NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-KA-0310**
VERSUS	*	**COURT OF APPEAL**
SHAWN WILLIAMS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 424-903, SECTION "G"
Honorable Julian A. Parker, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris, Sr., and Judge David S. Gorbaty)

JONES, J. DISSENTS WITH REASONS

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CONVICTIONS AND SENTENCES AFFIRMED

Shawn Williams was charged by bill of information on September 24, 2001, with solicitation for a crime against nature in violation of La. R.S. 14:89(A)(2) and with possession of cocaine in violation of La. R.S. 40:967 (C). At his arraignment on September 27th he pleaded not guilty. Probable cause was found to bind the defendant over for trial, and the motions to suppress the evidence and statements were denied after a hearing on October 11th. A six-member jury found him guilty as charged on each count after trial on November 14th. The state filed a multiple bill charging the defendant as a fourth felony offender on count one, and after a hearing on December 5th in which the state proved the charge, Williams was sentenced to twenty years at hard labor under La. R.S. 14:89(A)(2) and La. R.S. 15:529.1(A)(1)(c)(i). The defendant's motion for reconsideration of sentence was denied, and his motion for an appeal was granted.

At trial Detective Rickey Jackson testified that on August 13, 2001, he was working undercover, wearing plain clothes and driving an unmarked car near the intersection of Ursuline Street and North Claiborne Avenue,

when he noticed the defendant standing on the corner. The defendant waved to the detective who then pulled into Ursuline Street and stopped his car. The detective was able to notify his backup team of his position before the defendant reached his car. The defendant approached the passenger's side of the car and asked the detective if he were a policeman, and the detective answered affirmatively. The defendant laughed and asked the question again, and the officer responded, "Didn't I just tell you I was the police?" The defendant concluded, "You're not the police," opened the car door, got into the car, and told the officer to drive. As they drove away, the defendant said, "Okay, I'll give you head for ten dollars." Detective Jackson gave a prearranged signal to his backup team, and a marked police car pulled him over. The defendant stated, "You are the police," got out of the car, and began to run. He was quickly apprehended.

Detective Montalbano of the Vice Squad testified that his unit was targeting street level prostitution, and he was serving as backup to Detective Jackson. When he was notified that Detective Jackson had signaled, Detective Montalbano moved into the area and stopped Jackson's car. The defendant got out and ran; Detective Montalbano gave chase and, after a scuffle, detained the defendant. In a search incident to arrest, the detective found on the defendant's person a cigarette lighter and a glass tube with a

burnt end and containing a white residue. The detective recognized it as a crack pipe. When he was arrested, the defendant gave his name as Shawn Johnson; sometime later the officer learned that the defendant's name was Shawn Williams.

Criminalist William Giblin, who testified as an expert in analysis of controlled dangerous substances, reported that he tested the residue in the glass tube taken from the defendant and found it to be crack cocaine residue.

In a single assignment of error, the defendant argues that his twenty-year sentence is excessive. Williams faced a sentence of twenty years to life at hard labor. He received the minimum sentence.

An appellate court reviews sentences for constitutional excessiveness under La. Const. Art. I, §20. A sentence is constitutionally excessive if it makes no measurable contribution to acceptable goals of punishment or is 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. 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. 1/29/79).

The minimum sentences imposed on multiple offenders by 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. 4 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 Louisiana Supreme Court has reviewed the law on point as to the "rare circumstances" under which a court may depart from the mandatory minimum sentence, stating:

> To rebut the presumption that the mandatory minimum sentence is constitutional, the defendant must clearly and convincingly show that:
>
> > [he] is exceptional, which in this context means that because of ***unusual*** circumstances, the 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. Lindsey, 99-3256, p. 5 (La. 10/17/00), 770 So.2d 339, 341, 343. (Emphasis added).

Moreover, in State v. Soraparu, 97-1027 (La. 10/13/97), 703 So.2d

608, the Louisiana Supreme Court stated:

> On appellate review of sentence, the only relevant question is "'whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate.'" State v. Cook, 95-2784, p. 3 (La. 5/31/96), 674 So.2d 957, 959 (quoting State v. Humphrey, 445 So.2d 1155, 1165 (La.1984)), cert. denied, --- U.S. ----, 117 S.Ct. 615, 136 L.Ed.2d 539 (1996). For legal sentences imposed within the range provided by the legislature, a trial court abuses its discretion only when it contravenes the prohibition of excessive punishment in La. Const. art. I, § 20, i.e., when it imposes "punishment disproportionate to the offense." State v. Sepulvado, 367 So.2d 762, 767 (La.1979). In cases in which the trial court has left a less than fully articulated record indicating that it has considered not only aggravating circumstances but also factors militating for a less severe sentence, State v. Franks, 373 So.2d 1307, 1308 (La.1979), a remand for resentencing is appropriate only when "there appear[s] to be a substantial possibility that the defendant's complaints of an excessive sentence ha [ve] merit." State v. Wimberly, 414 So.2d 666, 672 (La.1982).

Id.

The defendant argues that the trial court determined that the sentence was excessive but indicated it had no discretion to sentence the defendant to a lesser term.

At sentencing the court stated:

> The legislature has taken away from the trial court any discretion to impose a sentence of anything less than twenty years nor any sentence more than natural life. And the Court

> feel [sic] compelled to follow the dictates of the Louisiana State Legislature as articulated in Louisiana Revised statute 15:529.1 subsection (A)(2)(c)(1). [sic] However, the Court further notes that all of Mr. Williams' prior convictions involve a violation of Louisiana Revised Statute 14:89 and one involves a violation of 14:89 as well as 40:967(C)(2). . . . .
>
> So, Mr. Williams comes before the court now facing a sentence of twenty years to life because of convictions for possession of Cocaine [sic] residue and solicitation for crime against nature. While this court is not here to quarrel or to question the wisdom of the legislature as it relates to 15:529.1 subsection (A)(2)(C)(1) [sic], the Court finds the sentence of twenty years to life to be cruel and unusual punishment. [The court then addressed the defendant, asking him what he was talking about, and he answered, "I'm not talking to you." The defense attorney quickly intervened, stating that the defendant had been asking what was happening at the hearing. The court continued.]
>
> Well, Mr. Williams, what is happening is I'm trying not to give you twenty years . . . because I don't think you deserve it. . . . . And this policy of the District Attorney's office of charging people who have been arrested by the police in possession of drug paraphernalia with felony possession of cocaine and then filing multiple bills, is in the opinion of this court, unreasonable and there should be some discretion on a case for case basis. Even though Mr. Williams did go to trial and he did take up the time of the court, the public defender and the district attorney and he refused his forty month plea bargain, he is still a human being and in the opinion of the Court, is not deserving of the punishment that the Legislature has forced me to give him. *While I do find this to be cruel and unusual, the Court is going to decline holding the statute unconstitutional as it applies to Mr. Williams' case and I don't find any legal authority to delineate apart from the sentence in which I feel compelled to impose*.

(Emphasis added).

Here the court reviewed the defendant's history and noted that his

crimes—solicitation for a crime against nature (four) and possession of a pipe containing cocaine residue (two or three) - are offenses punished by terms the court finds excessive, especially when enhanced by the Habitual Offender Law. The court expressed sympathy for the defendant. However, the court declined to find the minimum twenty-year sentence excessive in this case because Williams offered no evidence that he is exceptional or his circumstances are unusual enough to rebut the presumption that the mandatory minimum sentence is constitutional. Implicit in the court's decision not to find this defendant an exception is the evidence in the record of twenty-six arrests between 1993 and 1998 when Williams was incarcerated for thirty months as a second offender. The defendant's six convictions since 1997 and his many arrests indicate an inability to live within the law and a need for correctional treatment. Although the trial court stated it did not agree with the legislature as to the crimes and punishments involved in this case, it recognized that the standard for imposing a lesser sentence could not be met under these circumstances because the defendant showed no redeeming factors which would support a sentence less than the minimum mandatory sentence.

The trial court did not err in sentencing the defendant to the statutory minimum term of imprisonment. Accordingly, Shawn Williams' convictions

and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED