

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2015-KA-1257**
VERSUS *
TYRONE HALL * **COURT OF APPEAL**
* **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
* * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 512-478, SECTION "K"
Honorable Arthur Hunter, Judge

* * * * *

Judge Dennis R. Bagneris, Sr.

* * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Roland L. Belsome,
Judge Sandra Cabrina Jenkins)

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MARCH 9, 2016

AFFIRMED

The State's appeal contends the trial court abused its discretion when it sentenced the defendant to five years at the Department of Corrections, a sentence below the statutory minimum required for his conviction on one count of possession of cocaine and his adjudication as a fourth felony offender. For the reasons that follow, we affirm the sentence imposed.

STATEMENT OF CASE/PROCEDURAL HISTORY

On July 13, 2012, the defendant, Tyrone Hall, was charged with one count of possession of cocaine, a violation of La. R.S. 40:967(C)(2). He entered a not guilty plea. After a trial on the merits, a six-person jury found the defendant guilty as charged.

The defendant appeared for sentencing on May 10, 2013. His motions for a new trial and a post-verdict judgment of acquittal were denied by the trial court. After sentencing delays were waived, the trial court sentenced the defendant to serve five years with the Department of Corrections, with credit for time served. The sentence was to be served concurrently with any other sentences the defendant faced. The defendant was recommended for the Bossier City drug program. After sentencing, the State then filed a multiple bill of information charging the

defendant with being a fourth felony offender.¹ Prior to the resolution of the defendant's multiple offender status, the trial court granted defendant's motion to appeal his conviction.²

The defendant entered a not guilty plea to the multiple bill. However, the trial court found the defendant to be a fourth felony offender. Thereafter, the defendant filed motions for a downward departure of the statutory minimum sentence and for new trial on the multiple bill. The trial court denied the motions. The defendant then filed a supplemental motion for downward departure. On May 21, 2014, the trial court re-affirmed defendant's status as a fourth offender; denied his motion for downward departure; and without assigning reasons, sentenced the defendant to the mandatory minimum of 20 years imprisonment.³ Later, the trial court denied defendant's motion to reconsider sentence.

The defendant filed a separate appeal of the multiple bill sentence. This Court considered the defendant's appeal;⁴ vacated the defendant's sentence; and remanded the matter to the trial court to re-sentence the defendant in compliance with La. C.Cr.P. art. 894.1(C).⁵ The State's writ application to the Louisiana Supreme Court regarding the remand was denied.⁶

¹ The alleged predicate convictions included: possession of cocaine in 2009; simple burglary in 1991; and simple burglary in 1983.

² This Court affirmed the defendant's underlying conviction and the initial sentence imposed in *State v. Hall*, 13-1194 (La. App. 4 Cir. 3/19/14), 134 So.3d 671, *writs denied*, 14-0802 (La. 11/7/14), 152 So.3d 174 and *sub nom. State ex rel. Hall v State*, 14-1417 (La. 11/7/14), 152 So.3d 174.

³ See La. R.S. 40:967 (C)(2); La. R.S. 15:529.1(A)(4)(a).

⁴ *State v. Hall*, 14-KA-1046 (La. App. 4 Cir. 5/13/15).

⁵ La. C.Cr.P. art. 894.1(C) provides: "The court shall state for the record the considerations taken into account and the factual basis therefor in imposing sentence."

⁶ *State ex rel. Hall v. State*, 15-0977 (La. 6/5/15), 169 So.3d 348 (Mem).

Thereafter, the trial court complied with this Court's order. It stated the factors considered and re-sentenced the defendant to serve five years at the DOC. The State filed the present motion for appeal.

STATEMENT OF FACT

The facts of this case are set forth in *State v. Hall*.⁷ We summarize those facts here as follows:

Police officers testified that they saw the defendant engage in what they believed was a hand-to-hand drug transaction with another man. The officers approached the defendant. As the defendant responded to their questions, a white rock-like substance fell from his mouth. The object was retrieved by police. The defendant was then handcuffed and read his rights.

ASSIGNMENT OF ERROR

The State's sole assignment of error maintains the trial court abused its discretion when it sentenced the defendant to five years as a fourth felony offender.

DISCUSSION/ANALYSIS

The State contends that the trial court abused its discretion in granting the defendant's motion for a downward departure based on the defendant's position that the mandatory minimum sentence of 20 years imposed was constitutionally excessive.

Louisiana jurisprudence establishes that the minimum sentences the Habitual Offender Law, La. R.S. 15:529.1, imposes upon multiple offenders are presumed to be constitutional. *State v. Dorthey*, 623 So.2d 1276, 1278 (La. 1993). However, our jurisprudence also recognizes that the imposition of a sentence, although within the statutory limit, may violate a defendant's constitutional right against

excessive punishment.⁸ Hence, our courts have the power to declare a minimum sentence under the Habitual Offender Law as excessive.⁹ This power emanates from Article I, Section 20 of the Louisiana Constitution which prohibits cruel, excessive, or unusual punishment.¹⁰ Thus, a sentence within the statutory limit is constitutionally excessive if it is grossly out of proportion to the severity of the crime or is nothing more than the purposeless imposition of pain and suffering.¹¹

The State emphasizes, however, that a court's authority to deviate from the mandatory minimum is not unfettered. Inasmuch as mandatory minimum sentences are presumed constitutional, the defendant bears the burden of proof to rebut that presumption. *State v. Short*, 96-2780, p. 8 (La. App. 4 Cir. 11/18/98), 725 So.2d 23, 27. In order to rebut that presumption, a defendant must clearly and convincingly show that:

“[he] is exceptional, which in this context means that because of unusual circumstances, the defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense and the circumstances of the case.”¹²

Therefore, in the present matter, the State argues that the trial court erred in failing to impose the mandatory minimum of 20 years for a fourth felony offender because the defendant did not show he was “exceptional” and the trial court did not articulate specific reasons for the downward departure in sentencing. We disagree.

⁷ See fn. 2.

⁸ *State v. Sepulvado*, 367 So.2d 762, 767 (La. 1979).

⁹ *State v. Dorthey*, 623 So.2d 1276, 1280 (La. 1993), citing *State v. Sepulvado*, 367 So.2d. 762 at 767.

¹⁰ *Id.*

¹¹ *State v. Landry*, 03-1671, p. 8 (La. App. 4 Cir. 3/31/04), 871 So.2d 1235, 1239.

¹² *State v. Lindsey*, 99-1937, p. 5 (La. 10/17/00), 770 So.2d 339, 343.

In support of its position, the State cites *State v. Johnson*.¹³ In *Johnson*, the Supreme Court held that the fact of defendant's non-violent history and his conviction on simple possession of cocaine alone were insufficient reasons to justify a downward departure from the statutory minimum sentencing. The State also relies on *State v. Allen*¹⁴ and *State v. Turner*¹⁵ as examples of this Court's rejection of downward departures in fourth felony offender cases where the defendants were convicted on cocaine possession charges and had histories of drug addiction. However, upon closer scrutiny, we find the above cited cases distinguishable from the instant matter.

In *State v. Johnson*, the Court found that no departure from the statutory minimum sentence was warranted where the trial court's deviation from the mandatory minimum resulted in part because it questioned the Legislature's wisdom to require enhanced sentences for multiple offenders involving non-violent "crimes of personal destruction" and where the defendant did not offer evidence to clearly and convincingly show that the mandatory minimum sentence was excessive for his circumstances.¹⁶ As explained in *State v. Lindsey*,¹⁷ a defendant's record of non-violent offenses may play a role in a sentencing judge's determination that a minimum sentence is too long; however, it cannot be the only reason or even the major reason for declaring the sentence excessive.

For similar reasons, in *State v. Allen*, this Court upheld the defendant's sentencing to the statutory minimum because there were no "facts in the record

¹³ 709 So.2d 672 (La. 1998).

¹⁴ 09-0813 (La. App. 4 Cir. 1/13/10), 30 So.3d 1024.

¹⁵ 10-0038 (La. App. 4 Cir. 9/29/10), 50 So.3d 836.

¹⁶ *Johnson*, 709 So.2d at 675-678.

¹⁷ 99-1937, p. 5, 770 So.3d 339 at 343.

which individualize or particularize the defendant or his circumstances.¹⁸ Likewise, in *State v. Turner*, we affirmed the defendant's mandatory minimum sentence because upon consideration of the defendant's drug addiction, the trial court deemed the addiction alone insufficient to justify a downward departure from the statutory minimum.¹⁹ Therefore, in all of the above cases relied on by the State, the defendants failed to put on sufficient, particularized proof to rebut the presumption that the mandatory minimum sentences imposed were unconstitutionally excessive.

Here, the defendant factually noted that his present conviction involved possession of less than .1 gram of cocaine and that his prior convictions were non-violent offenses. He also relayed that his mother was a heroin addict and that he had abused drugs since he was a teenager. However, defendant also produced evidence that showed he was in a work release program. A social worker attested to his chaotic family history, his early drug addiction, and his learning disability. The social worker added that the defendant participated in their narcotics anonymous classes and that the defendant had substantial family and community support. Two counselors and a sister spoke or prepared affidavits on his behalf. The defendant, who was 56-years old, also supplemented the record at the court's request to show that the average cost to incarcerate him amounted to \$19,637 per year, with costs being higher for aging inmates.

In its decision to sentence the defendant to 5 years, the trial court stated as follows:

Defendant Hall is 56-years old. When determining the new sentence, this Court considered the following factors: Defendant

¹⁸ *Johnson*, 709 So.2d at 674-675.

¹⁹ 09-0813, p. 6, 30 So.3d at 1027-1028.

Hall's difficult life circumstances including parental abuse, his additional history which likely resulted in Defendant Hall having diminished capacity, and his history as a non-violent offender. This Court also factored in the assertion that Defendant Hall has family and community support to assist him in reentering and participating in the community. Finally, this Court considered the age of Defendant Hall, and a sentence of twenty years is effectively a life sentence which may require elder care at the expense of the State.

Considering the facts of this case, and the mitigating factors, this Court finds that a sentence of five years with credit for time served.

Therefore, in accordance with La. C.Cr. P. art. 894.1 (C), the trial court stated for the record the reasons it considered in sentencing the defendant as it had been instructed to do so upon remand.

The reasons articulated by the trial court mirror factors considered by the Louisiana Supreme Court in *State v. Mosby*.²⁰ In *Mosby*, the Court found an enhanced sentence of thirty years for a 72-year old grandmother convicted of cocaine distribution and adjudicated a multiple offender was excessive. The Court vacated the mandated sentence and found a departure from the mandatory minimum was required based on the defendant's present age, her non-violent felony offenses, severe infirmities, and her addiction to crack cocaine at age forty-eight.

Where the court finds that the mandatory minimum is excessive, the court must impose the "longest sentence which is not constitutionally excessive."²¹ Hence, the State suggests that the trial court erred because five years is not the longest sentence that could have been constitutionally imposed. In this matter, we note that the trial court initially imposed a sentence of five years for the defendant's most recent conviction for possession of cocaine. That sentence is the

²⁰ 14-2704 (La. 11/20/15), 180 So.3d 1274.

²¹ *State v. Johnson*, 709 So.2d at 674-75.

maximum allowed for such an offense. Accordingly, this Court cannot say that the trial court abused its discretion in finding that five years was the longest constitutional sentence allowable after it determined that the 20-year sentence imposed for the multiple offender adjudication was constitutionally excessive.

The defendant put forth evidence of his exceptional circumstances. Upon consideration of that evidence, the trial court determined that the defendant rebutted the presumption that the mandatory minimum sentence was constitutional and articulated reasons to impose a sentence of five years. On appellate review of sentencing, the only relevant question is whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate.²² In the matter before us, we find no abuse of the trial court's sentencing discretion.

Based on the foregoing reasons, the judgment of the trial court granting the defendant's motion for a downward departure of his sentence is affirmed.

AFFIRMED

²² *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. 61, 136 L.Ed.2d 539 (1996).