| | | |
|---|---|---|
| **STATE OF LOUISIANA** | * | **NO. 2000-KA-2119** |
| **VERSUS** | * | **COURT OF APPEAL** |
| **ANTHONY L. SIMPSON** | * | **FOURTH CIRCUIT** |
| | * | **STATE OF LOUISIANA** |
| | * | |
| | * | |

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 406-964, SECTION "F"
HONORABLE DENNIS J. WALDRON, JUDGE

* * * * * *

**PER CURIAM**

* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Charles R. Jones and Judge James F. McKay, III)

**HARRY F. CONNICK,** DISTRICT ATTORNEY
**NICOLE BRASSEAUX BARRON,** ASSISTANT DISTRICT ATTORNEY
619 SOUTH WHITE STREET
NEW ORLEANS, LA 70119

COUNSEL FOR PLAINTIFF/APPELLEE

**GWENDOLYN K. BROWN**
LOUISIANA APPELLATE PROJECT
P.O. BOX 64962
BATON ROUGE, LA 708964962

COUNSEL FOR DEFENDANT/APPELLANT

**CONVICTION AFFIRMED;**
**SENTENCE VACATED;**

**REMANDED FOR RESENTENCING.**

The defendant, Anthony L. Simpson, was charged by bill of information on May 17, 1999, with solicitation with intent to engage in unnatural carnal copulation, a violation of La. R.S. 14:89(A)(2). At his arraignment on May 26, 1999 the defendant pleaded not guilty. Probable cause was found at a preliminary hearing on June 24, 1999, and a six-member jury found the defendant guilty as charged after trial on July 6, 1999. The State filed a multiple bill charging the defendant as a fourth felony offender, but after a hearing on September 3, 1999, the trial court found that because the Boykinization of the prior crimes was inadequate the State had failed to prove the defendant was a multiple offender. On that same day the defendant was sentenced to serve five years at hard labor. The defendant's motion for reconsideration of sentence was denied, and his motion for an appeal was granted.

At trial Officer Michael Lohman testified that on April 2, 1999, he and his partner, Detective Danny Jewel, were working in the vice crimes unit in the French Quarter when they encountered the defendant at the intersection of Dauphine and St. Louis Streets. The officers were wearing plain clothes and crossing the street on foot when the defendant, who had "the appearance of a female," made eye contact and said hello to them. The

officers stopped on the corner, and the defendant walked up to them and "grabbed both of our crotches simultaneously." He asked what they wanted, and they replied they were looking for a good time. The defendant suggested going into the Double Play Lounge, but the officers declined; he then suggested the Deja Vu Lounge, and the three men went there. While in the bar, Officer Lohman ordered three drinks. The defendant told the officers that for one hundred dollars he could show them a good time, and he specifically offered oral sex. The defendant also told them that he had a friend who would be interested in participating if Lohman and Jewel did not both want to have sex with him. The defendant then called to Denise Williams who was in the bar and who agreed to have oral sex for one hundred dollars. The officers told the two that they were staying at the Royal Sonesta Hotel, and the four of them began walking toward the hotel. Officer Lohman suggested entering the back door of the hotel because that door is across the street from the Eighth District Police Station. As they approached that hotel door, the officers identified themselves as undercover policemen and arrested the defendant and Denise Williams. The defendant was carrying a flowered bag which contained women's clothing.

The defendant makes three assignments of error, all concerning the length of his sentence. The defendant claims that the sentence is

constitutionally excessive, that the trial court did not comply with the requirements of La. C.Cr.P. art. 894.1 in imposing sentence, and the court erred in denying the motion to reconsider the sentence.

La. Const. art. I, § 20 prohibits excessive sentences. State v. Baxley, 94-2982 (La. 5/22/95), 656 So.2d 973, 977. Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. State v. Brady, 97-1095 (La. App. 4 Cir. 2/3/99), 727 So.2d 1264, 1272, rehearing granted on other grounds, (La. App. 4 Cir. 3/16/99); State v. Francis, 96-2389 (La. App. 4 Cir. 4/15/98), 715 So.2d 457, 461, writ denied, 98-2360 (La. 2/5/99), 737 So.2d 741. However, the penalties provided by the legislature reflect the degree to which the criminal conduct is an affront to society. Baxley, 656 So.2d at 979, citing State v. Ryans, 513 So.2d 386, 387 (La. App. 4 Cir. 1987), writ denied, 516 So.2d 366 (La. 1988). A sentence is constitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless imposition of pain and suffering, and is grossly out of proportion to the severity of the crime. State v. Johnson, 97-1906 (La. 3/4/98), 709 So.2d 672, 677; State v. Webster, 98-0807 (La. App. 4 Cir. 11/10/99), 746 So.2d 799, 801. 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. Baxley, 656 So.2d at 979; State v. Hills, 98-0507 (La. App. 4 Cir. 1/20/99), 727 So.2d 1215, 1217.

La. C.Cr.P. art. 894.1specifically requires the trial court to "state for the record the considerations taken into account and the factual basis therefor in imposing sentence." However, articulation of the factual basis for a sentence, not rigid or mechanical compliance with its provisions, is the goal of Art. 894.1. Where the record clearly demonstrates an adequate factual basis for the sentence imposed, resentencing is unnecessary even when there has not been full compliance with Art. 894.1. State v. Lanclos, 419 So.2d 475 (La. 1982). Thus, a failure to comply with La. C. Cr. P. art. 894.1 does not render the sentence invalid if the sentencing choice is clearly supported by the record and reflects that the sentence is not excessive. State v. Smith, 430 So.2d 31 (La. 1983); State v. Scott, 593 So.2d 704, 711 (La. App. 4 Cir. 1991).

The defendant was convicted of La. R.S. 14:89(A)(2) which provides for a fine of not more than two thousand dollars, or imprisonment, with or without hard labor, for not more than five years or both. He was sentenced to the maximum prison term. At sentencing, after finding that the State did not produce proof of Boykinization in the prior pleas to support the multiple bill, the judge said, “Based on the entirety of the record, including the

number of convictions that this person has, the sentence is five years in the Department of Corrections."

In its brief, the State points out that the judge based the sentence on the defendant's criminal history, and his history is sufficient to warrant the sentence. Simpson's past offenses included in the multiple bill are possession of marijuana, second offense in 1998, felony theft of between one hundred and five hundred dollars in 1983, and simple robbery in 1977. The defendant was originally charged with armed robbery in 1977 when he pleaded guilty to simple robbery. Additionally he has a 1975 conviction for simple robbery.

The Supreme Court of Louisiana has recently considered the constitutionality of the crime against nature statute and penalty and found the five-year maximum term of imprisonment provided by La. R.S. 14:89(A)(2) was not unconstitutionally excessive on its face. State v. Smith, 99-0606, 99-2094, 99-2015, 99-2019 (La. 7/6/00), 766 So.2d 501; State v. Baxley, 94-2982 (La. 5/22/95), 656 So.2d 973. However, the court referred to the factors listed in State v. Telsee, 425 So.2d 1251 (La. 1983), as useful in determining whether a particular sentence is grossly out of proportion to the underlying crime for a specific defendant. The factors suggested are: the nature of the offense and the offender, sentences imposed on like crimes,

the legislative purpose of the punishment, and sentences imposed in other jurisdictions. Telsee, 425 So.2d at 1253.

Considering the Telsee factors, first we look at the nature of the offense. The defendant simply suggested a prohibited act. In his dissent to State v. Baxley, 656 So. at 982, Chief Justice Calogero notes that this is an "inchoate" offense like attempt or conspiracy because no commission of an unlawful act occurred. The harm caused or threatened by the defendant's act in this case is insignificant.

Considering the second Telsee factor, the nature of the offender, we note that prior to this offense the defendant had two violent offenses in his (distant) past simple robberies from the 1970's, a felony theft from 1983, and possession of marijuana, second offense in 1998. While acknowledging this deplorable criminal history, we note the defendant's offenses have become less serious with time. He did not testify and no additional facts about him were presented at the sentencing hearing. However, his unconventional appearance at his arrest suggests possible reasons for his conduct. The defendant's conduct does mandate incarceration, but he is hardly the worst sort of offender for whom maximum sentences are reserved.

Looking at the third Telsee factor, the penalties imposed in similar cases, we find that in this court sentences have been well below the five-year

maximum term of imprisonment. In State v. Littleton, 94-0462 (La. App. 4 Cir. 3/29/94), 635 So.2d 398, one of the early cases decided under State v. Dorthey, 623 So.2d 1276 (La.1993), a third offender convicted of solicitation of a crime against nature received a sentence of twelve months. Sentences of thirty months were imposed in State v. Krogh, 95-0273 (La. App. 4 Cir. 7/26/95), 659 So.2d 533, on a second offender convicted under La. R.S. 14:89(A)(2) and La. R.S. 15:529.1 and on third offenders in State v. Hamilton, 96-0807 (La. App. 4 Cir. 6/7/96), 677 So.2d 539, and State v. Bullock, 99-2091 (La. App. 4 Cir. 6/14/00), 767 So.2d 124. However, a ten year sentence was imposed on a third offender in State v. Richmond, 98-1015 (La. App. 5 Cir. 3/10/99), 734 So.2d 33, where the judge justified the sentence by noting that the defendant was HIV positive, knew of her condition, and continued to expose others to the disease.

The fourth Telsee factor, the purpose of the legislature in setting the punishment, was considered by the Louisiana Supreme Court in State v. Smith, 766 So.2d at 517, where the court pointed out that the statute imposes no minimum prison sentence or fine. The legislature has given the courts a wide range from a small fine up to five years in prison and a $2,000 fine. The very low initial range indicates the innocuous nature of the offense.

As to the fifth Telsee factor, the punishment for this offense in other

jurisdictions, the court in State v. Smith, 766 So.2d at 515, reported that in seven states the offense is a misdemeanor with minimal potential prison exposure, and in three states the offense is a felony with a longer possible sentence than Louisiana's statute provides.

In the case at bar, we note that the defendant was not sentenced under La. R.S. 15:529.1, but on the basis of his criminal history he received the maximum sentence. In fact, he received a longer term than defendants sentenced as multiple offenders in State v. Littleton, State v. Krogh, State v. Hamilton, and State v. Bullock. However, based on the factors in Telsee, we find that the defendant's sentence is disproportionate to his offense. The sentence is also a heavy burden on the taxpayer who must underwrite this long term. See State v. Littleton.

For the foregoing reasons, the defendant's conviction is affirmed. Because we find merit in the defendant's first assignment of error that his sentence is constitutionally excessive, we vacate the five-year sentence and remand the case for resentencing.

**CONVICTION AFFIRMED;**
**SENTENCE VACATED;**
**REMANDED FOR RESENTENCING**