.2d 873, 879 (La. App. 1st Cir. 1986), *writ denied*, 505 So.2d 55 (La. 1987). In *State v. Norman*, 99-600, pp. 6-7 (La. App. 5th Cir. 2/16/00), 756 So.2d 525, 529, *writ denied*, 00-0971 (La. 3/23/01), 787 So.2d 1007, the Fifth Circuit Court of Appeal observed that a reviewing court should consider whether the record provides a basis for concluding that a defendant was aware of the dangers and disadvantages of self-representation, but noted that prior extensive experience with the judicial process and the criminal justice system, such as experience obtained through prior felony convictions, may indicate such awareness on the defendant's part.

Herein, at the commencement of the arraignment proceeding, the trial court asked defendant if he had an attorney. When defendant responded negatively, the trial court inquired as to whether he could afford an attorney. Defendant again responded negatively and the trial court appointed the public defender to represent him. The public defender waived formal

reading of the bill of information and advised defendant to enter a plea of not guilty. Defendant then stated, "I would like to waive my rights to legal counsel, if that pleases the court, and enter a plea of guilty." The trial court thereupon requested a factual basis for the proposed guilty plea. After the state presented the factual basis, the trial court advised defendant as follows: "Let me do this. I'll set it for one week, I'll set it for motions. I'm going to ask you to plead not guilty at this time." Despite the trial court's further discouragement, defendant insisted that he wanted to plead guilty. Prior to the trial court's acceptance of defendant's guilty plea, this discussion took place:

THE COURT: Just put your hand down. Just so all the bases are covered, I'm appointing you to represent him. Just see if he'd like to discuss it with you one last time. I am going to honor his wishes if he wishes to plead guilty, but I want him to at least have the advice of counsel before we take a plea and possibly sentence him.

(After the public defender consults with the defendant, the following proceedings were had:)

THE COURT: What do we have, Mr. Harvey?

MR. HARVEY²: Your honor, Mr. Pascal [*sic*] has insisted to me that he wants to maintain his guilty plea.

Following the above colloquy, defendant was sworn and fully *Boykinized*. The record establishes that defendant was informed of and waived his right to trial by jury, to confront his accusers and against self-incrimination. Defendant was also informed of the maximum sentence for the offense. The trial court then questioned defendant as follows:

THE COURT: Are you satisfied with the way in which this court has handled this case and in the way in which the man I have appointed to represent you for purposes of this plea has handled this case on your behalf?

MR. PASCAL [*sic*]: Yes, sir.

² Mr. Harvey was the court-appointed public defender.

The trial court accordingly accepted defendant's guilty plea. The trial court further noted its unfamiliarity with the circumstances of the case and defendant's background and ordered a pre-sentence investigation. The public defender then informed the court that defendant wished to withdraw his guilty plea. The trial court replied that it was too late for defendant to do so and set a date for the sentencing hearing.

The state argues that defendant's guilty plea was counseled. Based on our review of the record, we agree. Despite that defendant initially chose to waive the benefit of appointed counsel, the trial court did not allow defendant to proceed during the guilty plea proceeding without advice of counsel for that limited purpose. Based on our review of the transcript of the guilty plea proceeding, we find that defendant's guilty plea was in fact counseled.³

However, the trial court did allow defendant to represent himself at the sentencing proceeding. Because a sentencing hearing is generally considered a "critical stage" in a proceeding, a defendant is entitled to the assistance of counsel at such a hearing unless he makes a knowing and intelligent waiver of his right to counsel or makes an implied waiver through his failure to employ counsel even though he had a reasonable opportunity to do so. *Williams*, 374 So.2d at 1217. Defendant expressed his desire to decline counsel at the guilty plea proceeding and did not expressly request that counsel be appointed for the sentencing proceeding. At the time of defendant's self-representation at sentencing, the trial court was well aware that defendant understood the judicial process. At the sentencing hearing, the trial court detailed defendant's prior extensive experience with the

³ Notably, defendant does not argue on appeal that the trial court violated his right to self-representation in appointing counsel to represent him during the guilty plea proceeding. We reiterate that defendant confirmed that he was satisfied with such representation at the end of the proceeding.

judicial process. Defendant is a fifth-time felony offender. In addition to the felonies, he has been convicted of several misdemeanor charges. Defendant's convictions include several guilty pleas involving the dismissal of additional charges. Based on his prior extensive experience with the criminal justice system, we find that defendant was aware of the dangers and disadvantages of self-representation. *See State v. Poche*, 05-1042, pp. 12-13 (La. App. 3d Cir. 3/1/06), 924 So.2d 1225, 1234. Thus, the trial court did not err in allowing defendant to represent himself at the sentencing proceeding and in the filing of the *pro se* motion to reconsider sentence. This assignment of error is without merit.

SECOND AND THIRD ASSIGNMENTS OF ERROR

In his second assignment of error, defendant argues that the trial court erred in imposing an excessive sentence. In his third assignment of error, defendant avers that the trial court erred in denying his motion to reconsider sentence.

Defendant specifically avers that the trial court failed to give the appropriate weight to mitigating factors presented by his case. He argues that under the circumstances of this case, it is not clear that he committed the offense to which he pleaded guilty. Defendant contends that the trial court focused "almost exclusively" upon his criminal history when sentencing him. Defendant emphasizes that the instant offense was not particularly serious, as it amounted to damaging property valued at less than five hundred dollars under circumstances in which the danger to human life was questionable. Finally, defendant avers that the trial court did not consider his acceptance of responsibility for the offense as a mitigating factor. Defendant contends that his guilty plea was instead misinterpreted as an effort to manipulate the legal system.

Louisiana Code of Criminal Procedure article 894.1 sets forth items that must be considered by the trial court before imposing sentence. The trial court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the criteria. *State v. Leblanc*, 04-1032, p. 10 (La. App. 1st Cir. 12/17/04), 897 So.2d 736, 743, *writ denied*, 05-0150 (La. 4/29/05), 901 So.2d 1063, *cert. denied*, ___ U.S. ___, 126 S.Ct. 254, 163 L.Ed.2d 231 (2005); *State v. Faul*, 03-1423, p. 4 (La. App. 1st Cir. 2/23/04), 873 So.2d 690, 692.

Article I, Section 20 of the Louisiana Constitution explicitly prohibits excessive sentences. Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. In reviewing a sentence for excessiveness, the appellate court must consider the punishment and the crime in light of the harm to society and gauge whether the penalty is so disproportionate as to shock its sense of justice or whether the sentence makes no reasonable contribution to acceptable penal goals and, therefore, is nothing more than the needless imposition of pain and suffering. *See State v. Guzman*, 99-1753, 99-1528, p. 15 (La. 5/16/00), 769 So.2d 1158, 1167.

The trial court has wide discretion in imposing a sentence within the statutory limits; and such a sentence will not be set aside as excessive in the absence of manifest abuse of discretion. *State v. Loston*, 03-0977, pp. 19-20 (La. App. 1st Cir. 2/23/04), 874 So.2d 197, 210, *writ denied*, 04-0792 (La. 9/24/04), 882 So.2d 1167. Thus, 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. *State v. Holmes*, 99-0631, p. 4 (La. App. 1st Cir. 2/18/00), 754 So.2d 1132, 1135, *writ denied*, 00-1020 (La. 3/30/01), 788 So.2d 440.

Louisiana Revised Statutes 14:55 provides in part: “Whoever commits the crime of aggravated criminal damage to property shall be fined not more than ten thousand dollars, imprisoned with or without hard labor for not less than one nor more than fifteen years, or both.” At the sentencing hearing, the trial court reviewed the pre-sentence investigation report. The report revealed that defendant is a fifth-time felony offender. The defendant has a 1991 felony theft guilty plea conviction in Kansas. In 1993, the defendant was arrested in Kansas for two counts of aggravated kidnapping, rape, and battery. In that case, defendant pleaded guilty to two counts of battery. In 1994, he pleaded guilty to a misdemeanor escape charge in Kansas. In 1995, defendant was arrested in Kansas for aggravated kidnapping, criminal threat, and battery, and pleaded guilty to the battery and criminal threat charges. In 1996, defendant pleaded guilty to a charge of driving under the influence (DUI) in Kansas. Defendant pleaded guilty to two additional counts of DUI in Kansas in 1999. In 2000, defendant pleaded guilty to three counts of misdemeanor theft and one count of misdemeanor criminal damage to property (also in Kansas). In 2001, defendant pleaded guilty to an Oklahoma charge of unauthorized use of a vehicle. Finally, in 2003, defendant pleaded guilty to an Oklahoma charge of unlawful possession of a firearm.

The trial court noted that defendant was on supervised probation for the last conviction at the time of sentencing, and that his arrest for the instant offense occurred within one year after his release from incarceration.⁴ The trial court characterized defendant’s criminal history as a “one-man crime spree . . . in at least three different states over the last fifteen to sixteen years.” The trial court also considered the violent nature of defendant’s

⁴ The trial court mistakenly referred to the jurisdiction of the conviction as Kansas, rather than Oklahoma.

criminal history. The trial court expressed its belief that defendant has no respect for the judicial system, concluding that defendant attempted to be sentenced before the trial court could be apprised of his out-of-state criminal background. The trial court expressed its concern that defendant would commit another crime during a probationary period.

The sentence imposed by the trial court is just above mid-range for the offense. We find that the record clearly shows an adequate factual basis for the sentence imposed. The sentence does not shock our sense of justice, nor do we find any abuse of discretion. Thus, defendant's second and third assignments of error lack merit.

CONVICTION AND SENTENCE AFFIRMED.