NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0650

STATE OF LOUISIANA

VERSUS

DAMON DAVID CALISTE

Judgment Rendered: October 29, 2010

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On Appeal from the 22nd Judicial District Court
In and For the Parish of St. Tammany
Trial Court Number 460590, Division "G"

Honorable William J. Crain, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Guidry, J. concurs.
Parro, J., concurs in the result.

HUGHES, J.

The defendant, Damon David Caliste, was charged by bill of information with theft of things having a value over $500.00, a violation of LSA-R.S. 14:67A and B(1).[1] The defendant entered a plea of not guilty, was tried before a jury, and was found guilty as charged. The State filed a habitual offender bill of information and defendant was adjudicated a fourth-felony habitual offender.[2] The trial court denied the defendant's motion for new trial and sentenced the defendant to life imprisonment at hard labor without the benefit of probation or suspension of sentence.[3] The trial court denied the defendant's motion to reconsider sentence. The defendant now appeals, challenging the denial of his motion for new trial and the constitutionality of the enhanced sentence. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence.

STATEMENT OF FACTS

On November 18, 2008 around 10:00 p.m., the defendant and codefendant Hinkel entered a Wal-Mart Supercenter in Slidell, Louisiana, and stole several digital photo cameras. The cameras were stored on a locked peg in the photography department of the store and were discovered missing when a store manager recovered several empty camera packages placed throughout the store. The manager reported the missing cameras to the store's loss prevention manager, Brandon Brown, the next day. Brown determined that the defendants stole fourteen cameras valued at an approximate combined total of $1,377.00. The

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[1] The defendant was charged and tried with codefendant Darien P. Hinkel. Hinkel is not a party to the instant appeal.

[2] The defendant's predicate offenses used for enhancement include a 1996 conviction of possession of contraband in prison, a violation of LSA-R.S. 14:402B, a 1994 conviction of armed robbery, a violation of LSA-R.S. 14:64, a 1993 conviction of distribution of cocaine, a violation of LSA-R.S. 40:967, and a 1993 conviction of two counts of forgery, a violation of LSA-R.S. 14:72.

[3] The minutes reflect that the sentence contained a parole restriction. However, the sentencing transcript and the reasons for judgment indicate that the sentence was not imposed with a parole restriction. When there is a discrepancy between the minutes and the transcript, the transcript prevails. **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

defendants returned to the store around 3:00 p.m. the following day, November 19, 2008, and were identified and apprehended by the Slidell Police Department. (R. 145).

ASSIGNMENT OF ERROR NUMBER ONE

In the first assignment of error, the defendant contends that the trial court erred in denying his motion and supplemental motion for a new trial. The defendant argues that the trial court violated its duty to advise him of his right to individual conflict-free representation, contending that the trial court was on notice of problems with the representation. The defendant contends that the defense hypothesis at trial that the fingerprint evidence did not support the finding that the value of the items stolen was more than $500.00, since his fingerprints were only lifted from one of the camera boxes, would have been stronger if the defendants had been tried separately. The defendant notes that in portions of the surveillance footage, he and Hinkel were not together or were passing each other in the camera aisle. The defendant argues that a lawyer dedicated to his interests only would have been in a position to cross-examine the witnesses about the specific occasions the defendant could be tied to a camera theft and, otherwise, could point the finger at Hinkel. The defendant contends that he was only responsible for a few of the stolen cameras, amounting to $300.00 of the total value of the items stolen. The defendant further notes that the jury insisted on viewing the security video a second time, after deliberations had begun, arguing that this strengthens a finding of separate, distinct, and individual culpability between the codefendants that one attorney representing both could not present.

The defendant also notes that the trial judge was on notice of several problems with the assistant public defender. First, the defendant notes a substitution in public defender representation. Second, the defendant notes that substitute defense counsel informed the trial court on Monday, the day before the

trial, that he had only been provided with the security videotapes on July 23rd, with the trial scheduled to begin on July 28th. The defendant also argues that fingerprint evidence presented on the day before the trial raised a defense based on the value of the items specifically connected to the defendants separately.[4] The defendant argues that the public defender was ill-prepared to show that his individual responsibility, even at the expense of his codefendant, amounted only to a misdemeanor. The defendant notes that the stakes were enormous since the felony conviction resulted in an enhanced life sentence. The defendant contends that the substitution of counsel may have led to the trial court's denial of the right to hear a motion to suppress the scissors recovered, noting that because of a lack of preparedness and knowledge about the case, a motion to suppress was not filed. The defendant also notes that no other pretrial motions were filed.

The defendant further contends that this case is distinguishable from others in that counsel was *appointed* to represent both defendants as opposed to *chosen*. The defendant argues that the appointment of a single public defender to represent codefendants implicates the court directly and involves it in the provision and supervision of counsel under the Sixth Amendment to the United States Constitution and Article I, Section 13 of the Louisiana Constitution. The defendant suggests that under LSA-C.Cr.P. art. 517, when counsel is appointed to represent codefendants, the court's obligation should be enhanced, and where the requirements of the Article are not followed, reversal should follow without examination for actual conflict. At any rate, the defendant concludes that there was an actual conflict of interest in the instant case based on the public defender's inability to aggressively represent him while ignoring Hinkel's interest.

[4] The defendant contends that the State did not disclose fingerprint evidence until the day before the trial and that the State in support thereof maintained there was "overwhelming other evidence" against the defendant so that the fingerprint evidence could be introduced despite the untimely disclosure. We note that "harmless error" is not a proper argument in support of the introduction of evidence at trial.

The Sixth Amendment to the United States Constitution and Louisiana Constitution Article I, Section 13 guarantee that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense. See **State v. Cisco**, 2001-2732, pp. 16-17 (La. 12/3/03), 861 So.2d 118, 129, cert. denied, 541 U.S. 1005, 124 S.Ct. 2023, 158 L.Ed.2d 522 (2004). The right to counsel secured under the Sixth Amendment includes the right to conflict-free representation. See **Holloway v. Arkansas**, 435 U.S. 475, 482, 98 S.Ct. 1173, 1177, 55 L.Ed.2d 426 (1978). An actual conflict of interest is defined as follows:

> If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Zuck v. State of Alabama, 588 F.2d 436, 439 (5th Cir.), cert. denied, 444 U.S. 833, 100 S.Ct. 63, 62 L.Ed.2d 42 (1979). Generally, "Louisiana courts have held that an attorney laboring under an actual conflict of interest cannot render effective legal assistance to the defendant she is representing." **Cisco**, 2001-2732 at p. 17, 861 So.2d at 129.

Louisiana Code of Criminal Procedure article 517 provides:

> A. Whenever two or more defendants have been jointly charged in a single indictment or have moved to consolidate their indictments for a joint trial, and are represented by the same retained or appointed counsel or by retained or appointed counsel who are associated in the practice of law, the court shall inquire with respect to such joint representation and shall advise each defendant on the record of his right to separate representation.
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> B. Unless it appears that there is good cause to believe that no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

Article 517 is a procedural vehicle to lessen the possibility that after conviction a jointly-represented defendant will assert a claim that his counsel was

not conflict-free and thus was ineffective. Joint representation is not per se illegal and does not violate the right to assistance of counsel under the Sixth Amendment to the U.S. Constitution or Article I, Section 13 of the Louisiana Constitution unless it gives rise to an actual conflict of interest. **State v. Kahey**, 436 So.2d 475, 484 (La. 1983) (*citing* **State v. Ross,** 410 So.2d 1388, 1390 (La. 1982)). Accordingly, the failure of the trial court to inquire into the joint representation on the record does not rise to the level of a denial of a constitutional right and is subject to a harmless error review. **State v. Miller**, 2000-0218, p. 14 (La. App. 4th Cir. 7/25/01), 792 So.2d 104, 114-15, writ denied, 2001-2420 (La. 6/21/02), 818 So.2d 791; see also **State v. Castaneda**, 94-1118, p. 5 (La. App. 1st Cir. 6/23/95), 658 So.2d 297, 301.

Holloway creates an automatic reversal rule only where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict. **Mickens v. Taylor**, 535 U.S. 162, 168, 122 S.Ct. 1237, 1241-42, 152 L.Ed.2d 291 (2002). In **Holloway**, prior to trial, the defense counsel moved for the appointment of separate counsel for each of the three defendants on the basis of conflict of interest and the motion was denied. **Holloway**, 435 U.S. at 477, 98 S.Ct. at 1175. Prior to the empanelling of the jury, the motion was renewed, but was again denied. **Holloway**, 435 U.S. at 478, 98 S.Ct. at 1175. At trial, the court refused to permit defense counsel to cross-examine any of the defendants on behalf of the other defendants. **Holloway**, 435 U.S. at 479, 98 S.Ct. at 1176. The United States Supreme Court in **Holloway** reversed the defendants' convictions, holding, "whenever a trial court improperly requires joint representation over timely objection reversal is automatic." **Holloway**, 435 U.S. at 488, 98 S.Ct. at 1181.

In **Cuyler v. Sullivan**, 446 U.S. 335, 337-38, 100 S.Ct. 1708, 1712-13, 64 L.Ed.2d 333 (1980), no objection was made against multiple representation of

three defendants until post-conviction. The defendants were tried separately and represented by the same two attorneys. Sullivan was tried first and convicted without his defense presenting any evidence. The other defendants were acquitted in their trials. **Cuyler v. Sullivan**, 446 U.S. at 338, 100 S.Ct. at 1713. In a post-conviction hearing, one of the defense attorneys testified that he remembered he had been concerned about exposing defense witnesses for the other trials. **Cuyler v. Sullivan**, 446 U.S. at 338-39, 100 S.Ct. at 1713.

The U.S. Court of Appeals for the Third Circuit reversed Sullivan's conviction, holding a defendant was entitled to reversal of his conviction whenever he made some showing of a possible conflict of interest or prejudice, however remote. **United States ex rel. Sullivan v. Cuyler**, 593 F.2d 512, 519-21 (3d Cir. 1979). But that decision was subsequently vacated by the U.S. Supreme Court, holding that "the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." **Cuyler v. Sullivan**, 446 U.S. at 350, 100 S.Ct. at 1719.

The court in **Cuyler** additionally held that unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry into the propriety of a multiple representation. **Cuyler v. Sullivan**, 446 U.S. at 347, 100 S.Ct. at 1717. Even where an actual conflict of interest exists and the trial judge fails to make a **Cuyler** inquiry, reversal is not automatic absent a showing that the conflict adversely affected the adequacy of counsel's performance. See **Mickens**, 535 U.S. at 171-74, 122 S.Ct. at 1243-45.

When a defendant raises a pretrial objection because of a possible conflict of interest, **Holloway** requires the trial court to appoint separate counsel or take adequate steps to determine if the claimed risk is too remote. Failure to take either action warrants automatic reversal, even in the absence of specific prejudice.

However, should the objection to multiple representation be made after trial, **Cuyler** is controlling and the defendant must show an actual prejudice in support of his claim. **State v. Marshall**, 414 So.2d 684, 687-88 (La.), cert. denied, 459 U.S. 1048, 103 S.Ct. 468, 74 L.Ed.2d 617 (1982).

Courts of appeal applying **Cuyler** traditionally ask two questions: (1) whether there was an actual conflict of interest, as opposed to a merely potential or hypothetical conflict; and (2) whether the actual conflict adversely affected counsel's representation. If a conflict does not adversely affect counsel's performance, no actual conflict exists. An actual conflict exists when defense counsel is compelled to compromise his or her duty of loyalty or zealous advocacy to the accused by choosing between, or blending, the divergent or competing interests of a former or current client. If a defendant establishes an actual conflict that adversely affected counsel's performance, prejudice is presumed without any further inquiry into the effect of the actual conflict on the outcome of the defendant's trial. See **United States v. Infante**, 404 F.3d 376, 391-93 (5th Cir. 2005).

While we agree with learned defense counsel that the better practice is for the trial court to advise codefendants of their right to separate representation, especially when counsel is court-appointed, Code of Criminal Procedure article 517 does not distinguish between retained or appointed counsel. And in the instant case, because the defendant first raised the conflict issue post-trial, an actual prejudice in support of his claim must be shown. The defendant claims that had he had his own individual counsel, he could have argued that he was only liable for the monetary value of the cameras that he actually touched. This claim, however, assumes that defendant and Hinkel were not working together. To the contrary, the trial court noted that the evidence overwhelmingly showed that both of the defendants worked together to steal the cameras. Specifically, the surveillance

camera footage showed both men walking together in the store, side-by-side, pulling camera boxes from the aisle and placing them into the same buggy. They are again shown, one walking behind the other, removing items from the camera aisle. One places a camera on a shelf and the other grabs it. One drops a camera on the floor, and the other picks it up. Both men remained together in the electronics department, in close proximity, for more than thirty minutes.

As the trial court instructed the jury, all persons concerned in the commission of a crime are principals and are guilty of the crime charged if, whether present or absent, they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime. LSA-R.S. 14:24. The jurisprudence is clear that the mere allegation that one codefendant intends to point an accusing finger at the other is not sufficient to support a claim of actual conflict of interest. **Kahey**, 436 So.2d at 485; **State v. Murphy**, 463 So.2d 812, 825 (La. App. 2d Cir.), writ denied, 468 So.2d 570 (La. 1985). The evidence shows that the defendant was a principal to the theft of the cameras taken by the codefendant and equally culpable in those thefts. The theft of the cameras was a joint, concerted effort by Caliste and Hinkel. Since the defendant did not urge the existence of a conflict of interest before the trial, and has failed to demonstrate the existence of an actual conflict of interest or prejudice, this assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

In the second assignment of error, the defendant contends that the enhanced sentence is excessive. As in his motion to reconsider sentence, in support of this assignment the defendant considers the nature of his offenses. The defendant notes that the total loss for the thefts in the instant offense was under $1,400.00. He further notes that the forgery conviction involved two checks, each in the amount of $25.75. The defendant also notes that the contraband on prison grounds

conviction was based on a small amount of marijuana and that the cocaine distribution conviction was for a single rock. The defendant further notes that the armed robbery offense involved the use of a knife in a business where the defendant waited outside of the building with another of the codefendants. The defendant concludes that in the grand perspective of things, he should not receive a sentence in excess of the minimum twenty years.

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 that 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**, 99-1528, 99-1753, 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 a manifest abuse of discretion. **State v. Loston**, 2003-0977, pp. 19-20 (La. App. 1st Cir. 2/23/04), 874 So.2d 197, 210, writ denied, 2004-0792 (La. 9/24/04), 882 So.2d 1167.

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**, 2004-1032, p. 10 (La. App. 1st Cir. 12/17/04), 897 So.2d 736, 743, writ denied, 2005-0150 (La. 4/29/05), 901 So.2d 1063, cert. denied, 546 U.S. 905, 126 S.Ct. 254, 163 L.Ed.2d 231 (2005); **State v. Faul**, 2003-1423, p. 4 (La. App. 1st Cir. 2/23/04), 873 So.2d 690, 692.

In **State v. Dorthey**, 623 So.2d 1276, 1280-81 (La. 1993), the Louisiana Supreme Court recognized that if a trial judge determines that the punishment mandated by the habitual offender law makes no measurable contribution to acceptable goals of punishment or that the sentence amounts to nothing more than the purposeful imposition of pain and suffering and is grossly out of proportion to the severity of the crime, he is duty bound to reduce the sentence to one that would not be constitutionally excessive. However, the holding in **Dorthey** was made only after, and in light of, express recognition by the court that the determination and definition of acts that are punishable as crimes are purely a legislative function. It is the legislature's prerogative to determine the length of the sentence imposed for crimes classified as felonies. Moreover, courts are charged with applying these punishments unless they are found to be unconstitutional. **Dorthey**, 623 So.2d at 1278. A maximum sentence under the habitual offender law is reserved for the worst offender. **State v. Telsee**, 425 So.2d 1251, 1253 (La. 1983). Particularly, a maximum sentence may be imposed under the habitual offender law where the defendant's criminal record is extensive. **State v. Ballay**, 99-906, pp. 29-30 (La. App. 5th Cir. 2/29/00), 757 So.2d 115, 134, writ denied, 2000-0908 (La. 4/20/01), 790 So.2d 13; **State v. Tran**, 97-640, p. 14 (La. App. 5th Cir. 3/11/98), 709 So.2d 311, 318; **State v. Conners**, 577 So.2d 273, 274 (La. App. 3rd Cir. 1991).

We note that the sentencing comparisons made by the defendant in his appeal brief are of little value. It is well-settled that sentences must be individualized to the particular offender and to the particular offense committed. **State v. Albarado**, 2003-2504, p. 6 (La. App. 1st Cir. 6/25/04), 878 So.2d 849, 852, writ denied, 2004-2231 (La. 1/28/05), 893 So.2d 70; **State v. Banks**, 612 So.2d 822, 828 (La. App. 1st Cir. 1992), writ denied, 614 So.2d 1254 (La. 1993).

Pursuant to LSA-R.S. 14:67B(1), for the underlying offense of theft where the value amounts to $500.00 or more, the defendant was subject to a sentence of not more than ten years imprisonment, with or without hard labor, and a fine of not more than three thousand dollars, or both. As a fourth-felony offender, the defendant was subject, under LSA-R.S. 15:529.1A(1)(c)(i), to a minimum of twenty years imprisonment and not more than life imprisonment. See also LSA-R.S. 14:402G, LSA-R.S. 14:64B, LSA-R.S. 40:967B(4)(b), and LSA-R.S. 14:72D. As previously stated, the defendant was sentenced to life imprisonment at hard labor. In imposing sentence, the trial court considered the facts of the instant offense and the defendant's lengthy criminal record. The trial court concluded that the defendant would continue to commit crimes during any period of not being incarcerated. The trial court further noted that the defendant had committed violent crimes in the past and noted its obligation to protect the community. The trial court was aware of the nature of the crime for which defendant was convicted and was aware of the fact that defendant was a career criminal. Based on the record before us, we do not find that the trial court abused its discretion in imposing the maximum sentence. Considering the facts of the instant offense combined with the defendant's criminal history, the sentence is not shocking or grossly disproportionate to the defendant's behavior. Assignment of error number two is without merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.