NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

VERSUS

MARK A. WILLIAMS

COURT OF APPEAL

FIFTH CIRCUIT

STATE OF LOUISIANA

02-KA-145

APPEAL FROM
THE TWENTY-FOURTH JUDICIAL DISTRICT COURT,
PARISH OF JEFFERSON, STATE OF LOUISIANA,
NUMBER 99-237, DIVISION "K,"
HONORABLE AND MARTHA E. SASSONE, PRESIDING.

MAY 29, 2002

WALTER J. ROTHSCHILD
JUDGE

Panel composed of Judges Edward A. Dufresene, Jr.,
Sol Gothard and Walter J. Rothschild.

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AFFIRMED; CASE REMANDED WITH INSTRUCTIONS

This is the defendant's second appeal before this Court. In State v. Williams, 00-58 (La. App. 5 Cir. 5/30/00), 767 So.2d 982, (not designated for publication), this Court vacated the defendant's enhanced sentence because he had not been advised of his right to remain silent before stipulating to the habitual offender bill of information, which alleged him to be a third felony offender. The opinion also remanded the matter for further proceedings.[1]

On January 30, 2001, the State filed another habitual offender bill of information alleging defendant to be a second felony offender.
The same day, the trial court advised the defendant of his rights as a multiple offender and accepted the defendant's stipulation to the bill filed by the State. Thereafter, the trial judge "vacate[d] the original sentence" and imposed an enhanced sentence of three and one-half years at hard labor as a second felony offender.

On April 24, 2001, the defendant filed a pro se writ application with this Court in which he claimed his sentence was excessive, the sole claim asserted in

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[1]A copy of this opinion is attached hereto as "Appendix A".

the present appeal. On April 27, 2001, this Court denied the application, stating that the review of defendant's enhanced sentence was by way of appeal, not supervisory review. On May 18, 2001, the defendant filed a pro se application for post-conviction relief in the district court. The trial judge considered the defendant's application as a motion for an appeal, granted the appeal, and ordered that the Louisiana Appellate Project was to be assigned to handle the appeal.

FACTS

The facts underlying the defendant's conviction for possession of cocaine are not repeated here because they are set out in the attached opinion.

DISCUSSION

Defendant's sole assignment on appeal is that his enhanced sentence of three and one half years as a second felony offender is constitutionally excessive because it is the same sentence he received when he was previously sentenced as a third felony offender. The State responds that the sentence is not constitutionally excessive.

Initially, it is noted that the defendant failed to object to the sentence as excessive, nor did he file a written motion for reconsideration of the sentence. LSA-C.Cr.P. art. 881.1(D) provides that the "[f]ailure to make or file a motion to reconsider sentence or to include a specific ground upon which a motion to reconsider sentence may be based, including a claim of excessiveness, shall preclude the . . . defendant from raising an objection to the sentence or from urging any ground not raised in the motion on appeal or review." Nevertheless, even in the absence of a motion to reconsider sentence, this Court has reviewed a defendant's sentence for constitutional excessiveness out of an abundance of caution. State v. Williams, 98-1146 (La. App. 5 Cir. 6/1/99), 738 So.2d 640, 653-

654, writ denied, 99-1984 (La. 1/7/00), 752 So.2d 176. The following is a review of the defendant's sentence for constitutional excessiveness:

The Eighth Amendment of the United States Constitution and Article I, Section 20 of the Louisiana Constitution prohibit the imposition of excessive or cruel punishment. A sentence is generally considered to be excessive if it is grossly disproportionate to the offense or imposes needless pain and suffering. A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. State v. Lobato, 603 So.2d 739, 751 (La. 1992); State v. Williams, 738 So.2d at 655.

The penalty for possession of cocaine is imprisonment with or without hard labor for not more than five years and a potential fine not to exceed $5000. LSA-R.S. 40:967(C)(2). As a second felony offender, the defendant faced a sentencing range between two and one-half and ten years at hard labor without benefit of probation or suspension of sentence. See LSA-R.S. 15:529.1(A)(1)(a) and (G).

The record of the defendant's first appeal is attached to the instant appeal as an exhibit. That record reflects that the defendant was alleged to be a third felony offender based on a 1989 predicate conviction for attempted simple burglary of an inhabited dwelling and a 1990 predicate conviction for simple burglary. At the multiple offender hearing, the assistant district attorney informed the court that, although the State had previously alleged the defendant to be a third felony offender, the State had determined that one of the two predicate convictions "overlapped." Consequently, the State filed a new bill of information alleging defendant to be a second, rather than a third, felony offender.

The thrust of the defendant's argument in this assignment is that his three and one-half-year sentence as a second felony offender is excessive, since it is

the same length as the sentence imposed when he was previously sentenced as a third felony offender. However, defendant cites no jurisprudence to support this proposition. The Louisiana Supreme Court has stated that the question presented when reviewing a defendant's sentence is not whether another sentence would have been more appropriate but whether the trial court abused its broad sentencing discretion. State v. Jones, 99-2207 (La. 1/29/01), 778 So.2d 1131, 1133. Prior criminal activity is one of the factors to be considered by the trial judge in sentencing a defendant. State v. Washington, 414 So.2d 313, 315 (La. 1982); State v. McCorkle, 97-966 (La. App. 5 Cir. 2/25/98), 708 So.2d 1212, 1219.

There is ample evidence of defendant's prior criminal activity. The defendant was 30 years old at the time he received the enhanced sentence in the instant case, and was 18 years old when he was convicted of attempted simple burglary of an inhabited dwelling in 1989, which is the predicate conviction currently relied upon by the State.

Further, the record of the defendant's first appeal indicates defendant stipulated that he had been convicted of simple burglary in 1990, as alleged by the State in the multiple bill. Even though the State determined that it would not use that conviction to enhance the underlying conviction, the fact remains that the defendant has three prior felony convictions. The record of the first appeal also indicates defendant was convicted for misdemeanor possession of marijuana simultaneously with the cocaine conviction.

Additionally, even sentences lengthier than the defendant's have been upheld. In State v. Haywood, 00-1584 (La. App. 5 Cir. 3/28/01), 783 So.2d 568, 582, the defendant was 22 years old when he committed the offense of possession of cocaine. Haywood was subsequently convicted, found to be a second felony offender, and received an enhanced sentence of eight years. This

Court took note of the defendant's youth, but observed that the defendant had two other adult convictions, a juvenile criminal record, plus numerous other arrests. Under the circumstances, the Haywood court held that the sentence was not excessive. State v. Haywood, 783 So.2d at 582.

In this case, defendant has received an enhanced sentence that is only six months longer than the sentence he received for the underlying offense of possession of cocaine. The enhanced sentence is less than one-half of the ten-year maximum sentence defendant faced as a second felony offender, and defendant did not receive a fine. Considering the defendant's criminal history and the fact that the enhanced sentence is on the lower end of the applicable sentencing range, we fail to find that the sentence is an abuse of the trial judge's discretion.

Defendant also requests a review for patent errors. As is customarily done, the record was reviewed for errors patent, according to LSA-C.Cr.P. art. 920; State v. Oliveaux, 312 So.2d 337 (La. 1975); and State v. Weiland, 556 So.2d 175 (La. App. 5 Cir. 1990). The following matters were discovered.

Although the commitment indicates that the defendant was completely advised of the prescriptive period for filing post-conviction relief, the transcript reflects that the judge failed to indicate when the period began to run. Generally, when there is a discrepancy between the minutes and the transcript, the transcript prevails. State v. Lynch, 441 So.2d 732, 734 (La. 1983); State v. Haynes, 96-84 (La. App. 5 Cir. 6/25/96), 676 So.2d 1120, 1123.

In this Court's original opinion, the trial court was ordered to inform the defendant of the applicable prescriptive period. (See the attached opinion in State v. Williams, 00-KA-58, p. 5. The record contains an order informing defendant that he had "a two year period in which to seek post-conviction relief." Because the trial court in the order did not inform the defendant when the period

begins to run, the information is incomplete. When the district court fails to completely inform a defendant of the prescriptive period for filing post-conviction relief, this Court has remanded the matter for the district court to inform the defendant of the provisions of LSA-C.Cr.P. art. 930.8 by sending appropriate written notice to the defendant within ten days of the rendition of this Court's opinion and to file written proof that defendant received the notice in the record. State v. Badeaux, 01-406 (La. App. 5 Cir. 9/25/01), 798 So.2d 234, 241. Accordingly, we remand the matter to the trial court to send written notice to the defendant which completely informs the defendant of these provisions.

It is also noted that the trial judge failed to specify that the defendant's enhanced sentence would be without benefit of probation or suspension of sentence, as required by LSA-R.S. 15:529.1(G). However, the trial court did not place the defendant on probation or suspend the sentence. Under these circumstances, this Court has held that a trial court is in "substantial compliance with the sentencing directives of the multiple offender statute" if the court does not affirmatively suspend any portion of the enhanced sentence or impose any probationary period, despite the failure to include the above restrictions. See, State v. Munson, 00-1238 (La. App. 5 Cir. 2/14/01), 782 So.2d 17, 21, and the cases cited therein. Thus, we find that no action is required to address the trial court's failure to specify that the sentence should be served without benefit of probation or suspension of sentence.

Moreover, under LSA-R.S. 15:301.1 and State v. Williams, 00-1725 (La. 11/29/01), 800 So.2d 790, 800-801, which interprets that statute, the sentence is "deemed" to contain these restrictions, as provided by Paragraphs A and C of that article:

> A. When a criminal statute requires that all or a portion of a sentence imposed for a violation of that statute be served without benefit of probation, parole, or suspension of sentence, each

sentence which is imposed under the provisions of that statute *shall be deemed to contain the provisions relating to the service of that sentence without benefit of probation, parole, or suspension of sentence.* The failure of a sentencing court to specifically state that all or a portion of the sentence is to be served without benefit of probation, parole, or suspension of sentence shall not in any way affect the statutory requirement that all or a portion of the sentence be served without benefit of probation, parole, or suspension of sentence.

. . . .

C. The provisions of this Section shall apply to each provision of law which requires *all or a portion of a criminal sentence to be served without benefit of probation, parole, or suspension of sentence, or of any one of them, any combination thereof*, or any substantially similar provision or combination of substantially similar provisions.

(Emphasis added).

CONCLUSION

Accordingly, for the reasons assigned herein, the sentence imposed by the trial court is affirmed. However, the case is remanded to the trial court with instructions for the trial court to correctly inform the defendant of the prescriptive provisions for seeking post-conviction relief pursuant to LSA-C.Cr.P. art. 930.8.

AFFIRMED; CASE REMANDED WITH INSTRUCTIONS

Court of Appeal

FIFTH CIRCUIT
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CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED OR DELIVERED THIS DAY MAY 29, 2002 TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

PETER J. FITZGERALD, JR.
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