**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2006 KA 1541**

**STATE OF LOUISIANA**

**VERSUS**

**KENNETH RORY WILLIAMS**

Judgment Rendered: May 4, 2007

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On Appeal from the 23rd Judicial District Court
In and For the Parish of Ascension
Trial Court No. 17,249 Division "A"

Honorable Ralph Tureau, Judge Presiding

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**BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.**

**HUGHES, J.**

The defendant, Kenneth Rory Williams, was charged by bill of information with one count of armed robbery, a violation of LSA-R.S. 14:64 (Count 1), and one count of aggravated battery, a violation of LSA-R.S. 14:34 (Count 2).[1] He pled not guilty. The defendant filed three motions to suppress the evidence and, following the hearings, the motions were denied. Following a jury trial, the defendant was found guilty of armed robbery. The defendant made an oral motion for "a judgment of acquittal notwithstanding the verdict," which was denied. The defendant was sentenced to ninety-nine years at hard labor without benefit of parole, probation, or suspension of sentence.[2]

The defendant now appeals, designating three counseled assignments of error: (1) the crime of armed robbery requires that the victim be an individual and the State failed to prove that the Burger Delight was the victim of an armed robbery, thus the bill of information was fatally defective; (2) the trial court erred in imposing a sentence that is unconstitutionally excessive; and (3) trial counsel's failure to object to the defective bill of information, call the defendant to testify, provide other evidence of prejudice, object to the sentence, or file a motion to reconsider the sentence constitutes unconstitutional ineffective assistance of counsel. The defendant's two *pro se* assignments assert: (1) the search of his apartment was unconstitutional because police officers failed to obtain a search and arrest warrants prior to the search and no consent for the search was given, and (2) he was denied effective assistance of counsel when his

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[1] Although the bill of information does not reflect it, the State pursued only the armed robbery charge against the defendant.

[2] While the State filed a habitual offender bill of information, it took no further action in having the defendant adjudicated a felony habitual offender. As such, the trial court's sentence is pursuant to LSA-R.S. 14:64.

trial counsel failed to object to the warrantless arrest and search. We affirm the conviction and sentence.

## FACTS

On March 20, 2004, Ascension Parish Sheriff's Office deputies and detectives responded to an armed robbery call at Burger Delight on U.S. Highway 61 in Ascension Parish. According to the victim, Millard Harris, manager of Burger Delight, he walked out to the back of the building at closing time. A light-skinned black male approximately 6'1" tall, with a bandana covering his face, approached Mr. Harris with a handgun, put the handgun to Mr. Harris's forehead, and demanded money. Mr. Harris gave him $300 in cash. A scuffle ensued, and the perpetrator hit Mr. Harris in the back of the head with his gun, knocking him down. The perpetrator then ran into the wooded area behind Burger Delight.[3]

A police K-9 unit was brought to the scene to track the perpetrator's trail in the woods. Along the trail, police officers found several items, including a blue jumpsuit, a black "do-rag" with yellow markings, a pair of work gloves, and Kool Filter King cigarettes. The dog also led police officers to a car nearby.[4] The car had a warm hood and was about 800 feet from Burger Delight. Detectives ran the license plate and discovered the car belonged to the defendant.

Based on information from Latasha Coleman, the defendant's girlfriend at the time, detectives obtained the video surveillance tape from a Circle K on Airline Highway in Gonzales. The tape showed that about two

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[3] Lisa Harris, Millard Harris's sister, was also working at Burger Delight. She witnessed Mr. Harris struggling with the perpetrator. At trial, she testified that the perpetrator had long sleeves, a little cap, and a red bandana on his face.

[4] The car was in the Controlled Maintenance, Inc. parking lot. Detectives contacted the owner of Controlled Maintenance, who said that there should have been no cars in the parking lot at that time.

hours before Millard Harris was robbed, a person who appeared to be the defendant was in the Circle K. He was wearing a blue jumpsuit and a "do-rag."

Upon learning that the defendant was living in an apartment in Gonzales with Ms. Coleman, detectives went to the apartment and found the defendant under his bed. The defendant was arrested and, pursuant to a search of the apartment, detectives found several items, including black jean shorts containing $600.64 in cash, a black "do-rag" cap, and Kool Filter King cigarettes. Detective Barry Tullier testified at trial about the conversation he had with Ms. Coleman, as follows:

> She informed me that shortly after nine o'clock on the night of March 20th, '04 that [the defendant] contacted her, sounded all out of breath or ask her [sic] -- I'm sorry. At that time asking her if she had made it back from Reserve, Louisiana. Later she received a second phone call from him, per her words, that he was out of breath saying, "I messed up. I messed up. I'm in deep trouble. I need you to come pick me up."

**ASSIGNMENT OF ERROR NO. 1**

In his first counseled assignment of error, the defendant argues that the bill of information was fatally defective. Specifically, the defendant contends that the bill of information failed to name an individual as the victim of the armed robbery.

The bill of information states:

> Count #1: ON OR ABOUT MARCH 20, 2004, IN THE PARISH OF ASCENSION, KENNETH RORY WILLIAMS committed the offense of R.S. 14:64 ARMED ROBBERY, by the intentional taking of property having value from the person of another or which is in the immediate control of another, namely BURGER DELIGHT, by use of force or intimidation while armed with a dangerous weapon, to-wit: A GUN.
>
> Count #2: ON OR ABOUT MARCH 20, 2004, IN THE PARISH OF ASCENSION, KENNETH RORY WILLIAMS committed the offense of R.S. 14:34 AGGRAVATED BATTERY, by committing a battery upon the person of MILLIARD [sic] HARRIS while armed with a dangerous

weapon, to-wit: A GUN.

At no time in the instant matter did the defendant complain prior to or during trial of the alleged defect in the bill of information. Where an accused has been fairly informed of the charge against him and has not been prejudiced by surprise or lack of notice, the technical sufficiency of the indictment may not be questioned after conviction, where no objection was raised to it prior to the verdict and where, without unfairness, the accused may be protected against further prosecution for any offense or offenses charged by it through examination of the pleadings and the evidence in the instant prosecution. **State v. James**, 305 So.2d 514, 516-17 (La. 1974). See also **State v. Folse**, 623 So.2d 59, 64-65 (La. App. 1 Cir. 1993).

In the instant matter, the bill of information clearly stated that the defendant was being charged with armed robbery. The bill gave the date and the location of the robbery and the type of weapon used. While the bill did list Burger Delight as the victim that was robbed, at a motion to suppress hearing prior to trial, the prosecutor informed the court that the victim, Millard Harris, provided a description of the perpetrator when he reported the robbery. See **State v. Woods**, 97-0800, pp. 16-18 (La. App. 1 Cir. 6/29/98), 713 So.2d 1231, 1242-43, writ denied, 98-3041 (La. 4/1/99), 741 So.2d 1281. Also prior to trial, the State filed a notice of intent to use evidence of other crimes, wherein it stated in pertinent part under paragraph IV:[5]

> In the instant case the defendant, Kenneth Williams, was arrested by the Ascension Parish Sheriff's office on March 21, 2004 for violation of R.S. 14:64 Armed Robbery. The defendant is alleged to have robbed Milliard [sic] Harris, owner and operator of Burger Delight at gunpoint. A Bill of Information was filed on April 23, 2004.

[5] This paragraph is actually the fifth paragraph of the pleading and should have been designated as number "V", but was incorrectly designated as number "IV".

We find there was no surprise or lack of notice as to the identity of the individual allegedly robbed by the defendant. The defendant has shown no prejudice as a result of the technical insufficiency of the bill of information. See **State v. Cross**, 461 So.2d 1246, 1249 (La. App. 1 Cir. 1984). Accordingly, this assignment of error is without merit.

## ASSIGNMENTS OF ERROR NOS. 2 AND 3

The defendant contends in his second counseled assignment of error that the sentence imposed was unconstitutionally excessive. He contends in his third assignment of error, *inter alia*, that defense counsel's failure to object to the sentence or file a motion to reconsider sentence constituted ineffective assistance of counsel.[6]

A review of the record indicates that defense counsel did not file a motion to reconsider sentence nor did he object to the sentence. Under LSA-C.Cr.P. arts. 881.1(E) and 881.2(A)(1), the failure to make or file a motion to reconsider sentence shall preclude the defendant from raising an objection to the sentence on appeal, including a claim of excessiveness. The defendant, therefore, is procedurally barred from having this assignment of error reviewed. **State v. Duncan**, 94-1563, p. 2 (La. App. 1 Cir. 12/15/95),

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[6] In his third assignment of error, the defendant also raises other issues of ineffective assistance of counsel, namely defense counsel's failure to object to the defective bill of information, to call the defendant to testify, and to "provide other evidence of prejudice." The defective bill of information argument has been addressed hereinabove, where we concluded the defendant was not prejudiced, even if the bill was defective. Thus, the claim of ineffective assistance of counsel as to that issue falls. See **State v. Robinson**, 471 So.2d 1035, 1038-39 (La. App. 1 Cir.), writ denied, 476 So.2d 350 (La. 1985). As to the other two issues (failure to call the defendant and to "provide other evidence of prejudice"), the defendant mentions them only in his third assignment of error heading. He does not address them in his argument. As such, they are considered abandoned. See Uniform Rules - Courts of Appeal, Rule 2-12.4. Moreover, these other allegations of ineffective assistance of counsel raised in the defendant's brief cannot be sufficiently investigated from an inspection of the record alone. Defense counsel's decision to not have the defendant testify, or his decision to present or not present certain evidence, could have involved matters of trial preparation and/or strategy. Decisions relating to investigation, preparation, and strategy cannot possibly be reviewed on appeal. Only in an evidentiary hearing in the district court, where the defendant could present evidence beyond what is contained in the instant record, could these allegations be sufficiently investigated. (The defendant would have to satisfy the requirements of LSA-C.Cr.P. art. 924, et seq. in order to receive such a hearing.) Accordingly, these allegations are not subject to appellate review. See **State v. Albert**, 96-1991, p. 11 (La. App. 1 Cir. 6/20/97), 697 So.2d 1355, 1363-64.

667 So.2d 1141, 1143 (en banc per curiam). See also **State v. Felder**, 2000-2887, p. 10 (La. App. 1 Cir. 9/28/01), 809 So.2d 360, 369, writ denied, 2001-3027 (La. 10/25/02), 827 So.2d 1173. However, we will examine the sentence for excessiveness because it is necessary to do so as part of the analysis of the ineffective counsel issue in the defendant's third assignment of error. See **State v. Bickham**, 98-1839, pp. 7-8 (La. App. 1 Cir. 6/25/99), 739 So.2d 887, 891-92.

Although a claim of ineffective assistance of counsel is normally raised in an application for postconviction relief, this court may address the merits of the claim when the record on appeal is sufficient. See **State v. Seiss**, 428 So.2d 444, 448-49 (La. 1983). In this instance, the record is sufficient as to the excessive sentence issue, and we will therefore address the defendant's claim regarding defense counsel's failure to object to the sentence or to file a motion to reconsider sentence.

In **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the United States Supreme Court enunciated the test for evaluating the competence of trial counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

In evaluating the performance of counsel, the inquiry must be whether counsel's assistance was reasonable considering all the circumstances. **State v. Morgan**, 472 So.2d 934, 937 (La. App. 1 Cir. 1985). In making the determination of whether the specific error resulted in an unreliable

sentence, the inquiry must be directed to whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. **Id.** Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. **Robinson**, 471 So.2d at 1038-39.

Failure to file a motion to reconsider sentence in itself does not 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. **Felder**, 2000-2887 at p. 11, 809 So.2d at 370 (citing **State v. Pendelton**, 96-367, p. 30 (La. App. 5 Cir. 5/28/97), 696 So.2d 144, 159, writ denied, 97-1714 (La. 12/19/97), 706 So.2d 450).

Article I, section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the trial court to consider when imposing sentence. While the entire checklist of Article 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. 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. Holts**, 525 So.2d 1241, 1245 (La. App. 1 Cir. 1988).

The articulation of the factual basis for a sentence is the goal of Article 894.1, not rigid or mechanical compliance with its provisions. 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 Article 894.1. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982). The trial judge should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than confinement. **State v. Jones**, 398 So.2d 1049, 1051-52 (La. 1981).

In the instant matter, the trial court imposed a ninety-nine year sentence at hard labor under LSA-R.S. 14:64(B). While the trial court did not mention Article 894.1 by name, it is clear from its reasons for judgment at sentencing that it considered the article. The trial court noted that according to the defendant's presentence investigation report, he had "an extensive criminal history, including numerous convictions for crimes of violence." The report also indicated that the defendant is "dangerous and imposes an extreme threat to society." Finally, in the report, the Department of Public Safety and Corrections recommended the maximum sentence due to the defendant's "history of violent crimes, his total disregard for human life, and the trauma that he has inflicted on the victims in this case."

This court has stated that maximum sentences permitted under statute may be imposed only 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. Hilton**, 99-1239, p. 16 (La. App. 1 Cir. 3/31/00), 764 So.2d 1027, 1037, writ denied, 2000-0958 (La. 3/9/01), 786 So.2d 113. As noted above, due to a history of violent crimes, the defendant poses an extreme threat to society.

Considering the trial court's careful review of the circumstances, the presentence investigation report, and the fact the defendant poses an unusual risk to public safety due to his past conduct of repeated criminality, we find no abuse of discretion by the trial court. Accordingly, the sentence imposed is not grossly disproportionate to the severity of the offense and, therefore, is not unconstitutionally excessive.

Because we find the sentence is not excessive, defense counsel's alleged failure to timely file a motion to reconsider sentence, even if constituting deficient performance, did not prejudice the defendant. See **State v. Wilkinson**, 99-0803, p. 3 (La. App. 1 Cir. 2/18/00), 754 So.2d 301, 303, writ denied, 2000-2336 (La. 4/20/01), 790 So.2d 631. His claim of ineffective assistance of counsel, therefore, must fall.

These assignments of error are without merit.

## ***PRO SE* ASSIGNMENTS OF ERROR NOS. 1 AND 2**

In his first *pro se* assignment of error, the defendant argues that he was arrested without an arrest warrant, that his apartment was searched without a search warrant, and that neither he nor his girlfriend gave police officers consent to search the apartment. As such, the defendant asserts the evidence obtained by police officers from the search of the apartment was the result of an illegal search and seizure.

In his second *pro se* assignment of error, the defendant argues that he was denied effective assistance of counsel when defense counsel failed to

contest the warrantless arrest and warrantless search of his apartment by filing a pretrial motion to suppress the illegally obtained evidence.

We address these interrelated assignments of error together. At trial, both Detectives Tullier and Hebert testified that a search warrant was obtained to search the defendant's apartment. Further, Detective Tullier testified that an "affidavit of arrest" was presented to a judge stating that there was probable cause to arrest the defendant based on the information presented. Thus, contrary to the defendant's assertions that he was arrested without a warrant and that his apartment was searched without a warrant, the trial testimony indicated otherwise. Other than this testimony, however, the record contains no documentary evidence, such as the arrest warrant and affidavit or the search warrant and affidavit.

Three motions to suppress were filed and a pretrial hearing was conducted on each of those motions. Defense counsel did not address in any way the search of, and subsequent seizure of items from, the defendant's apartment. In the first motion to suppress, defense counsel sought to suppress any items found by the dog by contesting the training of the dog and the certification of the trainer. In the second motion to suppress, defense counsel sought to suppress any evidence found in the defendant's car. In the third motion to suppress, defense counsel, again, sought to suppress any items found by the dog, but this time based on the lack of DNA evidence.

The first motion to suppress was a *pro se* motion filed by the defendant. The other two motions to suppress were filed by defense counsel. The defendant's *pro se* motion stated in pertinent part, "Defendant moves to suppress all physical evidence obtained in said case pending." Although not specifically stated, this language is arguably broad enough to cover the search of the defendant's apartment. However, at the hearing on

this motion to suppress, defense counsel elected not to address the issue of the search of the apartment but, instead, chose to focus on those items found by police officers pursuant to the search in the woods using the dog. Following is the relevant colloquy during the hearing between the trial court, defense counsel, and the prosecutor, wherein defense counsel limits the scope of the motion to suppress:

> Q. When you went to the scene, out to Burger Delight, at what point did you take the K-9 into the woods and begin --
>
> Mr. Gautreau [defense counsel]:
> I'm going to object, Your Honor. We're getting into the facts of the case. I think this hearing is limited to the training of the dog, the pedigree of the dog, training, the certification, certification of the trainer.
>
> The Court:
> Is that the only issues that you're interested in Mr. Gautreau; is that the basis of the Motion to Suppress?
>
> Mr. Gautreau:
> That is the basis of the Motion to Suppress.
>
> The Court:
> Your Motion to Suppress then deals with the issue of whether this officer is qualified and whether the dog is qualified and that is the extent of your Motion to Suppress?
>
> Mr. Gautreau:
> That particular point, right.
>
> Ms. Bush [prosecutor]:
> Your Honor, just for the record, it was my understanding that this is a suppression hearing to suppress the evidence obtained, not just limited to whether or not this particular K-9 and this officer were certified.
> But having said that, that is all the questions I have for this officer.

The record before us, thus, is incomplete. Since there was no motion to suppress the evidence seized from the defendant's apartment, there is no ruling by the trial court regarding that issue for us to review. While the defendant's *pro se* motion to suppress ostensibly sought the suppression of *any* evidence seized, whether from the woods, the defendant's car, or the

defendant's apartment, defense counsel chose to limit the scope of the motion at the hearing. Defense counsel may have concluded that there was a stronger likelihood to have the evidence seized during the dog search suppressed than to have the evidence seized during the search of the defendant's apartment suppressed, where, presumably, both an arrest warrant and a search warrant were properly obtained.

In any event, the defendant's allegations of ineffective assistance of counsel, as well as his allegations of a warrantless arrest and warrantless search of his apartment, cannot be sufficiently investigated from an inspection of the record alone. Defense counsel's decision to limit the scope of his motions to suppress could have involved matters of trial preparation and/or strategy. Decisions relating to investigation, preparation, and strategy cannot possibly be reviewed on appeal. Only in an evidentiary hearing in the district court, where the defendant could present evidence beyond what is contained in the instant record, could these allegations be sufficiently investigated.[7] Accordingly, these allegations are not subject to appellate review. See **Albert**, 96-1991 at p. 11, 697 So.2d at 1363-64.

## REVIEW FOR ERROR

The defendant asks that this court examine the record for error under LSA-C.Cr.P. art. 920(2). This court routinely reviews the record for such errors, whether or not such a request is made by a defendant. Under Article 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we have found no reversible errors. See **State v. Allen**, 94-1941, p. 11 (La. App. 1

[7] As previously indicated herein, the defendant would have to satisfy the requirements of LSA-C.Cr.P. art. 924, et seq. in order to receive such a hearing.

Cir. 11/9/95), 664 So.2d 1264, 1273, writ denied, 95-2946 (La. 3/15/96), 669 So.2d 433.

**CONVICTION AND SENTENCE AFFIRMED.**