NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2001-KA-0284**
VERSUS	*	**COURT OF APPEAL**
FERNELL M. RICHMOND	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 416-182, SECTION "G"
Honorable Julian A. Parker, Judge
* * * * * *
Judge Patricia Rivet Murray
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(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, Judge Terri F. Love)

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AFFIRMED

Fernell M. Richmond, who was convicted of crime against nature by solicitation (a violation of La. R.S. 14:89(2)) and sentenced to thirty months at hard labor as a second offender, appeals his conviction and sentence, arguing that there is insufficient evidence to support the conviction and that the sentence is excessive. For the reasons that follow, we affirm the conviction and sentence.

STATEMENT OF FACT

Vice Crimes Officer Vincent George testified that he was working undercover, investigating prostitution related activity on August 2, 2000. As Officer George approached the intersection of Dauphine and Dumaine Streets, he noticed a man, later identified as the Fernell Richmond, standing on the sidewalk, waving at him. When the officer pulled his car to the curb, Mr. Richmond got into the front passenger seat. A conversation ensued during which Mr. Richmond asked Officer George if he was "looking to get my freak on" and that for $20.00 "[Mr. Richmond] was going to 'F' [Officer

George] in [his] rear, put it like that." At that point Officer George gave the prearranged "take down" signal. Officer Steven Villere, a "take down" officer, responded to this signal and arrested Mr. Richmond.

Fernell Richmond, who took the stand in his own behalf, testified that on the night of his arrest he was returning from the Charity Hospital detox center, walking through the French Quarter to his aunt's house when Officer George asked him if he needed a ride. Mr. Richmond accepted. He testified that the undercover officer then offered him $20.00 to engage in sex. Mr. Richmond testified that when he refused and attempted to get out of the vehicle, he was arrested.

ERRORS PATENT

A review of the record for errors patent reveals none.

DISCUSSION:

Mr. Richmond contends that the evidence was insufficient to support the conviction. When assessing the sufficiency of evidence to support a conviction, the appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found proof beyond a reasonable doubt of each of the essential elements of the crime charged. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Jacobs*, 504 So.2d 817

(La.1987).

Conviction for violation of La. R.S. 14:89 A(2) requires proof beyond a reasonable doubt that the accused (1) solicited another with the intent to engage in any unnatural carnal copulation, and (2) [in exchange] for compensation. *State v. Bullock*, 99-2091 (La. App. 4 Cir. 6/14/00), 767 So.2d 124, *writ den.* 2000-2150 (La. 6/22/01), ___So.2d ___, 2001 WL 758795.

Mr. Richmond argues that the words "getting a freak on" and "'F' in the rear" are too ambiguous to support the verdict beyond a reasonable doubt.

Officer George testified that Mr. Richmond clarified what he was talking about; he stated that "he didn't do, he got done." In response to further questioning about what he meant, Mr. Richmond replied, "I do to you, you're not going to do anything to me." When Officer George asked what he was going to do to him, Mr. Richmond answered that "he was going to 'F' [the officer] in [his] rear." Officer George explained that he used "F" in order to clean up his language for the jury.

Apparently the jury believed the testimony of Officer George over that of Mr. Richmond. Viewing all of the evidence in a light most favorable to the prosecution, any rational trier of fact could have found all of the

essential elements of solicitation for crime against nature present beyond a reasonable doubt. The evidence is sufficient to support the conviction.

Mr. Richmond also maintains that his sentence is excessive. The sentencing range for violation of La. R.S. 14:89 is imprisonment, with or without hard labor, for not more than five years. In this case, as a second offender, Mr. Richmond was exposed to a sentencing range of two and one-half (thirty months) to ten years. La. R.S. 15:529.1(A)(1)(a). He was sentenced to the statutory minimum, thirty months.

Even though a sentence under the Habitual Offender Law is the minimum provided by that statute, the sentence may still be unconstitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, or is nothing more than the purposeful 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. Dorthey*, 623 So.2d 1276, 1280-81 (La.1993). However, the entire Habitual Offender Law has been held constitutional, and, thus, the minimum sentences it imposes upon habitual offenders are also presumed to be constitutional. *Johnson*, 709 So.2d at 675; *State v. Young*, 94-1636, (La.App. 4 Cir. 10/26/95), 663 So.2d 525, 527.

There must be substantial evidence to rebut the presumption of

constitutionality. *State v. Francis*, 96-2389, (La.App. 4 Cir. 4/15/98), 715 So.2d 457, 461. A defendant must clearly and convincingly show that the mandatory minimum sentence under the Habitual Offender Law is unconstitutionally excessive. *Johnson*, 709 So.2d at 678. "Departures downward from the minimum sentence under the Habitual Offender Law should occur only in rare situations." *Johnson*, 709 So.2d at 677.

In *State v. Lindsey*, 99-3256 (La.10/17/00), 770 So.2d 339, the Louisiana Supreme Court reiterated its holding from *Johnson*, that in order to rebut the presumption that the mandatory minimum sentence provided by the Habitual Offender Law is constitutional, a defendant must clearly and convincingly show that:

> [h]e is exceptional, which in this context 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.

Lindsey, 770 So.2d at 343 (quoting *Johnson*, 709 So.2d at 676, citing *State v. Young*, 94-1636 at pp. 5-6 (La.App. 4 Cir. 10/26/95), 663 So.2d 525, 529 (Plotkin, J. concurring).

Also, the Supreme Court in *Lindsey* reiterated its holding in *Johnson* that while a defendant's record of non-violent offenses may play a role in a sentencing judge's determination that a minimum sentence is too long, it

cannot be the only reason, or even the major reason for declaring such a sentence excessive. As the court recognized, a defendant's history of violent or non-violent offenses has already been taken into account by the legislature in setting the sentences under the Habitual Offender Law. *Id.*

The trial judge must keep in mind the goals of the statute, which are to deter and punish recidivism. The sentencing court's role is not to question the wisdom of the Legislature in requiring enhanced punishments for multiple offenders, but rather to determine whether the particular defendant before it has proven that the minimum sentence is so excessive in his case that it violates Louisiana's constitution. *Id.*

The only fact that Mr. Richmond offers in support of his contention that his sentence is excessive is that the predicate conviction was for a non-violent drug possession offense and his recent conviction was for "mere" solicitation. He has failed to carry his burden under *Johnson*.

CONCLUSION

Fernell Richmond's conviction and sentence are affirmed.

AFFIRMED