NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

VERSUS

KERRY ORGERON

COURT OF APPEAL

FIFTH CIRCUIT

STATE OF LOUISIANA

02-KA-276

APPEAL FROM
THE TWENTY-FOURTH JUDICIAL DISTRICT COURT,
PARISH OF JEFFERSON, STATE OF LOUISIANA,
NUMBER 95-6403, DIVISION "I,"
HONORABLE JO ELLEN GRANT, PRESIDING.

JULY 30, 2002

WALTER J. ROTHSCHILD
JUDGE

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

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AFFIRMED AND REMANDED

This is the third time defendant's case has been before this Court on appeal. In State v. Orgeron, 97-1054 (La. App. 5 Cir. 3/11/98), 708 So.2d 1242, defendant's first appeal, this Court dismissed the defendant's appeal as untimely and remanded the matter for the defendant to obtain reinstatement of his appeal rights. In the defendant's second appeal, State v. Orgeron, 98-1016 (La. App. 5 Cir. 4/27/99), 738 So.2d 210 (unpublished), this Court affirmed the defendant's three convictions for purse snatching, but vacated the habitual offender sentence of life imprisonment and remanded for re-sentencing because the record did not reflect which of the underlying sentences was enhanced.[1]

On remand, the State specified one of the underlying sentences to be enhanced, and the trial judge again sentenced defendant to life imprisonment without benefit of probation, parole or suspension of sentence. The defendant moved for reconsideration of the sentence as excessive, which the trial judge denied. After the district court granted defendant's timely-filed pro-se application for post-conviction relief seeking reinstatement of his appeal rights, the instant appeal was lodged.

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[1]Both of the prior appellate records are included with the present record as exhibits.

Along with other assignments of error in his second appeal, 98-KA-1016, defendant had complained that his habitual offender sentence was excessive. Because this Court vacated the habitual offender sentence, the Court pretermitted discussion of this assignment. In the present appeal, defendant has again assigned as error the excessiveness of his habitual offender sentence.

FACTS

On the night of August 7, 1995, Ms. Solange Parker, a 61-year-old grandmother, stopped to purchase some milk at a Shell Station in Jefferson Parish. As she drove up to the Shell Station, Ms. Parker saw a "greasy-looking" man walk out from behind the corner of the building. She thought that the man was coming to open the door of the Shell station for her. Instead, the man grabbed her purse, knocked her to the ground, and dragged her about 25 feet. While the man was dragging Ms. Parker, the strap on her purse broke and then the man fled the scene on foot. The police were called and Ms. Parker gave them a description of the man.

On September 4, 1995, at approximately 4:00 p.m., Wanda Hinson, a 60-year-old grandmother, and her three-year-old granddaughter, Krista, went to McKenzie's Bakery in the Winn-Dixie Shopping Center in Westwego to purchase some petit fours for a birthday party. Ms. Hinson noticed a man who looked like a "vagrant" or a "transient person" sitting on the curb in front of Winn-Dixie. As she and her granddaughter went into McKenzie's, the man came inside. The man stood right beside Ms. Hinson and asked the clerk for change for a dollar. After purchasing the pastries, Ms. Hinson exited the store with her purse on her shoulder. Ms. Hinson was holding Krista's hand with one of her hands and she had her purchases in her other hand. She pushed the door open with her shoulder, and the man caught the door. As Ms. Hinson turned around to thank the man, he pushed her, grabbed her purse, and dragged her on the ground until

she had to let go of the purse. The man had also knocked Krista to the ground. Both Krista and Ms. Hinson were hurt as a result of this incident. Krista's nose and lips were injured and her arm was skinned. Ms. Hinson suffered a sprained shoulder. Additionally, her knee was bruised and was still scarred at the time of trial. Ms. Hinson had $250 in cash and a pair of diamond earrings in her purse that were not recovered. After the incident, the police were called, and Ms. Hinson gave the police a description of the man.

The third incident involved Ms. Myrtle Jones, a 61-year-old lady who lived in Westwego. On September 12, 1995, Ms. Jones was pushing her grocery basket out of the Piggly Wiggly in Westwego on the Westbank Expressway. Her purse was sitting in the child's seat of the shopping cart. Suddenly, she heard someone run up behind her, and then a man pushed the basket away from her and grabbed her purse. She chased the man as he ran away with her purse. The man then got into a car and drove away. Another person who was at the scene took down the license plate of that car and the police were called.

All three victims identified the defendant as the perpetrator from photographic lineups. Defendant was ultimately arrested on September 16, 1995.

DISCUSSION

The defendant contends that his life sentence as a fourth felony offender is constitutionally excessive. After a careful review of the entire record in this matter, we find no merit in this argument.

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. In State v. Dorthey, 623 So.2d 1276 (La. 1993), and more recently in State v. Johnson, 97-1906 (La. 3/4/98), 709 So.2d 672, 676, the

Louisiana Supreme Court recognized that a mandatory minimum sentence under the Habitual Offender Law may still be reviewed for constitutional excessiveness.

In State v. Lindsey, 99-3256 (La. 10/17/00), 770 So.2d 339, 343, cert. denied, 532 U.S. 1010, 121 S.Ct. 1739, 149 L.Ed.2d 663 (2001), the Louisiana Supreme Court recognized that Johnson, supra, had established guidelines for the circumstances under which a court should exercise its discretion to find that a sentence is excessive even though it is the mandatory minimum provided by the Habitual Offender Law. According to Johnson's guidelines,

> a sentencing judge must always start with the presumption that a mandatory minimum sentence under the Habitual Offender Law is constitutional. A court may only depart from the minimum sentence if it finds that there is clear and convincing evidence in the particular case before it which would rebut this presumption of constitutionality.

State v. Johnson, 709 So.2d at 676. See also, State v. Medious, 98-419 (La. App. 5 Cir. 11/25/98), 722 So.2d 1086, 1093, writ denied, 98-3201 (La. 4/23/99), 742 So.2d 876.

The court in Johnson further explained that in order to rebut the presumption of constitutionality, the defendant must clearly and convincingly show that he is "exceptional, which . . . means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense and the circumstances of the case." State v. Johnson, 709 So.2d at 676.

The Louisiana Supreme Court cautioned in State v. Lindsey that "[a] sentencing court should exercise its authority to declare excessive a minimum sentence mandated by the Habitual Offender Statute only under *rare* circumstances, as set forth in *State v. Johnson*." State v. Lindsey, 99-3256 (La. 10/17/00), 770 So.2d 339, 345. (Emphasis in the original). In the event that the

defendant proves by clear and convincing evidence that a downward departure is warranted, the trial judge must impose the "longest sentence which is not constitutionally excessive." State v. Johnson, 709 So.2d at 677.

According to LSA-R.S. 15:529.1(A)(1)(c)(ii), if one of the predicate felonies or the underlying felony is a crime of violence as defined by LSA-R.S. 14:2(13), a life sentence of imprisonment without benefit of probation, parole or suspension of sentence is mandated.[2] In the instant case, the defendant's life sentence is mandatory because the offense that was enhanced, the count of purse snatching that occurred on September 12, 1995, is defined a crime of violence. See LSA-R.S. 14:2(13)(z).

The trial judge originally sentenced defendant on July 17, 1996 to 20 years of imprisonment at hard labor for each count of purse snatching, to run consecutively with each other. After a multiple offender hearing on October 25, 1996, the trial judge sentenced defendant to serve a term of life imprisonment without benefit of parole, probation, or suspension of sentence. On remand, the trial judge again sentenced defendant to life imprisonment. Although the defendant objected to the sentence as excessive, he did not urge any specific basis for the court to deviate from the mandatory minimum sentence.

On appeal, the defendant now contends that the sentence is constitutionally excessive because "purse snatching must surely be regarded as the least heinous" of the crimes of violence in LSA-R.S. 14:2(13), and because he "committed these crimes in the least reprehensible manner. He was unarmed, the criminal acts were limited to snatching the purses, and the victims were unharmed." He also asserts that two of his predicate convictions were "nearly ten years old" when he committed the instant offenses.

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[2]This provision was amended by 2001 La. Acts 403, § 2.

In support of his argument, defendant relies on State v. Webster, 98-0807 (La. App. 4 Cir. 11/10/99), 746 So.2d 799, in which the Fourth Circuit held that a mandatory life sentence was constitutionally excessive for a defendant who was convicted of purse snatching. In reaching this conclusion, the court stated as follows:

> The life sentence imposed in the instant case is clearly excessive. Although purse snatching, La.Rev.Stat. 14:65.1, is regarded as a violent felony, thus triggering the "three strikes" provision of La.Rev.Stat. 15:529.1(A)(1)(b)(ii), it appears the least heinous of those enumerated in La.Rev.Stat. 14:2(13), which defines "violent felony" for the purpose of the multiple offender statute. Furthermore, the defendant committed the underlying crime in the least reprehensible manner. He was unarmed, the criminal act was limited to reaching out to snatch the purse, the victim was not harmed, and her property was recovered immediately following the offense. Finally, the defendant's prior convictions for simple burglary were nearly ten years old when he committed the instant offense.

Id. at 801-802.

Although not mentioned by defendant's brief, the Louisiana Supreme Court remanded Webster to the Fourth Circuit for reconsideration because the Fourth Circuit had failed to analyze the case under State v. Johnson. See, State v. Lindsey 99-3256, consolidated with State v. Webster, 99-3302 (La. 10/17/00), 770 So.2d 339, 341, 345-346.

On remand, the Fourth Circuit vacated its original decree and reinstated the life sentence upon the defendant. Applying the Johnson analysis, the Fourth Circuit reasoned that the record disclosed nothing to indicate that the trial judge had abused his discretion by declining to deviate from the mandatory minimum life sentence. See, State v. Webster, 98-0807 (La. App. 4 Cir. 12/20/00), 775 So.2d 661, 662. Recently, the Louisiana Supreme Court remanded Webster to allow the defendant an opportunity to meet his burden in the district court pursuant to State v. Johnson, which the supreme court pointed out had not been

decided when defendant was sentenced. See, State v. Webster, 01-0397 (La. 1/25/02), 805 So.2d 1178 (per curiam).

In the present case, defendant did not present evidence pursuant to State v. Johnson at the time his sentence was re-imposed in 1999 although Johnson had been previously decided at this time. In addition, defendant does not argue in this court that he did not have an opportunity to meet his burden pursuant to State v. Johnson.

Further, nothing in the record indicates that the defendant is the type of "exceptional" individual contemplated by State v. Johnson. To the contrary, he seems to be the very type of recidivist individual for whom the Habitual Offender Law has been designed. The evidence of defendant's predicate convictions introduced at the habitual offender hearing held on October 25, 1996 reflects the defendant's steady progression toward violence. His first predicate conviction was possession of methaqualone in 1980, his second predicate conviction simple burglary in 1981, his third predicate conviction was simple burglary of an *inhabited dwelling* in 1988, and fourth felony was purse snatching.

Although none of defendant's predicates are listed as crimes of violence, the underlying offense, the September 12, 1995 purse snatching, is an enumerated violent crime. Defendant also has two other convictions for purse snatching, which he committed within a few months of the underlying offense. In both of the other two offenses, the victims were injured. In the August offense, defendant knocked 61-year-old Ms. Parker to the ground and dragged her along the concrete. In the offense involving 60-year-old Ms. Hinson, defendant did the same, and injured Ms. Hinson's three-year-old granddaughter as well. At trial, Ms. Hinson described at trial how the child lay "screaming and bleeding" on the sidewalk.

The record also indicates that the defendant had pending charges for aggravated assault and armed robbery, which the State dismissed at the original sentencing on July 17, 1996. According to the assistant district attorney, defendant had "at least ten prior convictions."

At original sentencing and when the habitual offender sentence was first imposed, the trial judge expressed her belief that the defendant deserved a severe punishment. At original sentencing, the trial judge stated that the defendant

> took advantage of three older women in a very short time span. You were arrogant, you were cocky, you have been that way in Court, other than the day of trial. You have no regard for anybody else. You pick on people who--who have no defenses, or at least a few defenses . . . You hurt a child in one of them. You have no regard for human life in any way, shape or form. . . . Frankly, I'm glad that I'm able to do what I'm going to do, and I'm going to give you twenty years on each count, I will make it consecutive all of the consecutive with each other. You don't deserve to be out of jail. . . .

When the enhanced sentence was first imposed, the trial judge again indicated that a serious sentence was appropriate:

THE COURT:

> Purse snatching, which is in paragraph two, section thirteen, this Court will sentence you, sir, to life in prison, without benefit of parole probation, or suspension of sentence, and sir, I have to tell you, I'm delighted to get you off the streets of Louisiana and the rest of this world, because what you have done to these old ladies, or older women, is beyond comprehension to this Court. You take people–your victims are people that cannot defend themselves, and I'm glad I can take you off the streets.

Based on the foregoing, we find no evidence that would justify a downward departure from the mandatory sentence of life imprisonment. The multiple offender law expresses clear legislative intent. Repeat offenders are to receive

serious sentences. State v. Windham, 99-637 (La. App. 5 Cir. 11/30/99), 748 So.2d 1220, 1224. In light of the defendant's criminal history, we find that the defendant is the typical recidivist offender for whom the Habitual Offender Law was designed. We find that the mandatory life sentence imposed by the trial court is not excessive.

ERROR PATENT DISCUSSION

The record of defendant's re-imposed enhanced sentence, 02-KA-276, was reviewed for errors patent, according to LSA-C.Cr.P. art. 920; State v. Oliveaux, 312 So.2d 337 (La. 1975); State v. Weiland, 556 So.2d 175 (La. App. 5 Cir. 1990). Because defendant received an error patent review upon his original appeal, that record is not part of the patent error review. See, State v. Taylor, 01-452 (La. App. 5 Cir. 11/14/01), 802 So.2d 779, 783; State v. Alberto, 95-540 (La. App. 5 Cir. 11/28/95), 665 So.2d 614, 625, writs denied, 95-1677 (La. 3/22/96), 669 So.2d 1222, 96-0041 (La. 3/29/96), 670 So.2d 1237.

The transcript of the instant appeal reflects that the trial judge properly imposed the life sentence without benefit of probation, parole or suspension of sentence, but the commitment only indicates that the sentence is to be served without *benefit of probation or suspension of sentence*. 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). Facing a similar situation in State v. Gaal, 01-376 (La. App. 5 Cir. 10/17/01), 800 So.2d 938, 952, this Court remanded the matter to allow the district court to specify the parole restriction in the commitment. Accordingly, we remand the matter to the trial court to amend the commitment to specify that the sentence is to be served without parole eligibility.

CONCLUSION

For the reasons set forth above, we affirm the defendant's sentence, and we remand the matter to the trial court to amend the commitment to conform with the transcript.

AFFIRMED AND REMANDED

Court of Appeal

FIFTH CIRCUIT
STATE OF LOUISIANA

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