NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2001-KA-0836**
VERSUS	*	**COURT OF APPEAL**
ERNEST T. LEE	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 416-318, SECTION "I"
Honorable Raymond C. Bigelow, Judge

* * * * * *

Chief Judge William H. Byrnes, III

* * * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge James F. McKay III, and Judge David S. Gorbaty)

HARRY F. CONNICK
DISTRICT ATTORNEY
JULIET CLARK
ASSISTANT DISTRICT ATTORNEY
619 South White Street
New Orleans, LA 70119
Counsel for Plaintiff/Appellee

GREGORY J. HUBACHEK

TAYLOR, WELLONS, POLITZ & DUHE, APLC
1515 Poydras Street
Suite 1900
New Orleans, LA 70112
Counsel for Defendant/Appellant

CONVICTIONS AND SENTENCES AFFIRMED

STATEMENT OF THE CASE

By bill of information dated August 23, 2000, Ernest T. Lee was charged with one count of distribution of cocaine and one count of possession of cocaine with the intent to distribute. Lee pleaded not guilty to both counts on August 29, 2000. On September 21, 2000, Lee was tried by a twelve-member jury that found him guilty as charged on the first count and guilty of possession of cocaine on the second count. The State filed a multiple bill, and Lee filed a motion for new trial. On February 23, 2001, the trial court denied the motion for new trial and found Lee to be a second offender. The trial court sentenced Lee to fifteen years at hard labor without benefit of probation, parole, or suspension of sentence for the first five years on Count 1; and, on Count 2, the trial court sentenced Lee to five years at hard labor. The sentences are to run concurrently. The trial court denied Lee's motion for reconsideration of sentence.

STATEMENT OF THE FACTS

New Orleans Police Department Detective Donald Polk testified that on July 26, 2000, he was working undercover in a narcotics investigation in the Heartwood Village Apartments. He stated that it was decided to do a "buy-bust" operation in which he or another officer would put himself into a position to solicit drug dealers. He related that the money to be used in making the drug buys was photocopied. Officer Polk described Heartwood Village as a haven for drug-trafficking. Officer Polk, who was wired in order to record any transactions, testified that at around midnight, he drove through the apartment complex waiting for someone to flag him down, but no one did.

Officer Polk then drove to the back of the complex where he saw the defendant seated on the stairs in a hallway area. Officer Polk testified that he stopped and asked the defendant if the defendant could help him purchase some "dimes," a slang term for crack cocaine or marijuana. He further testified that the defendant told him to park at the back of the complex; and, after he did as instructed, the defendant came over to him and asked what he wanted. Officer Polk told the defendant that he wanted a couple of "dimes," and the defendant told Officer Polk that he would be right back. The defendant walked out of his sight, but was then watched by surveillance detectives. After a few minutes, the defendant reappeared and waved to

Officer Polk to drive towards him. The officer did so and was then instructed by the defendant to park his car behind a cab that was farther up the driveway. Officer Polk testified that after he parked his car, the defendant came up; Officer Polk asked him what was going on and told the defendant not to worry about it if the defendant did not want to go through with the deal. Officer Polk testified that the defendant responded by telling him to keep his cool, and then walked over to two other men. Officer Polk stated that he was afraid he was going to be robbed.

The defendant walked back to Officer Polk's car and told him to roll down his window, and then handed him a hard rock-like substance, which later tested positive for cocaine. Officer Polk gave the defendant a marked twenty dollar bill, drove off and gave a signal to other officers that the transaction was completed. Officer Polk testified that the defendant did not appear to hesitate at any time during the entire transaction. The transaction was taped, and the tape was played for the jury.

Detective Derek Burke testified that he was in a surveillance unit at the apartment complex on the night in question. He stated that he did not see Officer Polk initially meet with the defendant. Detective Burke said that he was on the main driveway and that Officer Polk was on the back driveway. Detective Burke stated that he could hear Officer Polk talking to someone

and that Officer Polk then drove back to the main driveway. Detective Burke saw the defendant walk into a courtyard between two buildings, but lost sight of him. The defendant then walked back to the main driveway and met Officer Polk. Detective Burke saw the defendant point towards a taxicab and motion Officer Polk to pull over there. The detective stated that the defendant went back to the courtyard and spoke to two subjects. One of the subjects walked towards Officer Polk's car to look at him and then returned to the defendant and the other subject. The defendant walked back to Officer Polk's car, and Detective Burke saw him make a hand-to-hand transfer of an object Detective Burke could not see. After Officer Polk drove away, Detective Burke kept an eye on the defendant and directed three detectives to the defendant's location. Detective Burke stated that when the defendant saw them, he ran through the courtyard chased by one of the detectives. The two subjects who had been talking with the defendant were detained but not arrested.

Detective Jeff Sislo testified that he was part of the arrest team and did not see the transaction. After receiving a signal from Officer Polk that the transaction had been made, he, Officer Shawn Dent, and Officer Kevin Jackson were directed by Detective Burke to the defendant's location. Detective Sislo stated that as soon as he and the two officers exited their car,

the defendant started running up a flight of stairs. As he chased the defendant, Detective Sislo saw paper currency fall from the defendant's person. Detective Sislo continued chasing the defendant who opened the door to a storage room and removed a gun from his waistband. Detective Sislo stated that he then saw the gun on the floor of the storage room. Detective Sislo stated that he then saw the defendant reach again for his waistband from which he removed a small round white object that was the size of a golf ball. The defendant tossed this object onto a shelf in the storage room. Detective Sislo testified that he reached the defendant by this time and placed him under arrest. He took the defendant down the stairs to the two officers, and saw the bill on the ground that he had seen fall. He picked up the twenty dollar bill, and gave it to the officers. Detective Sislo went back to the storage room where he recovered a .38 caliber revolver and a piece of clear plastic containing twenty pieces of white compressed matter. Detective Sislo compared the twenty dollar bill with the one that had been photocopied and found that the serial numbers matched. Testing of some of the pieces of white matter in the plastic was positive for cocaine.

ERRORS PATENT

A review of the record reveals no errors patent.

ASSIGNMENTS OF ERROR NOS. 1, 2, 3, 5, & 7

In these assignments of error, the defendant complains that the State failed to prove his guilt and that he established the defense of entrapment. He further complains that the trial erred in denying his motion for new trial on these grounds. He asserts the fact that the jury found him guilty of simple possession of cocaine, rather than possession of cocaine with the intent to distribute, establishes that the jury did not believe that the defendant was predisposed toward criminal activity.

The standard for reviewing a claim of insufficient evidence is whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the offense proved beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781; State v. Hawkins, 96-0766 (La. 1/14/97), 688 So. 2d 473. The reviewing court is to consider the record as a whole and not just the evidence most favorable to the prosecution; and if rational triers of fact could disagree as to the interpretation of the evidence, the rational decision to convict should be upheld. State v. Mussall, 523 So. 2d 1305 (La. 1988). Additionally, the court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. Id. The trier of fact's determination of credibility is not to be disturbed on appeal absent an abuse of discretion. State v. Cashen, 544 So.

2d 1268 (La. App. 4 Cir. 1989).

The defendant was found guilty of two offenses. First, he was convicted of distribution of cocaine. The elements of distribution of cocaine are knowingly and intentionally distributing a controlled dangerous substance classified in Schedule II. La. R.S. 40:967(A); State v. Brumfield, 93-2087 (La. App. 4 Cir. 6/30/94), 639 So. 2d 1196. He was also convicted of possession of cocaine. To support a conviction for possession of cocaine, the State must prove that the defendant was in possession of the illegal drug and that he knowingly possessed it. La. R.S. 40:967(C).

The defendant asserts that Detective Polk entrapped him into selling the crack cocaine.

Contentions of entrapment are reviewed on appeal pursuant to the sufficiency of evidence standard of Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979). Also see, State v. Long, 97-2434 (La. 4 Cir. 8/25/99), 744 So. 2d 143, writ denied, 99-2780 (La. 3/17/00), 756 So. 2d 1140 and State v. Hardy, 98-25, p. 9 (La. App. 5 Cir. 5/13/98), 715 So. 2d 466, 471. The entrapment defense is composed of two elements: (1) an inducement by a state agent to commit an offense; and (2) lack of a predisposition to commit the offense on the part of the defendant. State v. Francis, 98-811 (La. App. 5 Cir. 1/26/99), 727 So. 2d 1235, 1238. Thus, when reviewing a

claim for entrapment, a reviewing court must first determine whether the defendant proved by a preponderance of the evidence that he was induced to commit the crime. State v. Long, supra, 97-2434, p.11, 744 So. 2d at 150-151. The question of whether the government agent induced an innocent person to commit a crime that he would not otherwise commit is for the jury to decide. Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210 (1932).

The defendant did not establish the defense of entrapment. Although Officer Polk initiated the contact with the defendant by asking the defendant to help him buy some "dimes," none of Officer Polk's subsequent actions can be construed as having induced the defendant to commit an offense he would not have otherwise committed. There was no indication that the defendant was reluctant to engage in the transaction. Officer Polk merely provided the defendant with the opportunity to commit a crime which the defendant was predisposed to commit. The State proved that the defendant knowingly and intentionally sold cocaine to Officer Polk. The State further proved, by the testimony of Detective Sislo, that the defendant possessed the cocaine that was seized from the storage room.

The defendant has also asserted that the trial court erred in denying his motion for new trial on the grounds that the evidence was insufficient to support the guilty verdicts. La. C.Cr.P. article 851(1) provides that the trial

court shall grant a defendant's motion for new trial whenever the verdict is contrary to the law and evidence. To reverse the trial court's denial of a motion for a new trial, the reviewing court must find that the denial was arbitrary and a palpable abuse of the trial court's discretion. State v. Tyler, 342 So. 2d 574 (La. 1977). Great weight is to be attached to the exercise of the trial court's discretion which should not be disturbed on review even if reasonable persons could differ as to the propriety of the trial court's action. State v. Talbot, 408 So. 2d 861 (La. 1980).

Nothing in the record indicates that the trial court erred in denying the defendant's motions for new trial or for post-verdict judgment of acquittal on the basis of the sufficiency of the evidence. These assignments of error are without merit.

ASSIGNMENTS OF ERROR NOS. 4 & 6

In these assignments of error, the defendant complains that the trial court erred in denying his motion for new trial on the grounds that the State made improper comments during closing argument. The defendant also maintains that he was not afforded the opportunity to confront the State's key witnesses.

La. C.Cr.P. art. 774 provides:

> The argument shall be confined to the evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may

> draw therefrom, and to the law applicable to the case.
>
> The argument shall not appeal to prejudice.
>
> The state's rebuttal shall be confined to answering the argument of the defendant.

The defendant objected to the prosecutor's statement that the police had received numerous citizens' complaints about drug activity in the area on the basis that there had been no testimony of that, and the trial court sustained the objection. There was no motion for a mistrial. Where there is no motion for a mistrial or an admonishment after the trial court sustains an objection to a remark made by the prosecutor, the defendant has no basis for claiming that the remark was prejudicial. State v. McGee, 98-2116, 98-2124 (La. App. 4 Cir. 2/23/00), 757 So. 2d 50.

The defendant also complains about the prosecutor's statement that the reason the defendant had the twenty pieces of cocaine was because he had just "opened up shop" when the officers approached. The trial court overruled the defendant's objection by stating that it was argument. This comment did not prejudice the defendant with respect to those twenty pieces of cocaine, considering that the jury found the defendant guilty of simple possession of cocaine rather than possession of cocaine with intent to distribute.

The defendant's other asserted basis for a new trial was that he was

denied his right to confront Detective Sislo and Detective Burke about their allegedly having falsified a police report in another case. He asserts that these two police officers have engaged in a pattern of conduct in falsifying public documents in order to enhance the probability of a conviction. In his motion for new trial, the defendant stated that the arresting officer (presumably Detective Sislo) had been suspended from active law enforcement pending a criminal investigation into allegedly unlawful acts while performing his duties. At the hearing on the motion, defense counsel acknowledged that Detective Sislo was not under investigation by the District Attorney's Office, but noted that there were federal charges pending. Defense counsel further stated that the pending investigation involved statements made by Detective Sislo which were inconsistent with statements in his report and recanting of testimony. The prosecutor responded that the investigation concerned proceedings separate from and subsequent to the proceedings involving the defendant. The trial court denied the motion for new trial on this ground.

When a motion for new trial is based on newly discovered evidence, the defendant must show, among other things, that notwithstanding the exercise of reasonable diligence, the new evidence was not discovered before or during trial. La. C.Cr.P. art. 854(1). Additionally, the defendant

must show that the evidence is material to issues at trial and that the evidence is of such a nature that it would have probably produced a different verdict. State v. Metoyer, 97-2266 (La. App. 4 Cir. 10/7/98), 720 So. 2d 148. Newly discovered evidence affecting only a witness' credibility ordinarily will not support a motion for new trial because such new evidence, which is merely cumulative or impeaching, is not an adequate basis for granting a new trial. State v. Cavalier, 96-3052, 97-0103 (La. 10/31/97), 701 So. 2d 949. However, the trial court possesses the discretion to grant a new trial when the witness' testimony is essentially uncorroborated and dispositive of the question of guilt or innocence and when it appears that had the impeaching evidence been introduced, it is likely that the jury would have reached a different result. Id. In making this determination, the trial court may assume that the jury would have known that the witness lied about the matter. Id.

In State v. Perron, 94-0761 (La. App. 4 Cir. 12/27/96), 686 So. 2d 994, this court rejected the defendant's claim that he was entitled to a new trial based upon newly discovered evidence, namely that the officer who had arrested him had been charged with murder and had been the subject of numerous complaints to Internal Affairs. This court held that the trial judge did not abuse his discretion in denying the motion under La. C.Cr.P. art. 851

(3) because the officer's involvement in a later murder was not newly discovered evidence as contemplated by Article 851(3). This court stated that it was instead evidence that did not yet exist because the officer had not yet committed the crime. This court, citing La. C.E. art 609.1(B), noted that only offenses for which the witness had been convicted were admissible on the issue of credibility.

In the present case, the trial court did not abuse its discretion in denying the motion for new trial based upon the allegations made against Detective Sislo in a federal investigation of the circumstances surrounding another case involving a different person and which case was subsequent to the defendant's case in which Detective Sislo testified. These assignments of error are without merit.

ASSIGNMENTS OF ERROR NOS. 8, 9, 10, 11, 12, 13, & 14

In these assignments of error, the defendant raises complaints arising from his having been adjudicated a multiple offender. He claims that the trial court misapplied the standard of proof, that the State failed to prove he was a second offender, and that the ten-year cleansing period had not elapsed. He further claims that the State failed to disclose exculpatory evidence in conjunction with the multiple bill.

In State v. Cossee, 95-2218 (La. App. 4 Cir. 7/24/96), 678 So. 2d 72,

this court held that the failure to file a written response to the multiple bill as required by La. R.S. 15:529.1(D)(1)(b) precluded appellate review of the defendant's claim that the documentary evidence was insufficient to support one of the prior convictions set forth in the multiple bill. The record in the present case does not contain a written response; but the defendant specifically raised the issue of the lack of fingerprint evidence at the multiple bill hearing, and the trial court noted the defendant's objection to the multiple offender adjudication. An oral objection has been found sufficient to preserve such issues for appellate review. State v. Anderson, 97-2587 (La. App. 4 Cir. 11/18/98), 728 So. 2d 14. Thus, the defendant in the present case preserved the issue of identity for appellate review.

At the multiple bill hearing, Officer Terry Bunch, latent fingerprint examiner, testified that he fingerprinted the defendant that morning. He compared those prints with those on an arrest register dated November 21, 1989, in the name of Ernest Lee. He stated that the prints he took that morning matched those on the arrest register. The arrest was for two counts of armed robbery, and Officer Bunch identified a bill of information charging Ernest Lee and another man with simple robbery. The bill of information was in State's Exhibit 3 which included docket masters, a waiver of constitutional rights/plea of guilty form, and a certified copy of the

arrest register that Officer Bunch identified as being the same as the one in State's Exhibit 2. The guilty plea form also contained fingerprints, but Officer Bunch stated that those prints were unreadable.

Following Officer Bunch's testimony, defense counsel argued that the State had to prove identity beyond a reasonable doubt; and the trial judge asked counsel if that was the burden in a multiple bill hearing. After defense counsel said that it was, the trial judge stated that he disagreed. After some further argument, the trial judge stated:

> I've reviewed the State's Exhibit 1, which is the fingerprint card, which was taken here in Court today.
>
> I've also reviewed State's Exhibit 2, which is the certified copy of the arrest register, which was taken from the defendant date [sic] of his arrest on November 21, 1989. The police officer – the fingerprint expert who testified indicated that there is no doubt in his mind that these two – this defendant is the same defendant who was arrested and fingerprinted on November 21st, 1989.
>
> I've also reviewed State's Exhibit 3 which contains a certified copy of a conviction in Case # 340-002 which contains a certified copy of an arrest register which is identical to the arrest register with the fingerprints on the back of State's Exhibit 2.
>
> I've also reviewed the Plea of Guilty form and the minute entry, which indicates that all the required rights, the defendant was advised of all his constitutional rights in connection with this case. And I feel the State has met its burden as to whether or not the defendant was advised of his constitutional rights prior to pleading guilty.
>
> I've also looked at the two signatures of Mr.

> Ernest Lee contained on his Plea of Guilty form and have looked at a Plea of Guilty form as to count three in this case, which was signed by Mr. Ernest Lee on November 2nd, 2000, and it appears to me that the signatures are identical, which is another thing which shows to me that this is the same Ernest Lee who plead [sic] on December 3rd, 1989.

The trial court found the defendant to be a second offender and noted the defendant's objection for the record.

La. R.S. 15:529.1(D)(1)(b) states that the district attorney has the burden of proving beyond a reasonable doubt any issue of fact and that the presumption of regularity of judgment shall be sufficient to meet the original burden of proof. The Louisiana Supreme Court set forth the burden of proof in habitual offender proceedings in State v. Shelton, 621 So. 2d 769, 779-780 (La. 1993).

The State must establish the prior felony and that the defendant is the same person convicted of that felony. State v. Neville, 96-0137 (La. App. 4 Cir. 5/21/97), 695 So. 2d 534. There are various methods available to prove that the defendant is the same person convicted of the prior felony offense, such as testimony from witnesses, expert opinion as to a comparison of the defendant's fingerprints with those of the person previously convicted, photographs contained in a duly authenticated record, or evidence of an identical driver's license number, sex, race, and date of birth. State v.

Henry, 96-1280 (La. App. 4 Cir. 3/11/98), 709 So. 2d 322. The mere fact that the defendant and the person previously convicted have the same name does not constitute sufficient evidence of identity. Id.

The State proved beyond a reasonable doubt that the defendant was the same Ernest Lee who pleaded guilty to armed robbery in 1989. Detective Bunch testified unequivocally that the fingerprints from the 1989 arrest register matched those of defendant taken the morning of the hearing. Detective Bunch was unable to read the fingerprints on the bill of information; thus, he was unable to compare them to the defendant's fingerprints. This is contrary to the defendant's assertion that his prints did not match those on the bill of information. That is, the fact that the quality of the fingerprints on the bill of information made them unsuitable for comparison with the defendant's prints does not inevitably lead to the conclusion that the fingerprints on the bill of information were not those of the defendant. The arrest register was also part of the certified record from the 1989 guilty plea; thus, it linked the prints on State's Exhibit 2 to State's Exhibit 3. The date of birth on the arrest register is the same as the defendant's, and the date of the offenses and the names of the victims on the arrest register containing the fingerprints are the same as those on the bill of information and the docket master.

The defendant also asserts that the State withheld exculpatory evidence from him in conjunction with the multiple offender proceedings, namely that the fingerprints on the bill of information from the predicate offense did not match his. The defendant did not raise this particular objection at any point during the multiple bill hearing. Hence, the merits of this issue are not be considered.

The defendant has raised as an assignment of error the State's failure to prove that he was advised of his constitutional rights when he pleaded guilty to the prior offense; however, he has made no argument on this particular issue in his brief and the claim is deemed abandoned. Rule 2-12.4, Uniform Rules-Courts of Appeal; State v. Lambert, 98-0730 (La. App. 4 Cir. 11/17/99), 749 So. 2d 739. Moreover, the defendant failed to raise this particular issue during the multiple bill hearing; thus, appellate review was precluded.

The final issue with regard to the multiple bill is whether the State proved that the ten-year cleansing period had not elapsed.

The expiration of the previous sentence is determined by the date of the actual discharge from supervision by the Department of Corrections. State v. Lorio, 94-2591, p. 4 (La. App. 4 Cir. 9/28/95), 662 So. 2d 128, 130. Generally, the State has the burden of proving that the ten-year cleansing

period of La. R.S. 15:529.1 has expired. State v. Langlois, 96-0084, p. 14 (La. App. 4 Cir. 5/21/97), 695 So. 2d 540, 548, writ granted, remanded, on other grounds, 97-1491 (La. 11/14/97), 703 So. 2d 1281. In the instant case, however, the defendant failed to object contemporaneously to the lack of a discharge date. In State v. Jones, 94-0071 (La. App. 4 Cir. 3/29/95), 653 So. 2d 746, this court held that the failure to object contemporaneously to the lack of a dischar

ge date precluded review of that claim on appeal. Id., 94-0071 at p. 5, 653 So. 2d at 748. However, in Lorio, supra, the defendant also failed to specifically object to the State's failure to show that the then five-year cleansing period had elapsed, but did object to "the certified copies of the prior charges used as the predicate" in the habitual offender proceeding. Id., 94-2591 at p. 3, 662 So. 2d at 130. This court found that the general objection to those documents was sufficient to preserve the issue for review. But unlike Lorio, the defendant in the present case raised objections to the fingerprint evidence only. Therefore, appellate review is precluded. Accordingly, none of the assignments of error regarding the multiple offender adjudication has merit.

ASSIGNMENTS OF ERROR NOS. 15 & 16

In these two assignments of error, the defendant complains that the

trial court erred in imposing an excessive sentence and in failing to articulate reasons for the sentence. The defendant argues that his sentence is excessive based on his having presented what he terms "a compelling defense of entrapment" as to the charges against him and his having provided "provocative affirmative evidence" at the multiple bill hearing. The defendant asserts that in light of the gravity of the offense and the prejudice to which he was subjected by the State at trial and at sentencing, his circumstances should be deemed exceptional and the sentence imposed be found unconstitutionally excessive.

Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. State v. Sepulvado, 367 So. 2d 762 (La. 1979). A sentence is unconstitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless and needless imposition of pain and suffering, and is grossly out of proportion to the severity of the crime. State v. Lobato, 603 So. 2d 739 (La. 1992).

The minimum sentences imposed on multiple offenders by the Habitual Offender Law are presumed to be constitutional. State v. Dorthey, 623 So. 2d 1276 (La. 1993). The defendant bears the burden of rebutting the presumption that the mandatory minimum sentence is constitutional. State

v. Short, 96-2780 (La. App. 4 Cir. 11/18/98), 725 So. 2d 23. A court may depart from the minimum sentence only if it finds that there is clear and convincing evidence in the particular case before it that would rebut the presumption of constitutionality. State v. Johnson, 97-1906 (La. 3/4/98) 7, 709 So. 2d 672 at 676.

As a second offender convicted of distribution of cocaine, the sentencing range was from fifteen to sixty years. La. R.S. 15:529.1(A)(1)(a); La. R.S. 40:967(B)(4)(b). Thus, the defendant received the minimum sentence of fifteen years. The defendant also received a five-year sentence for the possession of cocaine count, which was the maximum sentence. La. R.S. 40:967(C)(2). In arguing that the mandatory minimum sentence is excessive under State v. Dorthey, 623 So. 2d 1276 (La. 1993), the defendant has reurged his prior assignments of error concerning the sufficiency of the evidence and his multiple offender adjudication, none of which was found to have merit. He has not pointed to any other factors or circumstances that would make the mandatory minimum sentence unconstitutionally excessive. The defendant has not briefed his assignment of error concerning the trial court's failure to give reasons for the sentences; thus, it is deemed abandoned pursuant to Rule 2-12.4, Uniform Rules-Courts of Appeal. These assignments of error are without merit.

The defendant's convictions and sentences are affirmed for the foregoing reasons.

CONVICTIONS AND SENTENCES AFFIRMED