NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-KA-0772**
VERSUS	*	**COURT OF APPEAL**
RITA HAYES	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 422-925, SECTION "J"
Honorable Leon Cannizzaro, Judge
* * * * * *
Judge Patricia Rivet Murray
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(Court composed of Chief Judge William H. Byrnes III, Judge Charles R. Jones, Judge Patricia Rivet Murray)

<u>JONES, J., CONCURS IN PART AND DISSENTS IN PART</u>

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AFFIRMED

On July 10, 2001, Rita Hayes was charged by bill of information with distribution and possession of cocaine in violation of La. R.S. 40:967(A) and (C), respectfully. At arraignment, she pled not guilty. Following a trial on July 30, 2001, a twelve-member jury found her not guilty of the distribution charge, but guilty of the attempted possession charge. The trial court initially sentenced her to the maximum thirty-month term. The state then filed a multiple bill. After a hearing, the trial court found her to be a third felony offender and re-sentenced her to serve the maximum sixty-month term. The trial court denied her motion to reconsider the sentence, but granted her motion for an appeal.

At trial, Lieutenant Tami Brisset testified that on June 27, 2001, at around 1:40 a.m., she and her partner, Sergeant Michael Glasser, were conducting an undercover drug investigation. Sergeant Glasser was driving an unmarked car, and Lt. Brisset was riding in the front passenger seat. They both were wearing plain clothes. When they were in the 3100 block of Gravier Street, Rita Hayes called out to them, stating "What's up?" Replying, Lt. Brisset stated that she was "looking for a twenty." Although

Ms. Hayes told the officer to get out of the car, Lt. Brisset refused because her gun would have been exposed. Ms. Hayes then told the officers to "[p] ull the car up and wait." Complying with her request, the officers stopped their car at the corner of Lopez and Gravier Streets. Lt. Brisset then exited the car and handed Ms. Hayes a twenty-dollar bill. Ms. Hayes then went to a house and knocked on the door. When no one answered, she went to another house two doors down the street. A man opened the door, and Lt. Brisset observed a drug transaction.

Ms. Hayes then returned to where the officers were, and she handed the rock to Lt. Brisset. The officers then departed. Contemporaneously, Sergeant Glasser radioed his backup team that the buy was completed and that the seller was an African American female wearing a black shirt and shorts. After the backup team arrested Ms. Hayes, the officers returned and positively identified her as the seller.

Sergeant Glasser testified to the same facts as Lt. Brisset.

Detective Patrick Evans, who was part of the backup team working with Sergeant Glasser and Lt. Brisset that day, testified that he received a radio message from Sergeant Glasser reporting that the drug buy was completed and describing the seller. Detective Evans and his partner, Detective Christian Varnado, then drove to the corner of Lopez and Gravier

Streets, and spotted Ms. Hayes in the 600 block of Lopez Street. When Detective Varnado exited the car and identified himself as a police officer, Ms. Hayes dropped an object from her right hand. Detective Varnado apprehended her on the top step of a residence. Detective Evans stated that Ms. Hayes struggled while being arrested.

Detective Varnado testified to the same facts as Detective Evans. He further stated that he picked up the crack pipe Ms. Hayes had dropped and that it was wrapped in a white napkin. He still further stated that Ms. Hayes was not taken to the hospital prior to being admitted to Central Lockup. The parties stipulated that the rock that Lt. Brisset purchased and the residue in the pipe were both tested and both proved to be crack cocaine.

At the time of her arrest, Ms. Hayes, a forty-one year old mother of four, testified that she was living at 618 South Tonti Street. On the day of the offense, Ms. Hayes stated that she was walking to a friend's house when the officers hailed her down and asked her "where it's at." She acknowledged that she answered the officers and told them to pull over to the side of the street. She also acknowledged that the female officer handed her a twenty-dollar bill and that she bought a rock of cocaine from people she knew who lived on the street. Afterward, as she started up the front steps of her friends' house, she stated that the police stopped her. At that

time, she was carrying a bag containing a full bottle of gin and a crack pipe. She testified that one officer grabbed her from the steps, slammed her against the police car, and began to choke her, saying, "You black, crack-head bitch, this is what you get." She further testified that she was hurt and was taken to the hospital before being admitted to Central Lockup. She admitted to being addicted to cocaine and blamed her prior convictions, which included crime against nature and possession of cocaine, on her addiction. She stated that she offered to get the cocaine for the officers because she believed she would get a tip of either cocaine or money.

In a single assignment of error, Ms. Hayes argues that her sentence is excessive. Pursuant to La. R.S. 40:979 and La. R.S. 15:529.1(A)(1)(b)(i), the sentencing range for a third felony offender is forty to sixty months. As noted, Ms. Hayes was sentenced to the maximum sixty-month term.

La. Const. Art. I, § 20 bars excessive punishment. 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; *State v. Dorthey*, 623 So. 2d 1276, 1280 (La. 1993).

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

Louisiana Supreme Court instructed that in reviewing the excessiveness of a sentence, the only relevant question is whether the trial court abused its broad discretion and not whether another sentence would have been more appropriate. Even a sentence within the statutory sentencing range can 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. As to sentences within the legislatively provided sentencing range, a trial court abuses its discretion only when it contravenes the constitutional prohibition against excessive punishment. *State v. Sepulvado*, 367 So.2d 762, 767 (La. 1979). Because the trial court has broad discretion in imposing a sentence within statutory limits, a reviewing court can set aside a sentence only if it is clearly excessive. *State v. Cook*, 95-2784, p. 3 (La. 5/31/96), 674 So. 2d 957, 959.

In reviewing an excessive sentence claim, an appellate court generally must determine whether the trial judge has adequately complied with the 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. Articulating "the factual basis for a sentence is the goal of Art. 894.1, not rigid or mechanical compliance with its provisions." *State v. Major*, 96-1214, p. 10, (La. App. 4

Cir. 3/4/98), 708 So. 2d 813, 819. Once adequate compliance with Article 894.1 is found, then a reviewing court must determine whether the sentence imposed is too severe in light of the particular defendant and the particular circumstances, keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged. *State v. Bonicard*, 98-0665, p. 3 (La. App. 4 Cir. 8/4/99), 752 So.2d 184, 185, *writ denied*, 99-2632 (La. 3/17/00), 756 So. 2d 324.

Ms. Hayes argues that she is not among the worst offenders to be sentenced on an attempted possession charge. She further argues that despite her admission to distributing and possessing cocaine, the jury found her guilty only on the attempted possession charge. She stresses that the jury recommended that she be placed in a rehabilitation program and that the trial court frustrated the jury's recommendation by imposing the maximum sixty-month sentence without giving any reasons when the sentence was imposed.

The state counters that Ms. Hayes is among the worst offenders to be sentenced on an attempted possession charge. In support, the state notes that Ms. Hayes was convicted of attempted possession, yet admitted at trial to distributing cocaine, a more serious offense. The state further counters that given those facts and given Ms. Hayes' prior record, the trial court was

justified in imposing the maximum sentence.

At sentencing, the trial court had before it a pre-sentence investigation (PSI) report, which documented Ms. Hayes' extensive criminal record. Between March 1998 and June 2001, she was arrested ten times; to wit: four times for solicitation for a crime against nature, two times for prostitution, two times for possession of cocaine, one time for possession of drug paraphernalia, and one time for criminal trespass and public drunkenness. She received probation for a prior offense, but according to the PSI report, her probation was revoked due to her extremely poor performance. On April 29, 2001, she was released from the Department of Corrections, and the instant offense occurred less than two months later on June 27, 2001. Although the jury was informed of her prior convictions, it was not informed of her inability to comply with probation or of the full extent of her prior criminal record.

Given the particular facts—Ms. Hayes' admission to both charged offenses, conviction of the lesser offense, and probation ineligibility—coupled with her criminal history, we cannot say the trial court abused its discretion in imposing the maximum sentence under the particular circumstances. This assignment of error is unpersuasive.

Accordingly, Ms. Hayes' conviction and sentence are affirmed.

AFFIRMED.