STATE OF LOUISIANA	*	**NO. 2002-KA-0438**
VERSUS	*	**COURT OF APPEAL**
GARY JONES	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

* * * * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 410-448, SECTION "G"
Honorable Julian A. Parker, Judge

* * * * * *

William H. Byrnes, III
Chief Judge

* * * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge Charles R. Jones, and Judge James F. McKay III)

JONES, J., DISSENTS

Harry F. Connick
District Attorney
Leslie Parker Tullier
Assistant District Attorney
619 South White Street
New Orleans, LA 70119
COUNSEL FOR PLAINTIFF/APPELLEE

Christopher A. Aberle

LOUISIANA APPELLATE PROJECT
P.O. Box 8583
Mandeville, LA 70470-8583
COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

This appeal concerns the resentencing only of Gary Jones, who was convicted of distribution of cocaine after trial by jury and then sentenced to life in prison as a third felony offender. He appealed, and, in an unpublished opinion, this Court affirmed his conviction but vacated his sentence and remanded the case for resentencing after a hearing in which the Jones had the opportunity to show that the life sentence was unconstitutionally excessive as applied to him. State v. Jones, 2002-1894 (La. App. 4 Cir. 6/13/2001).

A resentencing hearing was held, and Jones was again sentenced to life imprisonment as a third felony offender. He now appeals that sentence, offering four assignments of error: (1) the district court failed to comply with this Court's order to allow him to prove that the life sentence was unconstitutional as applied to him; (2) the life sentence is excessive; (3) that he was entitled to benefit from the amendment to the Habitual Offender Law; and (4) the Habitual Offender Law violates the Fourteenth and Sixth

Amendments to the U.S. Constitution.

The facts of the case as presented in the first appeal are as follows:

> At trial Sergeant Michael Glasser, who was working undercover while wearing plain clothes and driving an unmarked car, testified that about 11 p.m. on October 6, 1999, he was near the intersection of St. Ann and North Roman Streets when he observed the defendant standing on the corner. As the car approached the corner, the defendant gestured for him to stop and then walked to the passenger side where the sergeant was sitting. The defendant said, "What do you need?" and the sergeant responded, "I'm looking for a dime." The defendant then asked if the officer was a policeman, and the sergeant answered negatively; the defendant next asked for a ten-dollar bill and handed over his wallet as collateral. The wallet contained an LSU medical card in the name of Gary Jones. The defendant walked down North Roman Street to Orleans Avenue and turned right, and the officer lost sight of him for a few minutes. While the defendant was gone, the sergeant used the police radio to describe the defendant to his backup team. The defendant returned and again asked the sergeant if he was a policeman; when the sergeant said he was not, he received several loose pieces of a white rock substance. As the officer drove away, he alerted his backup team to the exact spot where the defendant was standing. He described the defendant as wearing a faded t-shirt, gray shorts and an ace bandage on his right leg.
>
> Sergeant Cindy Scanlan, Officer Glasser's partner, testified that she was driving the unmarked car on October 6, 1999, when her assignment was to drive to an area of high drug traffic. Sergeant Scanlan related the same facts as Officer Glasser. Additionally, she said that after they radioed their backup team that the transaction was completed and drove away, they returned to be sure that the

> right person was being arrested, and they saw that the defendant had been detained by Officer Greenup.
>
> Officer Randy Greenup testified that he was working as part of a "take down" team on October 6, 1999, in which Sergeants Glasser and Scanlan were serving in an undercover capacity. The officer was about one block from the undercover officers and in radio contact with them as they made their purchase. After receiving a radio message that the purchase was completed and a description of the man who sold the white substance, Officer Greenup drove into the area and arrested the defendant. While the officer was in the process of the arrest, Sergeants Scanlon and Glasser drove by, looked at the defendant and, over the radio, identified him as the man who sold them white rocks. The defendant was not in possession of any cocaine or any money when he was arrested.
>
> The parties stipulated that the rocks purchased from the defendant were tested and proved to be crack cocaine.
>
> Mr. Marvin Larry Cook, an investigator for the District Attorney's office, testified as to the chain of custody in handling the defendant's clothing. Mr. Cook picked up the defendant's clothing at parish prison on February 4, 2000, and transported it to the courthouse.

State v. Jones, 2001-1984, pp. 1-3.

Jones first argues that this Court's instructions were not followed by the district court in that he was not given a chance to speak at the resentencing hearing and to have his witnesses testify on his behalf. He maintains that his case should again be remanded so that he could testify in

his own behalf.

At the sentencing hearing only the judge spoke. A resentencing investigatory report had been ordered, and the court cited the information in that report as the basis for the sentence. At the end of the hearing, the judge turned to the defense attorney and said, "I note your client's objection."

Although Jones argues that he was not allowed to testify at the sentencing hearing, according to the transcript, he never attempted to make a statement nor did he object to the court's statement. Thus there is no evidence that the appellant's right to speak at the hearing was denied.

Furthermore, this Court remanded the case so that information about Jones' background could be brought to light. Unfortunately for Jones, the information in the pre-sentencing investigatory report indicates that he has a serious criminal history.

There is no merit in this assignment of error.

Jones next argues that his sentence is excessive. The state counters that his argument was not preserved for appeal because there was no objection to the sentence nor was a motion to reconsider the sentence filed as required under La. C.Cr.P. art. 881.1. However, there was an oral objection to the sentence when it was imposed, and this Court has found that sufficient to preserve the bare claim of constitutional excessiveness. State v. Mims,

619 So. 2d 1059 (La. 1993); State v Miller, 2000-0218 (La. App. 4 Cir. 7/25/01), 792 So. 2d 104; State v. Thompson, 98-0988 (La. App. 4 Cir. 1/26/00), 752 So. 2d 293.

La. Const. art. I, § 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.

The minimum sentences imposed on multiple offenders by the Habitual Offender Law are presumed to be constitutional. State v. Johnson,

97-1906 (La. 3/4/98), 709 So. 2d 672. 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 only depart from the minimum sentence 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 at p. 7, 709 So. 2d at 676.

At the resentencing hearing, the district judge looked at the pre-sentence investigation report and noted that Jones "received an other than honorable discharge from the Navy in 1994" and that the discharge was the result of drug abuse. The court continued:

> Mr. Jones admitted to the probation and parole agent . . . that he is a drug user; however, the probation agent indicates that the subject is an admitted drug user who would like the Court to believe that his drug addiction has led to his criminal conduct; however, the reporting agent goes on to state that, 'In reviewing the subject's criminal history, we find that the subject has a'—and I quote—'flagrant disregard for the law,' closed quote. The agent goes on to report that over a twenty year period the subject has had over forty-five arrests, multiple misdemeanor convictions, three felony convictions, and two 701 releases. These impediments of law are documented in both Court records and law enforcement rap sheets. The defendant's charges range from obstruction of sidewalks to possession with the intent to distribute cocaine. Although Mr. Jones did not receive his first felony conviction until he reached

> the age of 35, he has been having negative interactions with the law since he was 17 years old. In fact, he received his first misdemeanor conviction at the age of 17. The subject's criminal history indicates that he is unable to conform to the laws which govern our society.

The pre-sentence investigatory report answers the questions this Court posed in the earlier opinion. The report indicates that Jones has been arrested for battery seven times and convicted three times. He has two prior possession of cocaine convictions and five additional arrests for possession of cocaine as well as four arrests for possession of drug paraphernalia. He has been arrested for theft four times, armed robbery twice, simple burglary twice, attempted simple burglary once, and simple robbery twice. He has many more arrests. His documented work history consists of only one quarter of employment in 1997. Given his criminal history, we do not find that the court erred in imposing the mandated sentence of life imprisonment on Jones.

This assignment of error is without merit.

Jones next contends that he was entitled to be sentenced under the amended version of La. R.S. 15:529.1, which went into effect about a year after his life sentence was first imposed. Jones was first sentenced on September 22, 2000, and the amended version of the statute went into effect on June 15, 2001. He was sentenced as a third felony offender under La.

R.S. 15:529.1(A)(1)(b)(ii) which provided prior to June 15, 2001:

> If the third felony *or either* of the two prior felonies is a felony defined as a crime of violence under R.S. 14:2(13) or as a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for more than *five* years or any other crime punishable by imprisonment *for more* than twelve years, the person shall be imprisoned for the remainder of his life, without benefit of parole, probation, or suspension of sentence.
>
> [Italics added]

His record fits under this provision because his most recent conviction of distribution of cocaine requires a sentence of five to thirty years. However, the current statute provides:

> If the third felony *and the two prior felonies* are felonies defined as a crime of violence under R.S. 14:2(13) . . . or as a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for *ten* years or more or any other crime punishable by imprisonment for twelve years or more, or any combination of such crimes, the person shall be imprisoned for the remainder of his life, without benefit of parole, probation, or suspension of sentence. [Italics added]

Under the revised version, which requires that all three prior offenses meet the standard the statute delineates, Jones would not be a third offender because his prior convictions for possession of cocaine are not punishable by a term of ten years or more. Instead, he would be sentenced under La. R.S. 15:529.1(A)(1)(b)(i) which provides for a sentence of not less than two-

thirds of the maximum sentence for the conviction and not more than twice the longest possible term prescribed for the first conviction. Thus, under that law, his sentence could be between twenty and sixty years.

Jones acknowledges that under Louisiana jurisprudence the law in effect when the crime occurred determines the penalty. State v. Clark, 391 So. 2d 1174, 1176 (La. 1980). However, he argues that when the law changes prior to the appellant's being sentenced, then the sentence should reflect the amended term. In this case, however, Jones was sentenced a year before the statute was amended.

This Court has considered three cases in which defendants convicted of violations of La. R.S. 40:966(C) received suspended sentences and probation even though their offenses occurred prior to June 15, 2001, the effective date of the amendment. State v. Carter, 2001-1560 (La App. 4 Cir. 10/3/01), 798 So. 2d 1181; State v. Legendre, 2001-1483 (La. App. 4 Cir. 10/3/01), 798 So. 2d 1179; State v. Serpas, 2001-1477 (La. App. 4 Cir. 10/3/01), 798 So. 2d 1178. In each case, the State objected and filed a writ application contending that the sentence was illegal. This Court agreed, stating:

> It is well settled that the penalty set out in a statute at the time of offense applies. *State v. Ragas*, 98-0011 (La. App. 4 Cir. 7/29/99), 744 So. 2d 99. The fact that a statute is subsequently amended to lessen the possible penalty does not

> extinguish liability for the offense committed under the former statute. *State v. Narcisse,* 426 So. 2d 118 (La. 1983).

State v. Carter, 798 So. 2d at 1182; State v. Legendre, 798 So. 2d at 1180; State v. Serpas, 798 So. 2d at 1179.

We find the district court did not err in sentencing Jones.

There is no merit in this assignment of error.

In his last assignment of error, Jones concedes that this court must follow the current law. However, he argues that under a U.S. Supreme Court decision "yet to issue" La. R.S. 15:529.1 is unconstitutional. In State v. Johnson, 97-1906 (La. 3/4/98), 709 So.2d 672, 676, the Louisiana Supreme Court stated: "Since the Habitual Offender Law in its entirety is constitutional, the minimum sentences it imposes upon multiple offenders are also presumed to be constitutional," citing State v. Dorthey, 623 So.2d 1276 (La. 1993); State v. Young, 94-1636 (La. App. 4th Cir. 10/26/95), 663 So.2d 525.

Thus, Jones' argument is premature at this time.

Accordingly, for the reasons cited above Gary Jones' sentence is affirmed.

AFFIRMED