NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2001-KA-1454**
VERSUS	*	**COURT OF APPEAL**
RANDY L. BOYD	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
PLAQUEMINES 25TH JUDICIAL DISTRICT COURT
NO. 99-4680, DIVISION "A"
Honorable Anthony D. Ragusa, Judge
* * * * * *
Judge Miriam G. Waltzer
* * * * * *

(Court composed of Judge Steven R. Plotkin, Judge Miriam G. Waltzer, Judge Patricia Rivet Murray)

MURRAY, J., CONCURRING IN PART WITH REASONS

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CONVICTION AND SENTENCE AFFIRMED, AND SENTENCE CORRECTED.

STATEMENT OF CASE

On 16 December 1999, Randy Boyd and a co-defendant were charged by bill of information with distribution of cocaine within 1000 feet of a school. Defendant pled not guilty at arraignment and filed an application for discovery, a motion to suppress his confession, and a motion to suppress the cocaine seized as evidence. The State filed discovery responses, and defendant waived the motions to suppress the evidence and the confession.

Defendant filed a motion to quash the information alleging that he was entrapped and that the police utilized an illegal wiretap. On 1 September 2000, the trial court heard arguments and denied the motion. On 5 September 2000, a jury was empanelled. On 6 September 2000, the trial court declared a mistrial after the defendant failed to appear. On 7 and 8 November 2000, the case was tried to a jury, and defendant was found guilty as charged. The trial court ordered a pre-sentence investigation.

On 15 February 2001, the trial court sentenced the defendant to serve twenty years in the custody of the Louisiana Department of Corrections at

hard labor, without benefit of pardon, parole or suspension of sentence.

STATEMENT OF FACTS

Detective Jason Picou of the Plaquemines Parish Sheriff's Office testified that on 5 October 1999, he and Agent Adams arranged with two confidential informants, Mr. Andrew Merrick and Mrs. Cheryl Denise Merrick, to conduct an undercover operation at the Merricks' apartment which was outfitted with surveillance equipment. Andrew Merrick telephoned the defendant who agreed to deliver crack cocaine to the Merrick house that evening. The defendant failed to arrive within thirty to forty-five minutes of the initial call. Detective Picou telephoned Andrew Merrick and instructed him to telephone the defendant again, which he did. After another forty-five minutes passed, Merrick was again instructed to telephone defendant. Merrick informed the detectives that defendant was having difficulty arranging transportation and Merrick was instructed to inform defendant that he would meet him wherever he wanted. After concluding the conversation, Merrick informed the detectives that defendant had instructed him to send his wife to Buras High School.

The detectives formulated a plan whereby Detective Picou would participate in the buy with Mrs. Merrick. Agent Adams took Detective

Picou and Mrs. Merrick to the Buras Library and they began walking back towards the high school on the opposite side of the roadway. They observed a gold Toyota Corolla approach and Mrs. Merrick said that she believed defendant was in that car. The car pulled over on the shoulder, and Detective Picou and Mrs. Merrick greeted the defendant at the passenger side of the car. Defendant informed the two that he had the cocaine with him. Defendant also said that Detective Picou looked like an undercover officer. Mrs. Merrick replied that he was all right and handed defendant fifty dollars. Defendant said that he needed another fifty dollars and handed Mrs. Merrick a rock of cocaine, which she handed to Detective Picou. Detective Picou inspected the cocaine and then handed defendant fifty dollars.

After the buy was completed Detective Picou obtained a device used to measure distances, known as a walking stick, from an accident scene investigator, and measured the distance from the where the buy took place to the fence of the Buras High School to be 500 feet. An aerial photograph of the area was also introduced, and Detective Picou identified the location of the buy and various other landmarks depicted in the photograph. Both Detective Picou and Cheryl Merrick identified defendant in a photographic lineup. Defendant was arrested pursuant to an arrest warrant. The lab report

identifying the substance as cocaine was introduced into evidence.

ERRORS PATENT

In 2001, the Legislature made substantial changes to various penal provisions. By Acts 2001, No. 403, §4, effective 15 June 2001, the Legislature modified the penalty provision of LSA-R.S. 40:967(B)(4) and rewrote LSA-R.S. 40:981.3(E). Prior to the 2001 amendment, LSA-R.S. 40:967(B)(4)(b) provided,

> Distribution, dispensing, or possession with intent to produce, manufacture, distribute, or dispense cocaine or cocaine or a mixture or substance containing cocaine or its analogues as provided in Schedule II(A)(4) of R.S. 40:964 shall be sentenced to a term of imprisonment at hard labor for not less than five years nor more than thirty years, with the first five years of said sentence being without benefit of parole, probation, or suspension of sentence; and may, in addition, be sentenced to pay a fine of not more than fifty thousand dollars.

This section now provides,

> Distribution, dispensing or possession with intent to produce, manufacture, distribute or dispense cocaine or cocaine base or a mixture or substance containing cocaine or its analogues as provided in Schedule II(A)(4) of R.S. 40:964 shall be sentenced to a term of imprisonment at hard labor for not less than two years nor more than thirty years, with the first two years of said sentence being without benefit of parole, probation, or suspension of sentence; and may, in addition, be sentenced to pay a fine of not more than fifty thousand dollars.

LSA-R.S. 40:967(B)(4)(b). By the same legislation, Acts 2001, No. 403, §

4, the Legislature changed Paragraph E of LSA-R.S. 40:981.3, which section provided, in pertinent part,

> E. (1) On a first conviction, whoever violates a provision of this Section shall be punished by the imposition of the maximum fine and not less than one-half nor more than the maximum term of imprisonment authorized by the applicable provisions of R.S. 40:966 through R.S. 40:970, with the minimum mandatory term of imprisonment being served without benefit of parole, probation, or suspension of sentence, provided in no one case shall the term of imprisonment be less than the minimum term provided in R.S. 40:966 through R.S. 40:970.

Paragraph E now provides,

> Whoever violates a provision of this Section shall be punished by the imposition of the maximum fine and be imprisoned for not more than one and one-half times the longest term of imprisonment authorized by the applicable provisions of R.S. 40:966 through R.S. 40:970.

LSA-R.S. 40:981.3(E).

Acts 2001, No. 403, § 4 explicitly provided that "[t]he provisions of this Act shall only have prospective effect." Moreover, the Louisiana Supreme Court has recently held that these amendments shall apply to crimes committed after the effective date of the Act, 15 June 2001. *State v. Sugasti*, 2001-3407 (La. 6/21/2002), 820 So.2d 518, 522. Boyd's crime occurred on 5 October 1999. The statutes, as they existed prior to the 2001 amendments, control the appropriate sentence. The trial court sentenced

Boyd to twenty years at hard labor without benefits for the entire sentence. Moreover, the trial court failed to impose any fine. Thus, Boyd received both an illegally excessive sentence and an illegally lenient sentence.

LSA-R.S. 15:301.1 provides,

> A. When a criminal statute requires that all or a portion of a sentence imposed for a violation of that statute be served without benefit of probation, parole, or suspension of sentence, each sentence which is imposed under the provisions of that statute shall be deemed to contain the provisions relating to the service of that sentence without benefit of probation, parole, or suspension of sentence. The failure of a sentencing court to specifically state that all or a portion of the sentence is to be served without benefit of probation, parole, or suspension of sentence shall not in any way affect the statutory requirement that all or a portion of the sentence be served without benefit of probation, parole, or suspension of sentence.
> B. If a sentence is inconsistent with statutory provisions, upon the court's own motion or motion of the district attorney, the sentencing court shall amend the sentence to conform to the applicable statutory provisions. The district attorney shall have standing to seek appellate or supervisory relief for the purpose of amending the sentence as provided in this Section.
> C. The provisions of this Section shall apply to each provision of law which requires all or a portion of a criminal sentence to be served without benefit of probation, parole, or suspension of sentence, or of any one of them, any combination thereof, or any substantially similar provision or combination of substantially similar provisions.
> D. Any amendment to any criminal sentence as authorized by the provisions of this Section shall be completed within one hundred eighty days of the initial sentencing.

The trial court's error in subjecting Boyd's entire sentence "self-activates the correction and eliminates the need to remand for a

ministerial correction." *State v. Williams*, 2000-1725 (La. 11/28/2001), 800 So.2d 790, 799. Such self-activating errors are not subject to the time limitation for correcting such errors imposed by Paragraph D of LSA-R.S. 301.1. Moreover, "[a]n 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. 882.

The trial court imposed an illegally lenient sentence by failing to impose the mandatory fine under LSA-R.S. 40:981.3(E). Although an illegal sentence "may be corrected" at any time under LSA-C.Cr.P. art. 882, we decline to exercise this discretion under the facts of this case. To reach any other conclusion fails to give effect to the clear language of LSA-R.S. 15:301.1(D). *Williams*, 2000-1725, p. 18 (La.11/28/01), 800 So.2d 790, 804 (Calogero, Chief Justice, dissenting.). The State failed to do anything to correct the sentence. The State did not timely ask the trial court to reconsider the sentence, did not timely seek supervisory jurisdiction, and did not timely appeal the illegally lenient sentence, irrespective of LSA-R.S. 15:301.1(D). Therefore, we decline to consider Boyd's illegally lenient sentence.

FIRST ASSIGNMENT OF ERROR: The trial court erred in admitting the cocaine in evidence because the state failed to establish an unbroken

chain of custody.

The record reflects that defendant did not object when the cocaine was offered into evidence. LSA-C.Cr.P. art. 841 provides that an irregularity or error cannot be raised after verdict unless it was objected to at the time of occurrence. Accordingly, the assignment of error has not been preserved for appellate review.

SECOND ASSIGNMENT OF ERROR: The trial court erred in allowing testimony concerning co-defendant Chuc Nguyen.

Defendant contends that this testimony was not relevant and that it prejudiced the defendant. Defendant contends further that the testimony was solicited to confuse the jury and constituted evidence of other crimes.

The record reflects that the only testimony concerning Nguyen, which predominantly concerned his identification from a photographic lineup, was elicited by defendant's trial counsel, not the State. Indeed, the State objected to any testimony concerning Nguyen on the basis of relevancy.

Upon information and belief that Nguyen was the driver of the vehicle from which defendant distributed the cocaine, Nguyen was charged in the bill of information. This later proved not to be the case, and the charges were dismissed. Furthermore, defendant does not suggest how any of the

testimony or evidence constituted other crimes evidence; nor does the record reflect that anything concerning Nguyen could remotely be considered other crimes evidence.

This assignment of error is without merit.

THIRD ASSIGNMENT OF ERROR: The State failed to overcome defendant's entrapment defense.

The affirmative defense of entrapment arises when a law enforcement official or an undercover agent acting in cooperation with such an official, for the purpose of obtaining evidence of a crime, originates the idea of the crime and then induces another person to engage in conduct constituting the crime, when the other person is not otherwise disposed to do so. The defendant bears the burden of proving entrapment by a preponderance of the evidence. The entrapment defense will not be recognized when the law enforcement official merely furnishes the accused with an opportunity to commit a crime to which he is predisposed. *State v. Brand*, 520 So.2d 114, 117 (La.1988).

Entrapment arguments are reviewed on appeal under the sufficiency of evidence standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Alford*, 99-0299 (La.

App. 4 Cir. 6/14/00), 765 So.2d 1120.

The record does not show that the defendant actually pursued the defense of entrapment beyond his motion to quash. He offered no testimony or other evidence to establish the defense.

Defendant contends that the fact that the Merricks telephoned him on three occasions is evidence that he was induced to sell the cocaine. However, it is clear from the record that the last two phone calls were prompted by the defendant's difficulty in obtaining transportation to the Merrick's house, and there is no evidence that the defendant was badgered or coerced to commit an offense he was not predisposed to commit. The Merricks merely provided an opportunity for the defendant to commit the crime. A rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could conclude reasonably that the defendant had not proved, by a preponderance of the evidence, that he had been entrapped.

This assignment of error is without merit.

FOURTH ASSIGNMENT OF ERROR: The sentence is constitutionally excessive.

LSA-Const. art. I, § 20 explicitly prohibits excessive sentences. *State*

v. Baxley, 94-2982, p. 4, (La. 5/22/95), 656 So. 2d 973, 977. Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. *State v. Brady*, 97-1095, p. 17 (La.App. 4 Cir. 2/3/99), 727 So. 2d 1264, 1272, *rehearing granted on other grounds*, (La.App. 4 Cir. 3/16/99). However, the penalties provided by the legislature reflect the degree to which the criminal conduct is an affront to society. *Baxley*, 94-2984 at p. 10, 656 So.2d at 979. A sentence is constitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless imposition of pain and suffering, and is grossly out of proportion to the severity of the crime. *State v. Johnson*, 97-1906, pp. 6-7 (La. 3/4/98), 709 So. 2d 672, 677. 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. *Baxley*, 94-2984 at p. 9, 656 So.2d at 979.

Defendant was sentenced to twenty years at hard labor for distribution of cocaine. LSA-R.S. 40:967(B)(4)(b) provided at the time of defendant's arrest that a person convicted of distribution of cocaine must be sentenced to not less than five nor more than thirty years at hard labor, with the first five years without benefits. LSA-R.S. 40:981.3(E) provided that a person

convicted of distribution of cocaine within 1000 feet of a school must be sentenced to not less than one half the maximum term (that is, fifteen years) and not more than the maximum term of thirty, with the minimum term served without benefits.

The record reflects that the defendant had previously been convicted of second-degree battery, for which he was sentenced to five years in prison, of unauthorized use of a movable, and of criminal damage to property.

Given that defendant's sentence was within five years of the statutory minimum and in light of his previous criminal history, defendant's twenty-year sentence is not constitutionally excessive.

CONCLUSION AND DECREE

We affirm the defendant’s conviction and affirm the defendant’s sentence. We order that the first fifteen years of defendant’s sentence be served without benefit of probation, parole, or suspension of sentence.

CONVICTION AND SENTENCE AFFIRMED, SENTENCE CORRECTED