Judgment rendered June 23, 2010
Application for rehearing may be filed
within the delay allowed by Art. 922,
La. C.Cr.P.

No. 45,365-KA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

STATE OF LOUISIANA — Appellee

versus

BRADLEY K. CULP — Appellant

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Appealed from the
Eighth Judicial District Court for the
Parish of Winn, Louisiana
Trial Court No. 41,166

Honorable Jacque D. Derr, Judge

* * * * *

EDWARD K. BAUMAN
Louisiana Appellate Project — Counsel for Appellant

R. CHRISTOPHER NEVILS
District Attorney — Counsel for Appellee

* * * * *

Before STEWART, CARAWAY and PEATROSS, JJ.

CARAWAY, J.

After resentencing remand by this court for Bradley Culp's distribution of methamphetamine conviction, the trial court imposed a sentence of 15 years at hard labor to run concurrent with a previously affirmed sentence of 15 years at hard labor for a firearms conviction. Culp appeals the new sentence. We affirm.

Facts

On June 13, 2007, Culp was on probation for a 2006 conviction for distribution of methamphetamine and was arrested after a home visit from his probation officer. During the visit, a search of the home revealed Culp to be in possession of a shotgun, a rifle and a substance later determined by the crime lab to be methamphetamine. Following the defendant's arrest, a drug screen was performed; Culp tested positive for two illegal substances: THC (from marijuana) and amphetamines. Defendant was charged with distribution of methamphetamine and illegal possession of a firearm by a convicted felon and a jury found him guilty as charged. A motion for new trial was denied.

Culp was sentenced to 15 years at hard labor without benefit of probation or suspension of sentence for distribution of methamphetamine, and 15 years of imprisonment at hard labor without benefit of parole, probation or suspension of sentence for the firearms conviction, both sentences to run concurrently. Culp appealed and in *State v. Culp*, 44,270 (La. App. 2d Cir. 7/15/09), 17 So. 3d 429, this court affirmed his convictions and the sentence imposed for the firearms conviction. The court

vacated the sentence imposed on the distribution of methamphetamine conviction, however, because the trial judge erroneously concluded that at least 5 years of the sentence had to be served without benefit of probation or suspension of sentence. Thus, the matter was remanded to the trial court for resentencing. On remand, the trial court sentenced Culp to 15 years at hard labor without any reference to any portion of the sentence being served without benefits. The record indicates that no motion to reconsider was filed. The defendant now appeals the sentence as excessive.

Discussion

Because Culp failed to file a motion to reconsider the imposed sentence, he is relegated to having the appellate court consider the bare claim of constitutional excessiveness. *State v. Mims*, 619 So. 2d 1059 (La. 1993); *State v. Masters*, 37,967 (La. App. 2d Cir. 12/17/03), 862 So. 2d 1121; *State v. Duncan*, 30,453 (La. App. 2d Cir. 2/25/98), 707 So. 2d 164.

A sentence violates La. Const. art. 1, §20 if it is grossly out of proportion to the seriousness of the offense or nothing more than a purposeless and needless infliction of pain and suffering. *State v. Smith*, 01-2574 (La. 1/14/03), 839 So. 2d 1; *State v. Dorthey*, 623 So. 2d 1276 (La. 1993); *State v. Bonanno*, 384 So. 2d 355 (La. 1980). A sentence is considered grossly disproportionate if, when the crime and punishment are viewed in light of the harm done to society, it shocks the sense of justice. *State v. Weaver*, 01-0467 (La. 1/15/02), 805 So. 2d 166; *State v. Lobato*, 603 So. 2d 739 (La. 1992); *State v. Robinson*, 40,983 (La. App. 2d Cir.

1/24/07), 948 So. 2d 379; *State v. Bradford*, 29,519 (La. App. 2d Cir. 4/2/97), 691 So. 2d 864.

Culp is a second felony offender. At the time of the present offenses, he was less than a year into a 3-year term of supervised probation for an earlier conviction for the same offense. Clearly, Culp has failed to benefit from prior sentencing leniency. The sentencing range for the crime of distribution of methamphetamine is imprisonment at hard labor for not less than 2 years nor more than 30 years and a possible fine of not more than $50,000. La. R.S. 40:967(B). Accordingly, Culp received a mid-range sentence.

The record fails to show that Culp's sentence is constitutionally excessive. Considering his prior criminal record and that his sentencing exposure on the distribution charge was 30 years at hard labor, the sentence imposed in no way shocks the sense of justice. Accordingly, this assignment of error lacks merit.

Defendant also makes the argument, though not as a separate assignment of error, that he had ineffective assistance of counsel on remand because his counsel failed to file a motion to reconsider sentence after the defendant was resentenced. This failure, defendant argues, precludes him from raising a full excessive sentence claim on appeal.

As a general rule, a claim of ineffective assistance of counsel is more properly raised in an application for post-conviction relief ("PCR") in the trial court than by appeal. However, defendant's claim is that he received ineffective assistance of counsel in the sentencing phase of the proceedings

which is not cognizable on collateral review pursuant to La. C. Cr. P. art. 930.3. *State v. Thomas*, 08-2912 (La. 10/16/09), 19 So. 3d 466. Accordingly, we will review the merits of defendant's claims.

The right of a defendant in a criminal proceeding to the effective assistance of counsel is mandated by the Sixth Amendment to the U. S. Constitution. *State v. King*, 06-1903 (La. 10/16/07), 969 So. 2d 1228; *State v. Wry*, 591 So. 2d 774 (La. App. 2d Cir. 1991). A claim of ineffectiveness of counsel is analyzed under the two-prong 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).

To establish that his attorney was ineffective, the defendant first must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. The relevant inquiry is whether counsel's representation fell below the standard of reasonableness and competency as required by prevailing professional standards demanded for attorneys in criminal cases. *Strickland*, *supra*. The assessment of an attorney's performance requires his conduct to be evaluated from counsel's perspective at the time of the occurrence. A reviewing court must give great deference to trial counsel's judgment, tactical decisions, and trial strategy, strongly presuming he has exercised reasonable professional judgment. *State v. Grant*, 41,745 (La. App. 2d Cir. 4/4/07), 954 So. 2d 823, *writ denied*, 07-1193 (La. 12/7/07), 969 So. 2d 629; *State v. Moore*, 575 So. 2d 928 (La. App. 2d Cir. 1991). *Also, State v.*

Tilmon, 38,003 (La. App. 2d Cir. 04/14/04), 870 So. 2d 607, *writ denied*, 04-2011 (La. 12/17/04), 888 So. 2d 866.

Second, the defendant must show that counsel's deficient performance prejudiced his defense. This element requires a showing the errors were so serious as to deprive the defendant of a fair trial, *i.e.*, a trial whose result is reliable. *Strickland*, *supra*. The defendant must prove actual prejudice before relief will be granted. It is not sufficient for the defendant to show the error had some conceivable effect on the outcome of the proceedings. Rather, he must show that but for counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different. *Strickland*, *supra*; *State v. Pratt*, 26,862 (La. App. 2d Cir. 4/5/95), 653 So. 2d 174, *writ denied*, 95-1398 (La. 11/3/95), 662 So. 2d 9. A defendant making a claim of ineffective assistance of counsel must identify certain acts or omissions by counsel which led to the claim; general statements and conclusory charges will not suffice. *Strickland*, *supra*; *State v. Jordan*, 35,643 (La. App. 2d Cir. 4/3/02), 813 So. 2d 1123, *writ denied*, 02-1570 (La. 5/30/03), 845 So. 2d 1067.

The mere failure to file a motion to reconsider sentence does not in and of itself constitute ineffective assistance of counsel. A basis for ineffective assistance of counsel may only be found if a defendant can "show a reasonable probability that but for counsel's error, his sentence would have been different." *State v. Allen*, 03-1205 (La. App. 5th Cir. 2/23/04), 868 So. 2d 877. *See also, State v. Louis*, 32,347 (La. App. 2d Cir. 10/27/99), 744 So. 2d 694; *State v. Lee*, 26,542 (La. App. 2d Cir. 5/12/94),

636 So.2d 634; *State v. White*, 03-1535 (La. App. 3d Cir. 4/28/04), 872 So. 2d 588.

While counsel did not file a motion to reconsider sentence on Culp's behalf, defendant does not state what mitigating circumstances counsel could have raised to show a reasonable probability that but for counsel's error, his sentence would have been different. Accordingly, defendant has failed to demonstrate any prejudice caused by the failure to file a motion to reconsider sentence and, therefore, has failed under the second prong of the *Strickland* test to show that his trial counsel was ineffective.

Decree

For the foregoing reasons, Culp's sentence is affirmed.

AFFIRMED.