NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-KA-1942**
VERSUS	*	**COURT OF APPEAL**
MELVIN TATE	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 429-361, SECTION "J"
Honorable Leon Cannizzaro, Judge
* * * * * *
Judge David S. Gorbaty
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(Court composed of Judge Steven R. Plotkin, Judge Dennis R. Bagneris, Sr., Judge David S. Gorbaty)

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AFFIRMED

Melvin Tate appeals his sentence of thirty months at hard labor without benefit of parole, probation, or suspension of sentence as a second offender. For the following reasons, we affirm the sentence and conviction.

PROCEDURAL HISTORY:

On April 8, 2002, Melvin E. Tate, Jr., was charged by bill of information with possession of cocaine in violation of La. Rev. Stat. 40:967 (C). On May 16, 2002, a six-person jury found him guilty of attempted possession of cocaine. The State filed a multiple bill charging Tate as a second felony offender, and on July 15, after being advised of his rights, Tate pleaded guilty to the bill. He was sentenced under La. Rev. Stat. 15:529.1 to serve thirty months at hard labor. His sentence was imposed under La. Rev. Stat. 15:574.5, the About Face Program in Orleans Parish Prison. His motion for reconsideration of sentence was denied, and his motion for an appeal was granted.

FACTS:

At trial the following facts were adduced. Officers Kori Keaton and Earl Razor were on proactive patrol about 11 a.m. on March 21, 2002, when they noticed a green four-door auto run a stop sign at the corner of Villere and Touro Streets. (On proactive patrol, the officers do not answer calls for service, but when they observe violations they stop the offenders). The officers activated their sirens and dash lights and followed the car. The defendant, who was driving, pulled over in the 1300 block of Touro Street and immediately stepped out of the car. Most people do not get out of their cars in such circumstances, and the officers told him to come toward their car. Tate hesitated and reached back into his car. The officers observed that he had his keys in his left hand and something clinched in his right hand; they again ordered him to come toward them. He turned, and Officer Keaton saw him drop an object from his right hand to the ground. The object appeared to be a crumpled piece of paper. It landed six to eight inches away from his back tire, between the tire and the curb. When Tate approached the police car, Officer Razor spoke with him. Officer Keaton picked up the object that had been dropped to the ground, and when he opened it, he found a small plastic bag containing several rocks of what appeared to be crack cocaine. Officer Keaton indicated to Officer Razor that contraband had been seized, and Officer Razor tried to place handcuffs on

Tate, but he began screaming and struggling with Officer Razor. Officer Keaton tried to grab the defendant's right arm, and in the scuffle, all three men fell to the ground. The officers succeeded in handcuffing the defendant who sustained a head laceration in the fall. Officer Keaton made the search incident to arrest of Tate and found that he was carrying $122. Officer Razor advised Tate of his *Miranda* rights. He was taken to Charity Hospital for treatment of his head injuries.

The parties stipulated that the rocks found near Tate's car were tested and proved to be crack cocaine.

Mr. Dwayne Tate, the defendant's cousin, testified that he lives with Melvin Tate. On March 21st, the day he was arrested, Melvin Tate drove his son and Dwayne to school on Pauger Street.

Ms. Kianadras Martin, the defendant's fiancée, told the court that she lives with Melvin Tate, their two children, and Dwayne Tate. A friend, who lives near the spot where Melvin Tate was stopped, called Ms. Martin to tell her what was happening, and Martin arrived at the scene in time to see Tate with blood on his face and shirt. Ms. Martin stated that Tate had been working for August Building and Maintenance since he got out of jail last year. In answer to another question, Ms. Martin explained that Tate's incarceration concerned a violation of his probation.

Ms. Brittany Harrison testified that she was with Kianadras Martin when she learned that the police were beating her fiancé. They went to the site and saw Melvin Tate with blood over his face and shirt sitting in the back of a police car.

Mr. Leo Dolliole of 1332 Touro Street, who knows the defendant, testified that he was standing on his porch drinking a cup of coffee on March 21 when a police car followed another car around the corner. When the driver of the car stopped, the policemen jumped out of their car, pulled the driver from his car, threw him to the ground, put a knee in his back, and searched his car. Mr. Dolliole did not see the driver with anything in his hands or trying to resist arrest. When Mr. Dolliole walked near the cars, Tate called him by name. The policemen asked Mr. Dolliole if he knew the defendant, and Mr. Dolliole answered that Tate was a "good kid" who "works [and] takes care of his children." One of the policemen replied that they "just found a bunch of dope on him." Mr. Dolliole stated that he never saw Tate drop an object or resist the officers. Additionally, he did not see the officers pick anything up from the ground.

ASSIGNMENT OF ERROR:

In a single assignment of error, Tate claims that the trial court erred in imposing an unconstitutionally excessive sentence. As a second offender

under La. Rev. Stat. 40:979 and La. Rev. Stat. 15:529.1, Tate faced a sentence of fifteen to sixty months at hard labor, and he received the mid-range term of thirty months.

Louisiana Constitution. art. I, § 20 explicitly prohibits excessive sentences. *State v. Baxley*, 94-2982, p. 4, (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, p. 17 (La.App. 4 Cir. 2/3/99), 727 So.2d 1264, 1272, *rehearing granted on other grounds*, (La.App. 4 Cir. 3/16/99); *State v. Francis*, 96-2389, p. 6 (La.App. 4 Cir. 4/15/98), 715 So.2d 457, 461. However, the penalties provided by the legislature reflect the degree to which the criminal conduct is an affront to society. *Baxley*, 94-2984 at p. 10, 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*, 97-1906, pp. 6-7 (La. 3/4/98), 709 So.2d 672, 677; *State v. Lindsey*, 99-3256 (La. 10/17/00), 770 So.2d 339. 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*, 94-2984 at p. 9, 656 So.2d at 979; *State v. Hills*, 98-0507, p. 5 (La.App. 4 Cir. 1/20/99), 727 So.2d 1215, 1217.

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. Code Crim. Proc. art. 894.1, and whether the sentence is warranted under the facts established by the record. *State v. Trepagnier*, 97-2427, p. 11 (La.App. 4 Cir. 9/15/99), 744 So.2d 181, 189; *State v. Robinson*, 98-1606, p. 12 (La.App. 4 Cir. 8/11/99), 744 So.2d 119, 127. If adequate compliance with La. Code Crim. Proc. 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. Ross*, 98-0283, p. 8 (La.App. 4 Cir. 9/8/99), 743 So.2d 757, 762; *State v. Bonicard*, 98-0665, p. 3 (La.App. 4 Cir. 8/4/99), 752 So.2d 184, 185.

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.

At sentencing the trial court, after considering the pre-sentence investigatory report, noted that Tate was on probation for a prior drug offense when he was arrested. The court also stated that the Probation Department did not recommend a suspended sentence or probation for this defendant.

However, Tate maintains that the thirty-month sentence is excessive for a non-violent, repeat drug offender.

The pre-sentencing investigatory report indicates that on June 30, 2000, the defendant, convicted of distribution of marijuana, was sentenced to serve seven years at hard labor. His sentence was suspended, and he was placed on five years active probation. The pre-sentencing report recommends no leniency in sentencing because of Tate's poor performance while on probation and his unwillingness to face his drug abuse problem.

Although he completed the About Face Program after his first offense, the trial court sentenced him again under La. Rev. Stat. 15:574.5. Thus, Tate's sentence is tailored to offer him help in overcoming his dependence on illegal substances. We do not find the thirty-month sentence excessive in

this case.

Accordingly, Melvin Tate's conviction and sentence are affirmed.

AFFIRMED