NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-KA-0386**
VERSUS	*	**COURT OF APPEAL**
KEITH DUNCAN	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 424-572, SECTION "J"
Honorable Leon Cannizzaro, Judge
* * * * * *
Judge David S. Gorbaty
* * * * * *

(Court composed of Judge Michael E. Kirby, Judge Max N. Tobias, Jr., Judge David S. Gorbaty)

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CONVICTION AFFIRMED; REMANDED FOR RESENTENCING

Keith Duncan appeals his sentence as being excessive. For the following reasons, we affirm the conviction, and remand this matter for the trial court to amend Duncan's sentence to include imposition of a fine mandated by La. Rev. Stat. 14:95.1(B)

STATEMENT OF THE CASE:

Keith Duncan was charged by bill of information with possession of a firearm by a convicted felon in violation of La. Rev. Stat. 14:95.1. His first trial ended in a mistrial; however, on October 25, 2001, a twelve-member jury found him guilty as charged. Duncan was sentenced to serve ten years at hard labor without benefit of probation, parole, or suspension of sentence. His motion to reconsider sentence was denied, and his motion for an appeal was granted.

STATEMENT OF THE FACTS:

At trial Officers John L. Holmes and August Michelle testified that on August 4, 2001, they were on proactive patrol at Frenchman and North Tonti

Streets. Officer Holmes defined "proactive patrol" as a patrol in which officers look for particular illegal actions. He explained that officers are trained to recognize certain reactions people have upon seeing a policeman. When they noticed Duncan, who was walking nearby, they saw him put his hand on his waistband as though he was trying to conceal something. They knew from experience that weapons are often hidden in waistbands. Officer Holmes called out to Duncan, who then turned and looked at the police car. When Officer Michelle got out of the car and walked toward him, Duncan began to run. Officer Michelle followed on foot and Officer Holmes followed in the car. Duncan took something from his waistband and dropped it. Officer Michelle picked up the object, a loaded handgun. The officers apprehended Duncan and advised him of his *Miranda* rights.

The parties stipulated that Duncan is a convicted felon. The handgun and fourteen rounds of bullets were admitted into evidence.

ERROR PATENT:

Before addressing the assignment of error, we note an error patent in that the trial court did not impose the $1000 to $5000 fine mandated by La. Rev. Stat. 14:95.1(B). In *State v. Course*, 2001-1812 (La.App. 4 Cir. 1/30/02), 809 So.2d 488, this court, noting that the fine of not more than $50,000 had not been imposed, stated:

> Pursuant to La. C.Cr.P. art. 882A, a [sic] illegally

> lenient sentence can be noticed or recognized by the appellate court *sua sponte* without the issue being raised by the State[.] … *State v. Williams*, 2000-1725 (La. 11/29/01), 800 So.2d 790. *Williams* retroactively overrules *State v. Jackson*, 452 So.2d 682 (La. 1984) and its progeny, including *State v. Fraser*, 484 So.2d 122 (La. 1986). In reference to La. R.S. 15:301.1, [footnote omitted] the Louisiana Supreme Court stated that: "When an illegal sentence is corrected, even though the corrected sentence is more onerous, there is no violation of the defendant's constitutional rights." *Id.* 800 *So.2d at* 798

State v. Course involved a violation of La. Rev. Stat. 40:966(A)(2) that mandates imposition of a fine of not more than $50,000. This Court held the trial court had discretion to omit the fine because no minimum amount was provided by the statute. However, a minimum fine is provided by La. Rev. Stat. 14:95.1, and it was not imposed.

In *State v. McGee*, 95-1863 (La.App. 4 Cir. 10/18/95), 663 So.2d 495, where a defendant sentenced under La. Rev. Stat. 14:95.1 was not fined, this Court, citing *State v. Booth*, 347 So.2d 241 (La. 1977), held that the fine was mandatory and the trial court had no discretion to waive it. Like Duncan, the defendant in *McGee* was indigent, and the Court noted that an indigent defendant may not be incarcerated for failing to pay a fine that is part of his sentence. However, because the fine is a mandatory part of the sentence, the case must be remanded for imposition of the fine.

ASSIGNMENT OF ERROR:

In a single assignment of error, Duncan claims that his sentence is excessive. He maintains that the ten to fifteen year term mandated by La. Rev. Stat. 14:95.1 for possession of a weapon by a convicted felon is excessive as compared to punishments for the same crime in other states. He points out that no other state has a minimum sentence that exceeds five years, and furthermore, while Florida has a maximum sentence of fifteen years, it has no minimum term.

In *State v. Wilson*, 96-1392, 96-2076 (La. 12/13/96), 685 So.2d 1063, 1086, the Louisiana Supreme Court considered a defendant's argument that the mandated sentence for his offense was excessive and stated:

> The legislature alone determines what are punishable as crimes and the proscribed penalties. State v. Dorthey, 623 So 2d 1276 (La. 1993); State v. Baxley, 94-2982 (La. 5/22/95), 656 So. 2d 973. The legislature is not required to select the least severe penalty for the crime as long as the selected penalty is not cruelly inhumane or disproportionate to the offense.

In *Wilson*, the defendant was charged with rape of a girl less than twelve years old, and he argued that the death penalty was disproportionate. In the discussion, the Supreme Court considered that Louisiana is the only state that has a law providing for the death penalty for rape of a child less than twelve years old, and concluded that that "fact … cannot be deemed determinative." Id., 685 So.2d at 1068. In finding the death penalty was not excessive, the Court stated that it gave "great deference to our legislature's

determination of the appropriateness of the penalty." Id., 685 So.2d at 1073.

Thus, Duncan would be better served by making his argument to the legislature.

In *State v. Wilson*, the Court noted that although the legislature determines penalties, those punishments must meet the mandates of the Eighth Amendment and Article I, § 20 of the Louisiana Constitution, and they are also subject to review by the courts. Accordingly, we will review Duncan's sentence to determine if it is excessive for him.

Louisiana Constitution Article I, § 20 explicitly prohibits excessive sentences. *State v. Baxley*, 94-2982 (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 (La.App. 4 Cir. 2/3/99), 727 So.2d 1264, 1272. However, the penalties provided by the legislature reflect the degree to which the criminal conduct is an affront to society. *Baxley*, 656 So.2d at 979, citing *State v. Ryans*, 513 So.2d 386, 387 (La.App. 4 Cir.1987). 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 (La.3/4/98), 709 So.2d 672.

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*, 656 So.2d at 979.

In reviewing a claim that a sentence is excessive, an appellate court generally must determine whether the trial judge has adequately complied with statutory guidelines in La. Code Crim. Proc. art. 894.1 and whether the sentence is warranted under the facts established by the record. *State v. Trepagnier*, 97-2427 (La.App. 4 Cir. 9/15/99), 744 So.2d 181, 189. If adequate compliance with La. Code Crim. Proc. art. 894.1 is found, the reviewing court must determine whether the sentence imposed is too severe in light of the particular defendant and the circumstances of the case, keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged. *State v. Bonicard*, 98-0665 (La.App. 4 Cir. 8/4/99), 752 So.2d 184, 185.

However, 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*, 519 U.S. 1043, 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, S 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.

Duncan received the minimum mandated sentence of ten years without benefits. He offers no evidence as to why this sentence is excessive, and, given his record, there does not appear to be a substantial possibility that his complaint has merit.

Accordingly, for reasons stated above, Keith Duncan’s conviction is affirmed. The case is remanded to the trial court for imposition of a fine, and in all other aspects the defendant’s sentence is affirmed.

CONVICTION AFFIRMED; REMANDED FOR RESENTENCING