NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2017 KA 0340

STATE OF LOUISIANA

VERSUS

ALFRED JONES SIMMONS

Judgment Rendered: NOV 0 1 2017

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket Number 562840/1

Honorable August J. Hand, Judge Presiding

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BEFORE: WHIPPLE, C.J., McDONALD, AND CHUTZ, JJ.

WHIPPLE, C.J.

The defendant was charged by amended bill of information with possession of a Schedule I controlled dangerous substance (marijuana and/or synthetic cannabinoids), second offense,[1] a violation of LSA-R.S. 40:966E (prior to amendment by 2015 La. Acts No. 295 §1) (count one); and possession of a Schedule II controlled dangerous substance (cocaine), a violation of LSA-R.S. 40:967C (count two). He entered a plea of not guilty and filed a motion to suppress the evidence, which was denied. Following a trial, the defendant was found guilty as charged. He filed motions for postverdict judgment of acquittal and new trial, both of which were denied. The State subsequently filed a habitual offender bill of information, and after a hearing, the defendant was adjudicated a fourth-felony habitual offender on count two.[2] The defendant was sentenced to twenty years imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence on count two. On count one, he was sentenced to one year imprisonment at hard labor. The district court ordered the sentences to run concurrently with each other and with those imposed under docket 562841.[3] The defendant filed a motion to reconsider sentence, which was denied. He now appeals, arguing that the sentence imposed on count two is excessive. For the

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[1]The defendant was previously convicted of possession of marijuana and/or synthetic cannabinoids on August 2, 2012, under Twenty-Second Judicial District Court ("22nd JDC") Parish of St. Tammany docket number 518544.

[2]The defendant's predicate offenses include: (1) October 8, 1996 guilty plea to aggravated burglary and armed robbery under Parish of Orleans Criminal District Court docket number 375993; (2) September 26, 2000 conviction to simple burglary of an inhabited dwelling, under Parish of Orleans Criminal District Court docket number 415949; (3) November 17, 2008 guilty plea to possession with intent to distribute cocaine and possession of MDMA under 22nd JDC Parish of St. Tammany docket number 449388; and (4) August 2, 2012 guilty plea to possession of cocaine under 22nd JDC Parish of St. Tammany docket number 518542.

[3]Under 22nd JDC Parish of St. Tammany docket number 562841, the defendant was charged with possession of drug paraphernalia (count one); improper turn (count two); and operating a vehicle without a valid license plate (count three). The defendant pled not guilty. A bench trial on those offenses was held simultaneously with the jury trial on the instant offenses, and the district court found the defendant guilty as charged.

following reasons, we affirm the defendant's convictions on both counts, habitual offender adjudication, and sentence on count one. We amend the defendant's sentence on count two to delete the restriction of parole and affirm as amended. We remand to the district court for correction of the minute entry and commitment order, if necessary.

FACTS

While conducting surveillance from his unmarked vehicle near 515 Beechwood Drive in Slidell on March 18, 2015, Slidell Police Department Detective Charles Esque observed the defendant enter the residence of the target of the surveillance, Anthony Heard.[4] The defendant was inside of Heard's residence for approximately two minutes before leaving and entering his vehicle. The defendant drove down Beechwood Drive toward Highway 90. The detective noticed that the defendant's vehicle did not display a registration, and the defendant failed to signal when he made a left turn. Because he was in an unmarked vehicle and dressed in plain clothes, the detective notified Slidell Police Department Officer Tommy Williams, who was on motorcycle patrol in the area. Officer Williams observed the defendant fail to come to a complete stop at a stop sign and make a left turn without a signal. He then pulled the defendant over for the traffic stop, and Detective Esque then pulled up and took over. As the detective approached the driver's-side window of the defendant's vehicle, he noticed that the defendant appeared extremely nervous and was sweating profusely. The detective also smelled a strong odor of marijuana. He asked the defendant to exit the vehicle, and when the defendant complied, the detective noticed one large bag and a bag containing what he believed to be marijuana inside

[4]Heard was charged by the same amended bill of information as the defendant with possession with intent to distribute a Schedule I controlled dangerous substance (count three); distribution of marijuana (counts four and five); and possession of a firearm by a convicted felon (count six).

of the unbuttoned cargo pocket on the defendant's pants. The defendant attempted to move toward his pocket, but the detective stopped him. The detective placed the defendant under arrest and searched him and his vehicle. Pursuant to the search, the detective located what he believed to be crack cocaine inside of a pill bottle, baggies containing synthetic marijuana, and a battery-powered digital scale. The contents of the evidence seized were tested and determined to contain synthetic cannabinoids, over sixty-two grams of marijuana, and one gram of cocaine.

The defendant testified at trial and stated that on the date of the incident, he was driving from Slidell to his aunt's house in New Orleans to help her fix her roof and to wash his laundry. The defendant claimed that he was in barber school and that Heard asked him to come over and give him a shave. He stated that he stopped by Heard's house to ask if he still wanted one, but Heard told him not to worry about the shave. The defendant maintained that he did not have any illegal substances on his person or in his vehicle and that Detective Esque planted the drugs.

EXCESSIVE SENTENCE

In his sole assignment of error, the defendant contends that the sentence imposed by the district court on count two is excessive because it is "grossly disproportionate to the severity of the crime and is a needless infliction of pain and suffering."[5] Specifically, the defendant argues that he would have received a maximum sentence of five years in "most other parishes in the state[.]" He further complains that because he is addicted to drugs, he should receive a five-year sentence in a prison that offers drug treatment.

At the outset, we note a sentencing error. Herein, the district court imposed the twenty-year enhanced sentence without the benefit of parole. As reflected in

[5]The defendant does not challenge the sentence imposed on count one.

the transcript, the district court was under the impression that it did not have "the discretion, given the statute as written, to afford [the defendant] that opportunity [the benefit of parole]." The district court further noted, "I know this sentence is without benefit of parole. But if the State sees fit to offer him some additional assistance going forward, I have no objection to it." However, LSA-R.S. 40:967C, 15:529.1A(4)(a) and (G) do not restrict parole eligibility. An illegal sentence may be corrected at any time by the court that imposed the sentence or by an appellate court on review. LSA-C.Cr.P. art. 882A. Therefore, we amend the enhanced sentence to delete the restriction of parole.

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. State v. Sepulvado, 367 So. 2d 762, 767 (La. 1979). A sentence is constitutionally 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. See State v. Hurst, 99-2868 (La. App. 1st Cir. 10/3/00), 797 So. 2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So. 2d 962. 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, 480 So. 2d 288, 291 (La. 1985). A district 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 district court before imposing sentence. See LSA-C.Cr.P. art. 894.1. The district court need not recite the entire checklist of Article 894.1, but

the record must reflect that it adequately considered the guidelines. 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 district court's stated reasons and factual basis for its sentencing decision. State v. Watkins, 532 So. 2d 1182, 1186 (La. App. 1st Cir. 1988).

Even though a sentence is the mandatory minimum sentence, it may still be excessive if it makes no "measurable contribution to acceptable goals of punishment" or amounts to nothing more than the "purposeful imposition of pain and suffering" and is "grossly out of proportion to the severity of the crime." State v. Dorthey, 623 So. 2d 1276, 1280 (La. 1993). In order for a defendant to rebut the presumption that a mandatory minimum sentence is constitutional, he must "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.

State v. Johnson, 97-1906 (La. 3/4/98), 709 So. 2d 672, 676. Departures downward from the minimum sentence should only occur in rare situations. See Johnson, 709 So. 2d at 677.

Prior to the imposition of sentence, the district court pointed out that the defendant was thirty-nine years old and "basically [led] a life under which, since you were basically in your 20s, you've been incarcerated, let out, another conviction. A lot of them stem from, seem to be related to drugs[.]" The court noted that it was "faced with the probability of . . . future arrests and convictions." Defense counsel argued that the defendant was addicted to narcotics and would be amenable to rehabilitation. In support of his argument, defense counsel stated that

the defendant had enrolled in a barber school, had a family, and expressed a desire to change his life. Counsel further argued that although the defendant had a conviction for a violent offense, it happened when he was "young." The district court responded, "I just wish I had greater latitude. I don't think he fits the criteria for a Dorthey departure. I wish I could say that that was true. Perhaps at a younger age he may have been and maybe that was the thought pattern back in 1996 when he was given a break." The district court concluded, "I feel compelled, just based upon his prior record, I think what is appropriate and what I'm going to do is sentence him to the 20 years at hard labor without benefit of probation, parole, or suspension of sentence as a fourth felony offender." According to the district court, any lesser sentence would deprecate the seriousness of the offense in conjunction with all of the defendant's prior convictions. See LSA-C.Cr.P. art. 894.1A(3).

Based on our review of the record, we find that the district court did not err or abuse its discretion in imposing the defendant's sentence in accordance with the mandatory penalty provided for in LSA-R.S. 15:529.1A(4)(a). The argument presented by defense counsel at the sentencing hearing did not clearly and convincingly show that the defendant is exceptional and a victim of the legislature's failure to assign a sentence that was meaningfully tailored to his culpability, to the gravity of the offense, and to the circumstances of the case. Thus, the district court had no reason to deviate downward from the mandatory term of twenty years. We also note that a remand for full compliance with Article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. See State v. Harper, 2007-0299 (La. App. 1st Cir. 9/5/07), 970 So. 2d 592, 602, writ denied, 2007-1921 (La. 2/15/08), 976 So. 2d 173. Accordingly, this assignment of error is without merit. The case is remanded to the district court to amend the

minutes and commitment order, if necessary, by deleting the restriction of parole on the sentence for count two.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE ON COUNT ONE AFFIRMED; SENTENCE ON COUNT TWO AMENDED TO DELETE RESTRICTION OF PAROLE, AND AFFIRMED AS AMENDED; REMANDED TO THE DISTRICT COURT FOR CORRECTION OF THE MINUTE ENTRY AND, IF NECESSARY, COMMITMENT ORDER.