NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2018 KA 0397

STATE OF LOUISIANA

VERSUS

GLENN THOMPKINS a/k/a GLEN THOMPKINS

Judgment Rendered: DEC 06 2018

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Appealed from the
Seventeenth Judicial District Court
In and for the Parish of Lafourche
State of Louisiana
Docket Number 558,909

Honorable Walter I. Lanier III, Judge Presiding

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BEFORE: GUIDRY, THERIOT, AND PENZATO, JJ.

Penzato, J. concurs

GUIDRY, J.

The defendant, Glenn Thompkins, was charged by bill of information with obscenity, a violation of La. R.S. 14:106, and pled not guilty. After a trial by jury, the defendant was found guilty as charged. The trial court denied the defendant's motions for new trial and post-verdict judgment of acquittal, and he was sentenced to three years imprisonment at hard labor. The defendant subsequently appealed to this court, assigning error to the constitutionality of his sentence. In this court's previous opinion, State v. Thompkins, 17-0210 (La. App. 1st Cir. 9/21/17), 232 So. 3d 40, the defendant's conviction and sentence were affirmed.

In November 2016, the State filed a habitual offender bill of information alleging the defendant's status as a fourth or subsequent felony habitual offender. Following a hearing, the defendant was adjudicated a fourth or subsequent felony habitual offender.[1] The trial court vacated the sentence previously imposed and resentenced the defendant to imprisonment at hard labor for forty-five years with credit for time served. The defendant filed a motion to reconsider sentence, but the motion was denied. The defendant now appeals, assigning error to the excessiveness of his enhanced sentence. For the following reasons, we affirm the defendant's habitual offender adjudication and sentence.

STATEMENT OF FACTS

The following facts are summarized from this court's previous discussion in Thompkins, *supra*. On December 19, 2014, Officer Sheena Hill, a corrections

[1] Predicate #1 was set forth as the defendant's February 27, 1997 guilty plea under 32nd Judicial District Court, Docket No. 261,280, to Second Degree Battery. Predicate #2 was set forth as the defendant's October 30, 1998 guilty plea under 17th Judicial District Court, Docket No. 308,111, to Possession of Cocaine. Predicate #3 was set forth as the defendant's May 4, 1999 guilty plea under 17th Judicial District Court, Docket No. 314,377, to Possession of Cocaine. Predicate #4 was set forth as the defendant's March 20, 2002 guilty plea under 17th Judicial District Court, Docket No. 364,121, to Distribution of Cocaine. Predicate #5 was set forth as the defendant's March 15, 2011 guilty plea under 17th Judicial District Court, Docket No. 492,385, to Possession of Cocaine. Predicate #6 was set forth as the defendant's December 3, 2015 guilty plea under 12th Judicial District Court, Docket No. 186,342, to Battery of a Correctional Officer.

officer at the Lafourche Parish Detention Center, was conducting her nightly security check when she came in contact with the defendant, an inmate at the facility. Officer Hill, as required of female officers, announced her presence by saying "female" or "female on the block" as she entered Block F, where the defendant was housed. Officer Hill testified that the purpose of the announcement is to alert an inmate that a female officer is approaching in order to allow them to get dressed or cover themselves to avoid exposure to the officer. The announcement was made approximately thirty feet from the third cell on the catwalk, where the defendant was located at the time (one cell over from the fourth cell where he was assigned). As she proceeded down the catwalk performing the security check, Officer Hill used a device called a guardian to scan inmate identification tags and report inmate activities. When Officer Hill approached cell three, the defendant was lying in bed two masturbating, with his penis exposed and a towel over his eyes. The defendant had a sheet hanging from the bunkbed, blocking the view of the other inmate in the cell, but allowing a full view from the catwalk. After Officer Hill addressed the defendant, he removed the towel from over his eyes, slightly held his head up to make eye contact with the officer, then put his head back down and continued masturbating. Officer Hill immediately used the guardian to document the defendant's activity as "Masturbating," and reported the incident to her lieutenant after completing her rounds.

EXCESSIVE SENTENCE

In his sole assignment of error, the defendant alleges the enhanced sentence, imposed on him as an "aging offender", is unconstitutionally excessive. He does not challenge the validity of the habitual offender adjudication.

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of cruel or excessive

punishment. 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 the sense of justice. State v. Andrews, 94-0842, pp. 8-9 (La. App. 1st 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. State v. Holts, 525 So. 2d 1241, 1245 (La. App. 1st Cir. 1988).

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. State v. Brown, 02-2231, p. 4 (La. App. 1st Cir. 5/9/03), 849 So. 2d 566, 569. 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 court 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. See State v. Jones, 398 So. 2d 1049, 1051-52 (La. 1981). On appellate review of a sentence, the relevant question is whether the trial court abused its broad sentencing discretion, not whether another sentence might have

been more appropriate. State v. Thomas, 98-1144, pp. 1-2 (La. 10/9/98), 719 So. 2d 49, 50 (per curiam).

In State v. Dorthey, 623 So. 2d 1276, 1280-81 (La. 1993), the Louisiana Supreme Court opined that if a trial court judge were to find that the punishment mandated by La R.S. 15:529.1 makes no "measurable contribution to acceptable goals of punishment" or that the sentence amounted to nothing more than "the purposeful imposition of pain and suffering" and is "grossly out of proportion to the severity of the crime," he has the option, indeed the duty, to reduce such sentence to one that would not be constitutionally excessive. In State v. Johnson, 97-1906, pp. 6-9 (La. 3/4/98), 709 So. 2d 672, 676-77, the Louisiana Supreme Court reexamined the issue of when Dorthey permits a downward departure from the mandatory minimum sentences in the Habitual Offender Law. While both Dorthey and Johnson involve the mandatory minimum sentences imposed under the Habitual Offender Law, the Louisiana Supreme Court has held that the sentencing review principles espoused in Dorthey are not restricted in application to the penalties provided by La R.S. 15:529.1. See State v. Fobbs, 99-1024 (La. 9/24/99), 744 So. 2d 1274, 1275 (per curiam); State v. Collins, 09-1617, p. 7 (La. App. 1st Cir. 2/12/10), 35 So. 3d 1103, 1108, writ denied, 10-0606 (La. 10/8/10), 46 So. 3d 1265.

Louisiana Revised Statutes 14:106(G)(1) provides that "[e]xcept as provided in Paragraph (5) of this Subsection, on a first conviction, whoever commits the crime of obscenity shall be fined not less than one thousand dollars nor more than two thousand five hundred dollars, or imprisoned, with or without hard labor, for not less than six months nor more than three years, or both." Furthermore, La. R.S. 15:529.1 (prior to amendment by 2017 La. Acts Nos. 257, § 1 and 282, § 1) provides in pertinent part:

> A. Any person who, after having been convicted within this state of a felony . . . thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows:
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> * * * *
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> (4) If the fourth or subsequent felony is such that, upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life then:
>
> (a) The person shall be sentenced to imprisonment for the fourth or subsequent felony for a determinate term not less than the longest prescribed for a first conviction but in no event less than twenty years and not more than his natural life[.]

In this appeal, the defendant does not challenge the validity of his habitual offender adjudication, and does not otherwise cite any mitigating factors to support a reduced sentence, but rather generally claims that his "forty[-]five year sentence is overwhelmingly excessive for masturbating behind a sheet on an all male tier of the jail." At the habitual offender hearing, the trial court found that the defendant was the same individual who pled guilty to the predicate offenses identified by the State. The trial court also noted the ten-year cleansing period pursuant to La. R.S. 15:529.1(C) had not passed regarding any of the predicate offenses. Therefore, the defendant was adjudicated a fourth or subsequent felony habitual offender in accordance with La. R.S. 15:529.1(A)(4)(a) (prior to amendment by 2017 La. Acts Nos. 257, § 1 and 282, § 1).

The defendant's sentencing exposure was twenty years to natural life at hard labor. See La. R.S. 14:106(G)(1) & La. R.S. 15:529.1(A)(4)(a). Here, the defendant's sentence of forty-five years at hard labor does not violate the prescribed sentencing provisions. In sentencing the defendant, the trial court noted the sentence was appropriate "considering the duration of his criminal history, the types of crimes that occurred with a minimum of a crime of violence and a weighted or heightened crime and a battery on a correctional officer . . . ." Further, the court noted that:

> [B]asically in a 20 to 22-year period of time from the alleged offense date of the second degree battery in 1995 to today's date with approximately 22 years passing, there was only approximately two years during that entire time and maybe a little bit more, two years, maybe four months, during that entire period of time where [the defendant] was either not incarcerated as a result of a pending charge, or serving time on an executed sentence, or was paroled out of serving time on a sentence, or was under probation after receiving a sentence which resulted in his release and being placed on a probationary status.

Despite the reasons articulated by the trial court, had I been the sentencing judge, I would not have given the defendant a forty-five year sentence as a recidivist for the instant offense of obscenity. However, I am constrained by the law and jurisprudence to find that the trial court did not abuse its wide discretion in imposing its sentence.

HABITUAL OFFENDER ADJUDICATION AND SENTENCE AFFIRMED