NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-KA-0423**
VERSUS	*	**COURT OF APPEAL**
KEVIN MILLER	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 411-280, SECTION "H"
Honorable Camille Buras, Judge
* * * * * *
Judge Patricia Rivet Murray
* * * * * *

(Court composed of Judge Steven R. Plotkin, Judge Patricia Rivet Murray, Judge Terri F. Love)

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AFFIRMED

On December 13, 1999, Kevin Miller was charged by bill of information with possession of between twenty-eight and two hundred grams of cocaine in violation of La. R.S. 40:967(F)(1)(a). At arraignment, he pled not guilty. After a hearing on April 11, 2000, the trial court found probable cause and denied the defense's motion to suppress evidence and statement. On September 21, 2000, a twelve-member jury found Mr. Miller guilty as charged. The state then filed a multiple bill charging Mr. Miller as a second offender. Following a hearing, the trial court found the applicable ten year period had elapsed between his prior and current offenses and thus found Mr. Miller was not guilty as a multiple offender. On September 14, 2001, the trial court sentenced Mr. Miller to serve thirty years at hard labor and suspended all but $1,900 of the mandatory $50,000 minimum fine. In lieu of the fine, the court ordered that the $1,900 that Mr. Miller was carrying when he was arrested be forfeited to the court. Although Mr. Miller's motion for reconsideration of sentence was denied, his motion for appeal was granted.

FACTUAL BACKGROUND

At trial, Officer Robert Hickman of the Special Operations Division testified that on October 11, 1999 at about 1:30 p.m., he and his partner, Officer Tommy Felix, were driving a marked police car in New Orleans East when they noticed Mr. Miller standing by the fence at the Ernest N. Morial Elementary School. At that time of day, children were playing in the schoolyard. The officers drove up to the place where Mr. Miller was standing and intended to conduct a field interview. Before the officers could get out of the police car, Mr. Miller ran behind the car toward the other side of the street. A second police car was just approaching, and Mr. Miller ran in front of that car. Officer Felix began to chase Mr. Miller. The second police car drove to the corner and turned right. Officer Hickman joined the chase and saw Mr. Miller reach into his right pocket and then toss an object onto the front lawn of a house on Viola Street. Meanwhile, Officers Eric Guillard and David Duplantier parked their vehicle and followed Mr. Miller. Although he tried to climb over a fence, Mr. Miller was apprehended. When Mr. Miller was arrested, he was holding a small clear plastic bag containing small rock-like objects and was carrying $1,920. While en route to the police station, Mr. Miller stated: “I don’t sell. I just pick up.”

Officer Felix testified that he retrieved the bag Mr. Miller dropped on the lawn. Officers Duplantier and Guillard also testified to the same facts as

Officer Hickman.

Officer Harry O'Neal, an expert in the field of analysis of controlled dangerous substances, testified that he tested the rocks found in the two bags taken from Mr. Miller. In the smaller bag were eight small plastic bags, each containing a white rock. The rock-like substance proved to be cocaine. The cumulative weight of the eight rocks was 1.5 grams. The second, larger bag contained a "slab" of white material weighing 63 grams. It also tested positive for cocaine.

Mr. Miller's sister, Catina Miller, testified that when her brother was a child his hands were severely burned and remain disfigured by scars. Mr. Miller receives social security disability; shortly before he was arrested, he had cashed a five thousand dollar check. Ms. Miller also stated that she knew her brother had a drug problem and that he was going to seek help. Mr. Miller's oldest child attends Ernest Morial Elementary School; he sometimes takes her to and from school.

DISCUSSION

Error Patent

Complying with La. C.Cr. P. art. 920, we have conducted a patent error review of the record on appeal and found a sentencing error. Mr. Miller was convicted of possession of between twenty-eight and two

hundred grams of cocaine under La. R.S. 40:967(F)(1)(a), which at the time of the offense imposed a sentence of not less than ten years, nor more than sixty years, and a fine of not less than $50,000 nor more than $150,000. La. R.S. 40:967(G) requires that the adjudication of guilt or imposition of a sentence under La. R.S. 40:967(F) "shall not be suspended, deferred, or withheld, nor shall such person be eligible for probation or parole prior to serving the minimum sentences provided by Subsection F."

As noted, the trial court in sentencing Mr. Miller suspended all but $1,900 of the mandated minimum fine of $50,000. In so doing, the trial court stated:

> [U]pon final judgment the Court is going to suspend all but Nineteen Hundred ($1,900) Dollars of the fine in this case. The mandatory not less than Fifty Thousand fine. All but Nineteen Hundred ($1,900) Dollars of that is suspended. And . . . upon exhaustion of final judgment and appeal, that money is to be forfeited to the Court.

Although the trial court by suspending most of the mandatory $50,000 fine arguably imposed an illegally lenient sentence, we decline to correct that sentencing error for two reasons.

First, the trial court's treatment of the fine is consistent with our suggestion in *State v. Hills*, 626 So. 2d 452 (La. App. 4 Cir. 1993). In *Hills*, *supra*, the trial court "waived" a mandatory fine and thus imposed an illegally lenient sentence. On the defendant's appeal, we discussed, yet

declined to correct, that patent sentencing error; in so doing, we suggested that "[t]he trial court might have more properly imposed the mandatory fine and then suspended it." *Hills*, 626 So. 2d at 453. The trial court's treatment of the fine followed our suggestion in *Hills, supra.* Nonetheless, we acknowledge that La. R.S. 40:967(G)'s mandate that a sentence imposed under La. R.S. 40:967(F) cannot be suspended arguably dictates a different result.

Second, we decline to depart from the settled jurisprudential rule pre-dating *State v. Williams*, 2000-1725 (La. 11/28/01), 800 So.2d 790, that it is inappropriate to correct "an error patent favorable to defendant" when the defendant was the sole appellant. *See Hills*, 626 So. 2d at 453 (citing *State v. Fraser*, 484 So.2d 122 (La. 1986)). Although we recognize that *Williams* arguably called into question that rule, we read *Williams* as applying only to sentencing errors subject to automatic correction under La. R.S. 15:301.1. The sentencing error at issue here--a mandatory fine--falls under La. R.S. 15:301.1 (B), which authorizes the court or the district attorney to have a sentence that is inconsistent with the statutory provisions amended by the sentencing court. *See Williams*, 2000-1725, pp. 10-11, 800 So.2d at 799 (citing, by way of example, failure to impose mandatory fine).

Our holding is consistent with that espoused by the dissent in *State v.*

Paoli, 2001-1733, p. 1 (La. App. 1 Cir. 4/11/02), 818 So. 2d 795 (Guidry, J., dissenting); as Judge Guidry, joined by Judge Pettigrew, aptly stated:

> Although *State v. Williams*, 00-1725 (La. 11/28/01), 800 So. 2d 790, arguably cast some doubt upon the reasoning in *State v. Fraser*, 484 So. 2d 122 (La. 1986), it does not overrule *Fraser* and I do not interpret *Williams* as applicable to sentencing errors of a type different than those subject to automatic correction under La. R.S. 15:301.1.

Accordingly, given that the district attorney has not appealed and given that the trial court's treatment of the fine was consistent with *Hills*, we decline to correct the arguably illegally lenient sentence resulting from the suspension of all but $1,900 of the fine. *See also State v. Esteen*, 2001-879 (La. App. 5 Cir. 5/15/02), 821 So. 2d 60 (declining to remand to correct illegally lenient sentence resulting from failure to impose a mandatory fine given state's failure to object before La. R.S. 15:301.1 (D)'s one-hundred eighty day period elapsed).

Excessive Sentence

Mr. Miller's sole assignment of error is that his sentence is excessive. As noted, he was sentenced under La. R.S. 40:967(F)(1)(a), which provided for a sentence of between ten and sixty years as well as the aforementioned

fine. Mr. Miller received a thirty-year term.

La. Const. art. I, § 20 prohibits imposition of an excessive sentence. *State v. Baxley*, 94-2982 (La. 5/22/95), 656 So.2d 973, 977. 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*, 96-3041 (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 *State v. Soraparu*, 97-1027 (La.10/13/97), 703 So.2d 608, the Louisiana Supreme Court instructed that in reviewing the excessiveness of a sentence, the only relevant question is whether the trial court abused its broad discretion and not whether another sentence would have been more appropriate. Even a sentence within the statutory limits can 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. As to sentences within the legislatively provided range, a trial court abuses its discretion only when it contravenes the prohibition against excessive punishment set forth in La. Const. art. I, § 20, which bars "punishment

disproportionate to the offense." *State v. Sepulvado*, 367 So.2d 762, 767 (La.1979).

In reviewing an excessive sentence claim, an appellate court generally must determine whether the trial judge has adequately complied with statutory guidelines in La. C.Cr.P. 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. Once adequate compliance with La. C.Cr.P. art. 894.1 is found, then a reviewing court must determine whether the sentence imposed is too severe in light of the particular defendant and the particular circumstances, 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.

Mr. Miller argues that he is not among the worst offenders to be sentenced on an attempted possession charge.

Before imposing the sentence, the trial court noted Mr. Miller's numerous prior convictions, which included: distribution of marijuana (1987), possession of marijuana second offense (1988), and distribution of cocaine (1990). The trial court also noted his prior arrests, which included: possession of cocaine (1999), possession of marijuana (1997), car jacking

(1995), and possession of a stolen automobile (1989). After reviewing his record, the trial court addressed Mr. Miller, stating, "You are thirty-nine years old and . . . you've amassed a criminal history that dates all the way back to your first arrest back in 1980. . . . Some twenty-one years of criminal history as reflected in the rap sheet."

Mr. Miller's sentence of thirty years is half of the maximum term. Given that Mr. Miller was convicted of possession of a large amount of cocaine and his history of selling drugs for a number of years, we cannot say that the trial court imposed an excessive sentence as to this particular defendant under these particular circumstances. This assignment of error is thus unpersuasive.

DECREE

Accordingly, for reasons stated above, we affirm the conviction and sentence.

AFFIRMED.