NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 KA 1615

STATE OF LOUISIANA

VERSUS

JESSIE BELL, JR.

DATE OF JUDGMENT: APR 2 6 2013

ON APPEAL FROM THE SEVENTEENTH JUDICIAL DISTRICT COURT
NUMBER 477,549, DIVISION C, PARISH OF LAFOURCHE
STATE OF LOUISIANA

HONORABLE WALTER I. LANIER, III, JUDGE

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* * * * * *

BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

Disposition: HABITUAL OFFENDER SENTENCES AFFIRMED.

KUHN, J.,

The defendant, Jessie Bell, Jr., a/k/a Jessie Moten, was charged by bill of information with distribution of cocaine and possession of cocaine with intent to distribute, violations of La. R.S. 40:967(A). He pled not guilty and, following a jury trial, was found guilty as charged on both counts. Thereafter, the State filed a habitual offender bill of information seeking to enhance the defendant's sentences pursuant to La. R.S. 15:529.1. Initially, the defendant was sentenced, on each count, to thirty years at hard labor, with the first two years without benefit of parole, probation, or suspension of sentence, and with the sentences to run concurrently. Following a habitual offender hearing, he was adjudicated a fourth-felony habitual offender, the prior sentences were vacated, and he received a single sentence of life imprisonment without benefit of parole, probation, or suspension of sentence. On appeal, this Court affirmed the convictions. See ***State v. Bell***, 10-1954 (La. App. 1st Cir. 6/10/11) (unpublished), writ denied, 11-1504 (La. 2/3/12), 79 So.3d 1024. Following a separate appeal of the habitual offender adjudications and sentence, this Court affirmed the habitual offender adjudications, vacated the habitual offender sentence, and remanded for resentencing. See ***State v. Bell***, 10-0786 (La. App. 1st Cir. 12/21/11) (unpublished). On remand, the defendant was sentenced to life imprisonment on each count, without benefit of probation, parole, or suspension of sentence, with the sentences to run concurrently. He moved for reconsideration of sentences, but the motion was denied. The defendant now appeals, contending the trial court misinterpreted this Court's opinion in the prior appeal taken from his original habitual offender sentence in docket number 2010-0786. In the alternative, he argues the sentences imposed were excessive. For the following reasons, we affirm the habitual offender sentences.

FACTS

The facts concerning the defendant's offenses are set forth in the prior appeal he took from his convictions (docket number 2010-1954).

MISINTERPRETATION OF OPINION

In assignment of error number one, the defendant argues the trial court misinterpreted the opinion rendered by this Court in the prior appeal taken from his habitual offender adjudications and sentence (docket number 2010-0786) as requiring the imposition of two life sentences.

In ***State v. Dorthey***, 623 So.2d 1276, 1280-81 (La. 1993), the Louisiana Supreme Court recognized that if a trial judge determines that the punishment mandated by the Habitual Offender Law makes no "measurable contribution to acceptable goals of punishment" or that the sentence amounts to nothing more than "the purposeful imposition of pain and suffering" and is "grossly out of proportion to the severity of the crime," he is duty bound to reduce the sentence to one that would not be constitutionally excessive.

However, the holding in ***Dorthey*** was made only after, and in light of, express recognition by the court that, "the determination and definition of acts which are punishable as crimes is purely a legislative function. It is the Legislature's prerogative to determine the length of the sentence imposed for crimes classified as felonies. Moreover, courts are charged with applying these punishments unless they are found to be unconstitutional." ***Dorthey***, 623 So.2d at 1278 (citations omitted).

In ***State v. Johnson***, 97-1906 (La. 3/4/98), 709 So.2d 672, the Louisiana Supreme Court reexamined the issue of when ***Dorthey*** permits a downward departure from the mandatory minimum sentences in the Habitual Offender Law.

The court held that to rebut the presumption that the mandatory minimum sentence was constitutional, the defendant had to "clearly and convincingly" show that:

> [he] is exceptional, which in this context means that because of unusual circumstances this 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.

Johnson, 709 So.2d at 676.

In the defendant's prior appeal taken from his habitual offender adjudications and sentence (docket number 2010-0786), we remanded for resentencing, stating:

> In this case, after being convicted of distribution of cocaine and possession of cocaine with intent to distribute, the defendant was billed as a habitual offender. In the habitual offender bill of information, the state listed both of these convictions. At the conclusion of the habitual offender hearing, the trial court adjudicated the defendant to be a fourth-felony habitual offender and vacated both of the previously imposed sentences. The court then imposed a single, enhanced sentence of life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. Therefore, it is unclear whether the court intended to enhance one or both of the sentences. If the court intended to enhance only one sentence, the record does not indicate for which conviction it intended to enhance the sentence. Moreover, if the court intended to enhance both sentences, but then imposed only a single sentence, error occurred. It is well settled that sentencing error occurs when a trial court, in sentencing for multiple counts, does not impose a separate sentence for each count. See **State v. Russland Enterprises, Inc.**, 542 So.2d 154, 155 (La. App. 1st Cir. 1989).

In support of his argument that the trial court misinterpreted this Court's prior opinion, the defendant relies on the following comments made by the trial court on remand:

> There was an appeal on Mr. Bell's behalf on the issue of the habitual offender. The First Circuit has spoken on the issue. I had given Mr. Bell a single life sentence. As I read the First Circuit's opinion which remanded the sentencing back to me after affirming the habitual offender sentence [sic], the best I can do is read it to report that Mr. Bell was appropriately found to be a habitual offender.
>
> There were two charges associated with his conviction at the jury trial and, therefore, it would appear instead of one life sentence,

that I was supposed to sentence Mr. Bell to two life sentences, as best I can tell from the First Circuit's judgment.

Additionally, the defendant also cites the trial court's comments at the hearing on the motion to reconsider sentence, as follows:

> Okay. With regard to this is a reconsideration, the Court would note that this – the issue of the legality of Mr. Bell's sentence has been upheld by the First Circuit. There was a technical issue that the Court only gave Mr. Bell a single life sentence for his charges of habitual offender when he was – there were two counts on the underlying charge which was – which created his habitual offender status. I have clarified that and ordered it to be two concurrent life sentences.
>
> With regard to any discretion this Court may have and the Court would argue that I do not have discretion, he is a fourth time habitual offender, the Code seems clear to the Court that it would be a mandatory life sentence and the Court has, in fact, ordered two life sentences for Mr. Bell to run concurrent.

Although the trial court stated it was "supposed to sentence" the defendant to two life sentences, and had no discretion, the record reviewed in its entirety indicates the court was aware of its authority under ***Dorthey*** and ***Johnson*** to depart from the mandatory minimum sentences upon a showing that the defendant was exceptional, but found no such showing had been made.

In imposing maximum sentences at the initial sentencing, the trial court stated:

> The Court does not believe Mr. Bell is an addict. I believe you're a dealer. Though you may use cocaine, there was no indication at the trial in this matter that you were under the influence of cocaine. I think you're a dealer. I think that's what you've done all along. I think you know the system in and out. I think you manipulate it to the way that works for you. And I do think you're a threat to the public if you are not incarcerated.
>
> Other crimes are a factor in the sentencing guideline. Mr. Bell has a significant record, a significant record involving drugs, two prior possession with intents to distribute, two prior possessions. The court believes that if he uses drugs it may be recreational. I do not believe he sells the quantity of drugs that he has as an addict. If he was an addict he would be a corner, or as I would describe, a corner seller selling a few rocks of crack cocaine in order to get a few rocks to smoke. Mr. Bell tends to deal in larger quantities.

> The Court does not believe that this is an issue of correcting Mr. Bell's addictive behaviors to make him go on a straight and narrow. The Court believes that he did this as a money operation. This is how he sustains his living. This is how he made his money. He did not do or sell drugs to continue a drug habit. He sold drugs to make money.
>
> The Court believes a lesser sentence would deprecate the seriousness of the defendant's crime. ... The Court believes that the offender was persistently involved in similar offenses. Some of that would be in his criminal history. The Court believes that Mr. Bell was the leader of this operation. There was [sic] some facts that came out in trial that Mr. Bell was – had given some drugs to some other individuals for various reasons. The Court believes that he was in a position to organize these events.
>
> The Court believes that Mr. Bell was an individual who in Lafourche Parish would receive fairly large quantities of drugs and distribute them to other levels of dealers. Again, he was not a street vendor selling on the corner. He was a higher level dealer than that. The Court believes that he obtained substantial income or resources from the ongoing drug activities. The Court does not particularly believe that he'll respond affirmatively to probationary treatments. He's been given that opportunity on other times. The Court believes that he'll go back to handling himself in such a way to make a living by selling drugs.

At the original habitual offender sentencing, the trial court stated, "[t]he Court does not believe it has any discretion and that as stated in one of the cases, the Court had no choice but to sentence the offender to life imprisonment." The court explained, however, "[t]he Court does not find that there are any minimizing factors to consider in Mr. Bell's case. In fact, as [previously articulated] the Court would find the opposite, that there are numerous factual bases that clearly fit the statute and clearly would prohibit the Court from finding any minimizing or other factual basis for diminution of Mr. Bell's life sentence." The defense objected to the sentence, "given the fact that judicially in some of the case law it's indicated that there is some discretion even on a mandatory life sentence." The trial court responded, "[a]nd if I have any discretion, I will choose for the factors [previously articulated] to choose not to exercise any discretion."

This assignment of error is without merit.

EXCESSIVE SENTENCE

In assignment of error number two, the defendant argues the mandatory life sentences imposed upon him were unconstitutionally excessive because "the culpability of [the defendant] must be viewed in light of his eighth-grade education, non-existent job skills and job opportunities."

Article I, Section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. 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. Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. ***State v. Hurst***, 99-2868 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 00-3053 (La. 10/5/01), 798 So.2d 962.

Whoever distributes cocaine or possesses cocaine with intent to distribute is exposed to a possible sentence of imprisonment at hard labor for not less than two years or more than thirty years, with the first two years of said sentence being without benefit of parole, probation, or suspension of sentence and a fine of not more than fifty thousand dollars. La. R.S. 40:967(B)(4)(b).

Prior to amendment by 2010 La. Acts Nos. 911, § 1 and 973, § 2, La. R.S. 15:529.1, in pertinent part, provided:

> 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:

***

(c) If the fourth or subsequent felony is such that, upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life then:

***

(ii) If the fourth felony and two of the prior felonies are felonies defined as a ... violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for ten years or more, ... the person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence.

On remand, on each count, the defendant was sentenced to life imprisonment without the benefit of probation, parole, or suspension of sentence, sentences to run concurrently.

In the instant case, the defendant failed to clearly and convincingly show that because of unusual circumstances he was a victim of the legislature's failure to assign sentences that were meaningfully tailored to his culpability, the gravity of the offense, and the circumstances of the case. See ***Johnson***, 709 So.2d at 676. Accordingly, there was no reason for the trial court to deviate from the provisions of La. R.S. 15:529.1(A)(1)(c)(ii) (prior to amendment by 2010 La. Acts Nos. 911, § 1 and 973, § 2) in sentencing the defendant. Additionally, the sentences imposed were not grossly disproportionate to the severity of the offenses and, thus, were not unconstitutionally excessive.

This assignment of error is without merit.

HABITUAL OFFENDER SENTENCES AFFIRMED.