STATE OF LOUISIANA	*	**NO. 2001-KA-0522**
VERSUS	*	**COURT OF APPEAL**
CARL B. RILEY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
PLAQUEMINES 25TH JUDICIAL DISTRICT COURT
NO. 92-3437, DIVISION "A"
HONORABLE MICHAEL E. KIRBY, JUDGE
* * * * * *
JAMES F. MCKAY, III
JUDGE
* * * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge Steven R. Plotkin, Judge James F. McKay, III)

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AFFIRMED

STATEMENT OF CASE

On November 16, 1992, the State charged Carl B. Riley with four counts of distribution of cocaine, a violation of La. R.S. 40:967(A)(1). On December 12, 1993, the State dismissed counts three and four of the bill of information. On May 4, 1994, a twelve-member jury found the defendant guilty as charged on counts one and two. On June 16, 1994, the court denied the defendant's motion for new trial. On October 13, 1994, the court sentenced the defendant to twenty years on each count, sentences to run concurrently with credit for time served. That same day, defense counsel entered an oral motion for appeal. On November 3, 1995, the defendant waived his right to an appeal and on November 14, 1995, the court ordered the appeal dismissed. On July 27, 1998, the defendant filed a petition for post conviction relief, which the trial court granted on February 12, 1999. On March 3, 2000, defendant filed a motion for appeal. The trial court granted the motion on March 14, 2000.

STATEMENT OF FACT

On August 11, 1992, Sergeant Michael Lafrance of the Plaquemines Parish Sheriff's Department was working undercover investigating the sale of narcotics in the Sunrise area. Sergeant Lafrance made two controlled buys from the defendant that night. The first buy occurred at approximately 6:30 p.m. Sergeant Lafrance drove down Church Lane, and the defendant approached his vehicle, and asked Sergeant Lafrance what he wanted. Sergeant Lafrance stated that he wanted one rock. The defendant responded that one rock would cost Sergeant Lafrance $25.00. Sergeant Lafrance gave the defendant the money; the defendant walked to a subject standing nearby, and showed the currency to the subject. The defendant walked back to Sergeant Lafrance, and handed him the cocaine. As Sergeant Lafrance drove away, he put the cocaine in a glass vial, which he dated and signed, and turned over to Sergeant David Illg.

Sergeant Lafrance made the second buy approximately forty-five minutes later, in the same location, for the same price and under the same circumstances as the first buy. The only difference between the first and second buy was that the defendant was alone when he made the sale to Sergeant Lafrance.

Sergeant Lafrance recognized the defendant as having previously served as a trustee in the kitchen of the Plaquemines Parish jail.

Sergeant David Illg testified that the sheriff's department was investigating citizen complaints of drug dealers standing on the side of the road making sales to motorists. Sergeant Illg corroborated Sergeant Lafrance's testimony that

he was supervising Sergeant Lafrance and Operation Clean Sweep in the Sunrise/Empire area the night the defendant was arrested.

NOPD criminalists Edgar Dunn and John Palm, Jr. testified by stipulation as experts in the analysis and identification of controlled substances. The criminalists testified that the evidence seized in this case tested positive for cocaine.

The defendant testified, denying that he made any drug sales to Sergeant Lafrance. The defendant claimed that Sergeant Lafrance approached him, asking for help in making some drug busts and threatened him if he refused to cooperate. The defendant contended that he was working with the sheriff's department to set up drug buys, identify the drug dealers, and get them away from neighborhood children.

ERRORS PATENT

A review of the record for errors patent reveals two. First, the record contains no indication that the defendant was ever arraigned. Failure to arraign the defendant or the fact that he did not plead is waived if the

defendant enters upon the trial without objecting thereto. In that case it is considered as if he had pleaded not guilty. C.Cr.P. art. 555; *State v. Crowell*, 99-2238 (La. App. 4 Cir. 11/21/00), 773 So.2d 871, *rehearing denied* (January 12, 2001), *writ den.* 2001-0045 (La. 11/16/01), ___So.2d ___, 2001 WL 1522150. The record does not reflect that any objections regarding arraignment were made prior to trial, nor does the defendant allege it as error now. Therefore, any irregularity with regard to the defendant's arraignment was waived, and the failure of the record to show that the defendant was arraigned on the charges in this case is harmless error. *State v. Brown*, 92-1337 (La. App. 4 Cir. 6/15/93), 620 So.2d 508.

The second error patent concerns the defendant's sentences. Under La. R.S. 40:967(B)(4)(b), the sentences should have been imposed without benefit of parole, probation or suspension of sentence for the first two and a half years. The sentences are therefore illegally lenient. Heretofore, this Court has followed the dictates of *State v. Fraser*, 484 So.2d 122 (La. 1986), which held that a sentencing error favorable to the defendant that is not raised by the State on appeal may not be corrected. However, the legislature recently enacted La. R.S. 15:301.1, which addresses those instances where sentences contain statutory restrictions on parole, probation or suspension of sentence. Paragraph A of La. R.S. 15:301.1 provides that in instances where

the statutory restrictions are not recited at sentencing, they are contained in the sentence, whether or not imposed by the sentencing court. Moreover, in *State v. Williams*, 00-1725 (La. 11/29/01), 800 So.2d 790, the Supreme Court has ruled that paragraph A self-activates the correction and eliminates the need to remand for a ministerial correction of an illegally lenient sentence, which may result from the failure of the sentencing court to impose punishment in conformity with that provided in the statute. Hence, this Court need take no action to correct the trial court's failure to specify that the first two and one half years of the defendant's sentences be served without benefit of parole, probation or suspension of sentence. The correction is statutorily effected. La. R.S. 15:301.1A.

ASSIGNMENT OF ERROR NUMBER 1

In his first assignment, the defendant argues the sentence is excessive, considering that he has no history of violent crime.

La. Const. art. I, S 20 explicitly 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. 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). 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*, 96-3041 (La.3/4/98), 709 So.2d 672. 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.

In reviewing a claim that a sentence is excessive, an appellate court generally must determine whether the trial judge has adequately complied with statutory guidelines in La.C.Cr.P. art. 894.1, and whether the sentence is warranted under the facts established by the record. *State v. Trepagnier*, 97-2427 (La.App. 4 Cir. 9/15/99), 744 So.2d 181, 189. If adequate compliance with La.C.Cr.P. art. 894.1 is found, the reviewing court must determine whether the sentence imposed is too severe in light of the particular defendant and the circumstances of the case, keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged. *State v. Bonicard*, 98-0665 (La.App. 4 Cir. 8/4/99), 752 So.2d 184, 185, *writ denied,* 99-2632 (La.3/17/00), 756 So.2d 324.

However, in *State v. Major*, 96-1214 (La.App. 4 Cir. 3/4/98), 708 So.2d 813, this court stated:

> The articulation of the factual basis for a sentence is the goal of Art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows 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). The reviewing court shall not set aside a sentence for excessiveness if the record supports the sentence imposed. La.C.Cr.P. art. 881.4(D).

96-1214 at p. 10, 708 So.2d at 819.

In *State v. Soraparu*, 97-1027 (La.10/13/97), 703 So.2d 608, the Louisiana Supreme Court stated:

> On appellate review of sentence, the only relevant question is " 'whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate.' " *State v. Cook*, 95-2784, p. 3 (La.5/31/96), 674 So.2d 957, 959 (quoting *State v. Humphrey*, 445 So.2d 1155, 1165 (La.1984)), *cert. denied*, 519 U.S. 1043, 117 S.Ct. 615, 136 L.Ed.2d 539 (1996). For legal sentences imposed within the range provided by the legislature, a trial court abuses its discretion only when it contravenes the prohibition of excessive punishment in La. Const. art. I, S 20, i.e., when it imposes "punishment disproportionate to the offense." *State v. Sepulvado*, 367 So.2d 762, 767 (La.1979). In cases in which the trial court has left a less than fully articulated record indicating that it has considered not only aggravating circumstances but also factors militating for a less severe sentence, *State v. Franks*, 373 So.2d 1307, 1308 (La.1979), a remand for resentencing is appropriate only when "there appear[s] to be a substantial possibility that the defendant's complaints of an excessive sentence ha[ve] merit." *State v. Wimberly*, 414 So.2d 666, 672 (La.1982).

Id.

Before imposing sentence in this case, the trial judge carefully considered both aggravating and mitigating factors as provided in C.Cr.P. art. 894.1. Moreover, the court had before it a pre-sentence investigation report, which documented the defendant's extensive record, dating from 1987 and which included arrests for theft, aggravated assault, possession of drug paraphernalia, and battery. Also of note, the defendant has prior convictions for burglary and distribution of cocaine.

The sentencing range for distribution of cocaine at the time of the offense was to two and a half to thirty years, with a possible fine. R.S. 40:967(B)(4)(b). Defendant's sentences of twenty years are higher than mid-level of the sentencing range, but his sentences are still lenient in that the trial court did not impose a fine, nor did it restrict the sentences with denial of benefits on the first two and a half years. R.S. 40:967(B)(4)(b). Given the facts of this case and considering the defendant's extensive criminal history, it does not appear that the court imposed excessive sentences as to this defendant. This assignment is without error.

ASSIGNMENT OF ERROR NUMBER 2

By this assignment, the defendant argues the trial court erred by admitting "other crimes" evidence.

Generally, evidence of criminal offenses other than the offense being

tried is inadmissible as substantive evidence due to the substantial risk of grave prejudice to the defendant. To avoid the unfair inference that a defendant committed the crime charged simply because he is a person of bad character, other crimes evidence is inadmissible unless it has an independent relevancy besides merely showing a criminal disposition. *State v. Hills*, 99-1750 (La.5/16/00), 761 So.2d 516.

Louisiana Code of Evidence article 404(B) provides, in pertinent part that:

> [E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident.

Admission of evidence of other crimes or misconduct creates the risk that the defendant will be convicted of the present offense simply because he is a bad person. Accordingly, such evidence is not admissible except in limited situations. *State v. Reddick*, 94-2230 (La.App. 4 Cir. 2/29/96), 670 So.2d 551.

In this case, during closing argument, the State referenced the defendant's prior conviction for simple burglary. The defense objected and moved for mistrial. The trial judge denied the motion but instructed the jury to disregard any reference to other crimes for any purpose other than an

attack on impeachment.

C. E. art. 609.1. provides in part:

> Attacking credibility by evidence of conviction of crime in criminal cases
>
> A. General criminal rule. In a criminal case, every witness by testifying subjects himself to examination relative to his criminal convictions, subject to limitations set forth below.
>
> B. Convictions. Generally, only offenses for which the witness has been convicted are admissible upon the issue of his credibility, and no inquiry is permitted into matters for which there has only been an arrest, the issuance of an arrest warrant, an indictment, a prosecution, or an acquittal.

In this case, during cross-examination the State did not exceed the parameters of C.E. art. 609.1(C). The State questioned the defendant only about prior convictions, the dates thereof and the sentences imposed.

Even if there was error in the State's closing remark, it was harmless. In order for an error to be harmless, it must be shown beyond a reasonable doubt that the complained-of error did not contribute to the verdict. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). As a trial error, as opposed to a structural error, it may be quantitatively assessed in the context of the other evidence presented. *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). The inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. *Sullivan*

v. Louisiana, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993).

In this case, the jury knew the defendant had an extensive criminal record because the State extensively cross-examined him, without objection, on his record. Moreover, the jury heard Sergeant Lafrance's unequivocal testimony that the defendant sold him cocaine. Moreover, the defendant did not deny that he made the sale to Sergeant Lafrance, only his motivation for doing so. Finally, considering the trial court's admonishment to the jury with regard to permissible impeachment, the defendant could hardly have been prejudiced by the State's closing argument, and the remark certainly did not contribute to the verdict. *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993). This assignment is without merit.

Accordingly, for the aforementioned reasons we affirm the defendant's convictions and sentences.

AFFIRMED