NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-0407**
VERSUS	*	**COURT OF APPEAL**
CURTIS RUTH	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 301-025, SECTION "G"
Honorable Julian A. Parker, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, and Judge Dennis R. Bagneris, Sr.)

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AFFIRMED

This appeal concerns a resentencing only.

In 1984 Curtis Ruth was convicted of armed robbery in violation of La. R.S. 14:64. He was sentenced to thirty-three years without benefit of parole, probation, or suspension of sentence as a second offender under La. R.S. 15:529.1. His conviction and sentence were affirmed in an errors patent appeal. State v. Curtis Ruth, KA-4565, unpub. (La. App. 4 Cir. 4/ 11/86). He filed an application for post conviction relief, alleging the denial of effective assistance of counsel on appeal, based on Lofton v. Whitley, 905 F.2d 885 (5th Cir. 1990), and on May 11, 1992, the trial court granted that application.

On appeal this court affirmed his conviction in an unpublished opinion and vacated the multiple bill sentence after finding that Ruth had not been advised of his Boykin rights before pleading guilty to his prior offense, and the case was remanded for resentencing. State v. Ruth, 92-1743 (La. App. 4 Cir. 2/11/94).

A new multiple bill hearing was held on September 16, 1994, and Ruth was adjudicated a second offender and sentenced to forty-nine and one-half years at hard labor without benefit of parole, probation, or suspension of

sentence. The defense objected to the sentence when it was imposed, and in 1995 the appellant filed a pro se writ application arguing that at his resentencing the trial court failed to consider the intent of the original sentencing judge and imposed a harsher sentence without justification. This Court found merit in that argument and again vacated his sentence and remanded the case for resentencing. State v. Ruth, 95-1911 (La. App. 4 Cir. 11/8/95).

On February 1, 1996, the trial court resentenced Ruth to thirty-three years at hard labor without benefit of parole, probation, or suspension of sentence. He was granted an out-of-time appeal in 1999.

The facts of the case are not at issue.

In a single assignment of error the defendant now argues that at his resentencing the trial court erred in imposing the minimum sentence without considering the possibility of a downward departure.

Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. State v. Sepulvado, 367 So. 2d 762 (La. 1979). A sentence is unconstitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the needless and purposeless imposition of pain and suffering, and is grossly out of

proportion to the severity of the crime. State v. Lobato, 603 So. 2d 739 (La. 1992); State v. Telsee, 425 So. 2d 1251 (La. 1983).

The minimum sentences under the Habitual Offender Law are presumed to be constitutional. State v. Johnson, 97-1906 (La. 3/4/98), 709 So. 2d 672. The defendant bears the burden of rebutting the presumption that the mandatory minimum sentence is constitutional. State v. Short, 96-2780 (La. App. 4th Cir. 11/18/98), 725 So. 2d 23. 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. State v. Johnson, 97-1906 at p. 7, 709 So.2d at 676.

The defendant was first sentenced in 1984 when the minimum sentence for a second felony offender convicted of armed robbery was thirty-three years without benefits. The defense points out that the original sentencing judge considered the term he imposed as the minimal available; that judge said:

> the law sets forth a minimum and a maximum sentence that I can impose and I have no choice in the matter. I have to sentence you to a minimum of one third of the longest . . . I have to sentence you to thirty-three years at hard labor without benefit of parole, probation or suspension of sentence.

The defense now argues that the court can depart from the minimal sentence

under State v. Dorthey, 623 So. 2d 1276 (La. 1993).

At the resentencing on February 1, 1996, the judge initially stated that the sentence would be thirty-three and one-third years. The defendant objected saying he was originally sentenced to thirty-three years, and the judge then imposed the thirty-three year sentence, commenting, "If that's what they say give them what they want." Presumably "they" refers to this court, and the trial court referred to this court's opinion when the writ was granted in 1995. In the writ, this court stated that

> [a] review of the transcript of the original sentencing on December 19, 1984 does not show that the court intended for the relator to receive the minimum sentence as a multiple offender. Instead, the transcript indicates that the ad hoc trial judge imposed the minimum sentence because he had no alternative.

The case was remanded for resentencing in accordance with North Carolina v. Pearce, 395 711, 726, 89 S.Ct. 2072, 2081 (1969), which concerns resentencing a defendant to a harsher term. However, the judge did not impose a harsher term; he simply imposed the original sentence of thirty-three year without benefits. Thus, he did not need to consider North Carolina v. Pearce. The defense attorney did not object to the sentence, and no evidence was presented to suggest that a lesser sentence was appropriate.

The Louisiana Supreme Court in State v. Lindsey, 99-3256 (La.

10/17/00), 770 So. 2d 339, has mandated that the guidelines set forth in State v. Johnson, 97-1906 (La. 3/4/98), 709 So. 2d 672 govern the review of mandatory minimum sentencing under an excessive sentence claim.

In Lindsey, the Court stated:

> "[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 which would rebut [the] presumption of constitutionality" and emphasized that "departures downward from the minimum sentence under the Habitual Offender Law should occur only in rare situations."

Id. at p. 5, 770 So. 2d at 343. (quoting Johnson, 709 So. 2d at 676-77). The Court further stated that in departing from the mandatory minimum sentence, the court should examine whether the defendant has clearly and convincingly shown there are exceptional circumstances to warrant the departure.

In the case at bar, the appellant made no showing that his sentence was excessive given his particular circumstances. This sole assignment of error is without merit.

Accordingly for reasons stated above, the defendant's sentence is affirmed.

AFFIRMED