**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**NO. 2010 KA 1930**

**STATE OF LOUISIANA**

**VERSUS**

**ZACHARIAH DAN JOHNSON**

***Judgment Rendered: May 6, 2011***

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**Appealed from the**
**22nd Judicial District Court**
**In and for the Parish of St. Tammany**
**State of Louisiana**
**Case No. 476706**

**The Honorable Martin E. Coady, Judge Presiding**

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**Walter P. Reed**
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**State of Louisiana**

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**Counsel for Defendant/Appellant**
**Zachariah Dan Johnson**

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**BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.**

**GAIDRY, J.**

The defendant, Zachariah Dan Johnson, was charged by bill of information with two counts of violation of La. R.S. 40:966(A)(1): (1) distribution of marijuana, a Schedule I drug (count one); and (2) distribution of methylenedioxymethamphetamine (MDMA, or ecstacy), a Schedule I drug (count two). He pleaded not guilty to both charges. Following a trial by jury, defendant was convicted as charged on both counts. The trial court originally sentenced defendant to imprisonment at hard labor for ten years on count one and 20 years at hard labor on count two.

Subsequently, the state filed a bill of information seeking to have defendant adjudicated and sentenced as a third-felony habitual offender. *See* La. R.S. 15:529.1 (the Habitual Offender Law). Following a hearing, the trial court adjudicated defendant a third-felony habitual offender, vacated the previously imposed sentence on count one, and resentenced defendant to imprisonment at hard labor for 20 years, without the benefit of probation or suspension of sentence.[1] The court ordered that the sentences run concurrently. Defendant filed a motion to reconsider, and the trial court denied the motion. Defendant now appeals. In a single assignment of error, defendant asserts the trial court erred in denying his motion to reconsider. Finding no merit in the assigned error, we affirm defendant's convictions, habitual offender adjudication, and sentences.

**FACTS**

In July 2009, Detective Julie Boynton of the St. Tammany Parish Sheriff's office agreed to assist Sergeant Fred Ohler and several other

[1] The minute entry for the June 14, 2010 habitual offender sentencing reflects that the court initially stated that the sentences were vacated on both counts. However, the minute entry also reflects, "*Later, in the day, Court ordered that Count 1 is the only count to be vacated.*" (Emphasis added.) Thus, the sentence on count two remains as originally imposed.

officers of the Slidell Police Department with an undercover drug operation. Sergeant Ohler had received information from a confidential informant that defendant was selling illegal narcotics in the Slidell Village North area, an area known as a high drug-crime area. As part of the operation, Sergeant Ohler was to arrange for Detective Boynton to be introduced to defendant by the informant for the purpose of purchasing illegal drugs.

On July 2, 2009, the informant drove Detective Boynton to the intersection of Beechwood and Walnut Streets in Slidell, where they met with defendant. Detective Boynton conversed with defendant and eventually negotiated the purchase of $20.00 worth of marijuana. During the conversation, Detective Boynton also told defendant that she worked for a company named "Textron" and agreed to assist defendant in gaining employment. To facilitate his employment efforts, defendant provided Detective Boynton with his name and date of birth. Detective Boynton told defendant that she also wanted to purchase some MDMA. Defendant replied that he only had marijuana. However, he indicated that he would contact another individual to arrange an MDMA purchase. After exchanging telephone numbers with the defendant, Detective Boynton and the informant left the area.

Shortly thereafter, Detective Boynton received a telephone call from defendant advising that the individual with the MDMA was in the area and was prepared to make the sale of the drug to her. Detective Boynton and the informant met with defendant again to transact that drug purchase. On that occasion, defendant introduced Detective Boynton to an individual named Brandon Navarre. Navarre sold Detective Boynton 17 tablets of suspected MDMA.

Scientific testing confirmed that the vegetative material purchased during the first transaction was marijuana. Thirteen of the 17 tablets purchased in the second transaction tested positive for MDMA.[2] A warrant was then obtained for defendant's arrest, and defendant subsequently was arrested.

**EXCESSIVE SENTENCES**

In his sole assignment of error, defendant contends the trial court erred in denying his motion to reconsider the sentence.[3] He argues that the sentences imposed are excessive under the facts of this case. Specifically, he asserts that the trial court erred in failing to give consideration to several mitigating factors, *i.e.*, his age (29 years), his lack of any juvenile criminal record, and his status as the father of one child. Defendant further notes that 18 of the 20 aggravating circumstances listed in the sentencing guidelines of La. C.Cr.P. art. 894.1 do not apply to this case. Thus, he argues that the 20-year sentences imposed constitute cruel and unusual punishment and are nothing more than a needless imposition of pain and suffering.

Article I, § 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. A sentence is unconstitutionally excessive if it is grossly disproportionate to the severity of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. *State v. Dorthey*, 623 So.2d 1276, 1280 (La. 1993). 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. *State v. Hogan*,

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[2] The remaining tablets were determined to contain benzylpiperazine, a drug not then scheduled by the State of Louisiana. Benzylpiperazine was added to the list of Schedule I drugs in La. R.S. 40:964(E)(5.1) by Acts 2009, No. 153, § 1, effective August 15, 2009.

[3] In his motion to reconsider and in his brief before this court, defendant refers to "sentence" in the singular. Thus, it is unclear which sentence defendant is appealing as excessive. We will accordingly review both sentences, one of which is a mandatory minimum sentence.

480 So.2d 288, 291 (La. 1985). Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. *State v. Sepulvado*, 367 So.2d 762, 767 (La. 1979); *State v. Lanieu*, 98-1260, p. 12 (La. App. 1st Cir. 4/1/99), 734 So.2d 89, 97, *writ denied*, 99-1259 (La. 10/8/99), 750 So.2d 962. However, a trial court is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed by it should not be set aside as excessive in the absence of manifest abuse of discretion. *State v. Lobato*, 603 So.2d 739, 751 (La. 1992).

The Louisiana Code of Criminal Procedure sets forth items that must be considered by the trial court before imposing sentence. La. C.Cr.P. art. 894.1. The trial court need not cite the entire checklist of article 894.1, but the record must reflect that it adequately considered the criteria. *State v. Herrin*, 562 So.2d 1, 11 (La. App. 1st Cir.), *writ denied*, 565 So.2d 942 (La. 1990). In light of the criteria expressed by article 894.1, a review for individual excessiveness must consider the circumstances of the crime and the trial court's stated reasons and factual basis for its sentencing decision. *State v. Watkins*, 532 So.2d 1182, 1186 (La. App. 1st Cir. 1988). Remand for full compliance with article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. *State v. Lanclos*, 419 So.2d 475, 478 (La. 1982).

***Distribution of Marijuana Sentence***

Louisiana Revised Statutes 40:966(B)(3) provides that any person convicted of distribution of marijuana shall be sentenced to "a term of imprisonment at hard labor for not less than five years nor more than thirty years, and pay a fine of not more than fifty thousand dollars." The defendant was sentenced as a habitual offender on the conviction for

distribution of marijuana. Prior to its 2010 amendments, the Habitual Offender Law, La. R.S. 15:529.1, provided in part as follows:

> (A)(1) Any person who, after having been convicted within this state of a felony . . . thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows:
>
> . . .
>
> (b) If the third felony is such that upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life then:
>
> (i) The person shall be sentenced to imprisonment for a determinate term not less than two-thirds of the longest possible sentence for the conviction and not more than twice the longest possible sentence prescribed for a first conviction . . . .

Defendant's predicate offenses are two cocaine possession convictions, the first in 2003 and another in 2008. As a third felony habitual offender with these predicates, defendant was exposed to a potential sentence of imprisonment at hard labor for a minimum of 20 years to a maximum of 60 years for the distribution of marijuana conviction. *See* La. R.S. 15:529.1(A)(1)(b)(i) (prior to its 2010 amendments) and La. R.S. 40:966(B)(3). He received the mandatory minimum sentence on this conviction.

The Louisiana Supreme Court has repeatedly upheld the constitutionality of the Habitual Offender Law and, accordingly, the minimum sentences it imposes are likewise presumed to be constitutional. *State v. Johnson,* 97-1906, pp. 5-6 (La. 3/4/98), 709 So.2d 672, 675. A sentencing judge must always start with the presumption that a mandatory sentence under the Habitual Offender Law is constitutional. 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. In order to rebut the presumption that the

mandatory minimum sentence is constitutional, the defendant must clearly and convincingly show that he is exceptional, that is, that because of unusual circumstances he 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. Downward departures from the minimum sentence under the Habitual Offender Law should occur only in rare situations. *State v. Lindsey*, 99-3302, pp. 4-5 (La. 10/17/00), 770 So.2d 339, 343 (citing *Johnson,* 97-1906 at p. 9, 709 So.2d at 677).

In addition, the trial judge must keep in mind the goals of the Habitual Offender Law, which are to deter and punish recidivism, and that the sentencing court's role is not to question the wisdom of the legislature in requiring enhanced punishments for multiple offenders, but rather to determine whether the particular defendant before it has proven that the minimum sentence is so excessive in his case that it violates Louisiana's Constitution. *Lindsey*, 99-3302 at p. 5, 770 So.2d at 343.

As noted above, defendant's sentence of 20 years is the minimum under the statute and, thus, is presumed constitutional. It is therefore incumbent upon defendant to rebut this presumption. In his brief, defendant does not specifically state that he is one of those rare persons who is deserving of a downward departure from the mandatory minimum sentence. Instead, he simply cites his age (29 years), his lack of a juvenile criminal record, and the fact that he is a parent to support his claim that the sentence is excessive. However, at the multiple offender sentencing, defendant's counsel specifically argued for a downward departure from the minimum sentence, noting that defendant is a relatively youthful offender, with a drug problem, who sold a small amount of marijuana and arranged for the sale of

a small amount of MDMA or ecstacy. Counsel argued that, under those circumstances, even the minimum sentence would be excessive.

Based upon our review of the record in this case, we do not find that defendant has clearly and convincingly shown that he is exceptional. Defendant made no showing of exceptional circumstances to justify a lesser sentence. We do not find that his age, parenthood, and lack of juvenile criminal history are sufficient circumstances to warrant a downward departure from the mandatory minimum sentence of imprisonment at hard labor for 20 years. Furthermore, even considering the "relatively small" amount of drugs sold in this case, we do not find that a lesser sentence is warranted. Defendant has failed to cite any unusual or exceptional circumstances to show that he is a victim of the legislature's failure to assign a sentence meaningfully tailored to his culpability, the gravity of the offense, and the circumstances of the case. We find that defendant, who has repeatedly committed felony drug offenses, is exactly the type of recidivist that the Habitual Offender Law intends to punish severely. As such, there was no reason for the trial judge to deviate from the mandatory minimum sentence provided for in this matter. Accordingly, we find no error in the trial court's imposition of the 20-year sentence for the offense of distribution of marijuana. The sentence is not excessive.

***Distribution of MDMA Sentence***

Under La. R.S. 40:966(B)(2), any person convicted of distribution of MDMA faces a penalty of "imprisonment at hard labor for not less than five years nor more than thirty years, at least five years of which shall be served without benefit of parole, probation, or suspension of sentence," and a fine of not more than $50,000.00. As previously noted, defendant was sentenced

to imprisonment at hard labor for 20 years on his distribution of MDMA conviction.

Prior to imposing the sentences, the trial court specifically referenced defendant's criminal history and noted that any lesser sentences would deprecate the seriousness of the offenses. Given the trial court's wide discretion in the imposition of sentences, and the fact that defendant's MDMA distribution sentence is well within the statutory limits, we cannot say that the trial court manifestly abused its discretion in sentencing defendant to 20 years at hard labor on this conviction. The sentence is neither grossly disproportionate to the severity of the offense, in light of the harm to society, nor so disproportionate as to shock our sense of justice. Although the court did not list every aggravating and mitigating factor considered, the sentence is clearly supported by the record. Considering the defendant's propensity to continue drug activity and his failure to respond to past rehabilitation efforts,[4] we conclude that the sentence imposed herein is not unconstitutionally excessive.

The trial court did not err in denying the defendant's motion to reconsider the sentences. This assignment of error lacks merit.

**SENTENCING ERROR**

Under La. C.Cr.P. art. 920(2), we are limited in our review to errors designated in the defendant's assignments of error and error discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. *See State v. Price*, 05-2514, p. 18 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123 (*en banc*), *writ denied*, 07-0130 (La. 2/22/08), 976 So.2d 1277. After a careful review of the record, we have found sentencing errors.

[4] The record reflects that defendant served a period of imprisonment on one of his prior drug convictions.

For his conviction of distribution of MDMA, defendant was sentenced to 20 years at hard labor. Under La. R.S. 40:966(B)(2), the court was required to restrict parole on "at least" five years of the sentence. The court did not impose a parole restriction on any portion of the sentence. Accordingly, defendant's sentence, which did not include a parole restriction, is illegally lenient. However, since the sentence is not inherently prejudicial to defendant, and neither the state nor defendant has raised this sentencing issue on appeal, we decline to correct the error. *See State v. Price*, 05-2514 at pp. 18-22, 952 So.2d at 123-25.

For the foregoing reasons, defendant's convictions, habitual offender adjudication, and sentences are affirmed.

**CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.**