NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

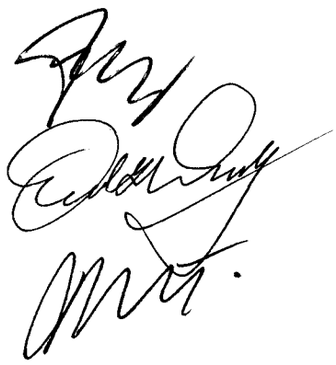
FIRST CIRCUIT

NUMBER 2014 KA 1392

STATE OF LOUISIANA

VERSUS

ANDREW CHARLES YORKISON



Judgment Rendered:

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On appeal from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket Number 0547677

Honorable Peter J. Garcia, Judge

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* * * * * *

BEFORE: GUIDRY, THERIOT, AND DRAKE, JJ.

GUIDRY, J.

The defendant, Andrew Charles Yorkison, was charged by bill of information with fourth-offense driving while intoxicated ("DWI"), a violation of Louisiana Revised Statutes 14:98.[1] He entered a plea of not guilty and, following a jury trial, was found guilty as charged by unanimous jury. The defendant filed motions for new trial and for post-verdict judgment of acquittal, both of which were denied. He was then sentenced to ten years at hard labor. The defendant filed a motion to reconsider sentence, which was denied. He now appeals, arguing that the sentence imposed by the district court was excessive. For the following reasons, we affirm the defendant's conviction and sentence.

FACTS

On March 21, 2014, around 7:30 p.m., Slidell Police Department Sergeant Cliff Laigust was traveling northbound on Pontchartrain Drive in Slidell, Louisiana, when he observed a Ford F-350 in the parking lot of Keith's Seafood Restaurant. The rear of the vehicle was parked on the roadway. Sergeant Laigust entered the restaurant and asked who owned the F-350.[2] The defendant, who appeared intoxicated when he approached, claimed that the vehicle belonged to him. Sergeant Laguist detected the smell of alcohol on the defendant's breath and noticed that his speech was slurred. Shortly thereafter, Slidell Police Department Officer Michael Giardina arrived on the scene and took over the investigation. Officer Giardina spoke with the defendant and immediately noticed that the defendant's speech was slurred, he swayed as he stood, and the odor of alcohol was emanating from his person. When asked why he parked his vehicle in the road, the defendant stated that

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[1] The bill of information lists the defendant's predicate convictions as follows: (1) March 31, 2009, DWI conviction under Twenty-Second Judicial District Court, Parish of St. Tammany, docket number 461,581; (2) June 22, 2005, DWI conviction under Douglas County Superior Court, Douglasville, Georgia, docket number 04-SR-1077; and (3) July 10, 2007, DWI conviction under Paulding County Superior Court, Georgia, docket number 06-CR-1349.

[2] The owner of the vehicle was the defendant's former boss, Chris Wilkin, who gave him permission to use it on the night of the incident.

he was "just coming to get something to eat real quick." He further stated to Officer Giardina that he drank two beers. The defendant agreed to take standardized field sobriety tests, and it was determined that he lacked smooth pursuit in the nystagmus test. He could not keep his balance, and he did not complete the walk-and-turn test, stating that his right knee hurt. He further indicated that he could not perform the one-leg-stand test because both of his knees were "bad." After determining that the defendant was intoxicated, Officer Giardina placed him under arrest and drove him to the police station. While at the station, the defendant admitted that he drank three beers and had been driving the vehicle, but Officer Giardina noted that his level of impairment was extreme and inconsistent with someone who had only consumed three beers. The defendant refused to take the breath test and stated that he was on parole for a previous DWI conviction.

EXCESSIVE SENTENCE

In his sole assignment of error, the defendant argues that the district court erred in imposing a constitutionally excessive sentence. Specifically, the defendant contends that he is suffering from alcoholism and in order to address this disease, a meaningful intervention focusing on treatment should have been implemented.

The Eighth Amendment to the United States Constitution and Article I, Section 20, of the Louisiana Constitution prohibit the imposition of excessive or cruel punishment. Although a sentence falls within statutory limits, it may be excessive. State v. Sepulvado, 367 So. 2d 762, 767 (La. 1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks one's sense of justice. State v. Andrews, 94-0842, pp. 8-9 (La. App. 1st Cir. 5/5/95), 655 So. 2d 448, 454. The district court has great discretion in

imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. See State v. Holts, 525 So. 2d 1241, 1245 (La. App. 1st Cir. 1988). Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the district court to consider when imposing sentence. While the entire checklist of Article 894.1 need not be recited, the record must reflect that the district court adequately considered the criteria. State v. Brown, 02-2231, p. 4 (La. App. 1st Cir. 5/9/03), 849 So. 2d 566, 569.

In the instant matter, the sentence imposed by the district court is the mandatory minimum sentence possible[3] under the appropriate sentencing provisions, and its imposition is presumed constitutional. See La. R.S. 14:98E(1)(a) & (4)(b);[4] see also State v. Johnson, 97-1906, pp. 5-6 (La. 3/4/98), 709 So. 2d 672, 675 and State v. Dorthey, 623 So. 2d 1276, 1278-79 (La. 1993). In Dorthey, the Louisiana Supreme Court recognized that if a district court 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. 623 So. 2d at 1280-1281. 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 that 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

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[3] See, however, our discussion of the sentence under review for error, infra.

[4] Louisiana Revised Statutes 14:98 was amended and reenacted by 2014 La. Acts 385, effective January 1, 2015. All references to La. R.S. 14:98 in this opinion refer to the version in effect at the time of the commission of the offense. See State v. Sugasti, 01-3407 (La. 6/21/02), 820 So. 2d 518, 520.

felonies. Moreover, courts are charged with applying these punishments unless they are found to be unconstitutional. Dorthey, 623 So. 2d at 1278.

In Johnson, the Louisiana Supreme Court re-examined the issue of when Dorthey permits a departure from a mandatory minimum sentence, albeit in the context of the Habitual Offender Law. 97-1906 at pp. 6-7, 709 So. 2d at 676. The court held that to rebut the presumption that a mandatory minimum sentence is constitutional, the defendant had to "clearly and convincingly" show:

> [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, 97-1906 at p. 8, 709 So. 2d at 676. While both Dorthey and Johnson involve the mandatory minimum sentences imposed under the Habitual Offender Law, the Louisiana Supreme Court has held that the sentencing review principles espoused in Dorthey are not restricted in application to the penalties provided by La. R.S. 15:529.1. See State v. Fobbs, 99-1024 (La. 9/24/99), 744 So. 2d 1274, 1275 (per curiam); see also State v. Henderson, 99-1945 (La. App. 1st Cir. 6/23/00), 762 So. 2d 747, 760 n.5, writ denied, 00-2223 (La. 6/15/01), 793 So. 2d 1235.

On appeal, the defendant contends that the district court failed to take into consideration his alcoholism. He points out that under La. R.S. 14:98G, a conviction of a third or subsequent DWI is presumptive evidence of the existence of a substance abuse disorder in the offender. He argues that in order to address a disease such as this one, there must be some type of meaningful intervention that focuses on treatment of the disease and not simply implementation of punishment. However, we find that the Legislature has already taken these factors into account when it set the mandatory minimum sentence for a fourth-offense DWI offender who has received the benefit of suspension of sentence and probation for a previous fourth-offense DWI conviction. Under the various sentencing provisions in Section 14:98,

the Legislature, in its wisdom, struck a balance between the benefits society receives when a DWI offender participates in court-ordered substance abuse treatment and the serious threat a serial DWI offender, who continues to drive while intoxicated, poses to the health and safety of the public. Under the particular facts in the instant case, that balance is provided in La. R.S. 14:98E(4)(b). The record before us reflects nothing unusual about the defendant's circumstances that would justify a downward departure from the mandatory minimum sentence under La. R.S. 14:98E(4)(b). Thus, based on the record before us, we find the defendant has failed to clearly and convincingly show that he is exceptional due to unusual circumstances. Accordingly, this assignment of error is without merit.

REVIEW FOR ERROR

In accordance with La. C. Cr. P. 920(2), all appeals are reviewed for errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. 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 discovered three errors. First, in addition to the sentencing provisions provided in La. R.S. 14:98E(4)(b), the statute mandates that a person who is convicted of a fourth or subsequent DWI offense shall be fined five thousand dollars. See La. R.S. 14:98E(1)(a). The sentencing transcript indicates that the district court failed to impose the mandatory fine. The minutes also reflect that no fine was imposed. Accordingly, the defendant's sentence, which did not include the fine, is illegally lenient. However, since the sentence is not inherently prejudicial to the defendant, and neither the State nor the defendant has raised this sentencing issue on appeal, we decline to correct this error. See Price, 05-2514 at pp. 18-22, 952 So. 2d at 123-25.

Additionally, we note that the district court failed to specify that the first two years of the sentence are without the benefit of parole, probation, or suspension of

sentence. See La. R.S. 14:98E(4)(b). However, when a criminal statute requires that all or a portion of a sentence imposed for a violation of that statute be served without the benefit of probation, parole, or suspension of sentence, the sentence imposed under the provisions of that statute shall be deemed to contain the provisions relating to the service of that sentence without the benefit of probation, parole, or suspension of sentence. See La. R.S. 15:301.1A; State v. Williams, 00-1725, p. 10 (La. 11/28/01), 800 So. 2d 790, 798-99.

Last, the district court did not wait the required twenty-four hours after the denial of the defendant's motions for new trial and post-verdict judgment of acquittal before imposing sentence. See La. C. Cr. P. art. 873. However, in response to the district court's inquiry whether the parties were ready for sentencing, defense counsel responded affirmatively. By announcing his readiness for a sentencing hearing, the defendant implicitly waived the waiting period. See State v. Lindsey, 583 So. 2d 1200, 1206 (La. App. 1st Cir. 1991), writ denied, 590 So.2d 588 (La. 1992). Moreover, the defendant has not cited any prejudice resulting from the court's failure to delay sentencing, nor have we found any indication that he was prejudiced. Therefore, any error which occurred is not reversible. State v. Steward, 95-1693, p. 23 (La. App. 1st Cir. 9/27/96), 681 So. 2d 1007, 1019.

CONVICTION AND SENTENCE AFFIRMED.