STATE OF LOUISIANA	*	**NO. 2002-KA-2060**
VERSUS	*	**COURT OF APPEAL**
JOHNNY PORTER	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 418-976, SECTION "C"
Honorable Sharon K. Hunter, Judge
* * * * * *
Judge Patricia Rivet Murray
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(Court composed of Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge David S. Gorbaty)

Harry F. Connick
District Attorney of Orleans Parish
Leslie Parker Tullier
Assistant District Attorney of Orleans Parish
619 South White Street
New Orleans, LA 70119
COUNSEL FOR PLAINTIFF/APPELLEE

William R. Campbell, Jr.
LOUISIANA APPELLATE PROJECT
700 Camp Street
New Orleans, LA 70130

COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

The sole question presented by this appeal is whether the sentence imposed was excessive. For the following reasons, we find it was not and affirm.

STATEMENT OF THE CASE

On January 11, 2001, Johnny Porter was charged by bill of information with theft of goods worth between $100 and $500, in violation of La. R.S. 14:67.10(B)(2). On January 16, 2001, he was arraigned and pleaded not guilty. On February 2, 2001, the trial court found probable cause and denied Mr. Porter's motion to suppress the evidence. Mr. Porter waived his right to a jury trial. On February 15th and 19th, 2001, a bench trial was held. The trial court found him guilty as charged, and sentenced him to serve twenty months at hard labor. The state filed a multiple bill. Following a hearing on May 7, 2002, the court found Mr. Porter to be a fourth-time felony offender, set aside the original sentence, and re-sentenced him to twenty-five years at hard labor. Mr. Porter's motion for reconsideration of sentence was denied, and his motion for appeal was granted. This appeal followed.

STATEMENT OF THE FACTS

The facts of this case are not at issue. At trial, the state's two witnesses were Macy's Department Store security officer, Marc Zeno, and a police officer, Jerry Warner. They testified regarding their involvement in Mr. Porter's arrest on December 27, 2001 for shoplifting two boxes of silverware having a total value of $260.from the house wares department. Mr. Zeno testified that he personally observed Mr. Porter conceal the silverware in a clear plastic bag and then exit the store without paying for it. Mr. Zeno also testified that because of Mr. Zeno's height, he recognized Mr. Porter as the individual that he had apprehended a few weeks earlier for shoplifting in the store.

Against the advice of counsel, Mr. Porter testified in his own behalf at trial. He claimed to be innocent of the offense. He based his defense on the fact that the security officer was unable to produce a surveillance camera videotape of him committing the alleged offense. Mr. Porter admitted being arrested awhile back at Macy's for shoplifting. Indeed, he testified that he was aware of how Macy's video surveillance camera operated because on that prior occasion he was shown how he was caught on tape shoplifting. Mr. Porter also admitted that he had three prior felony convictions.

DISCUSSION

Mr. Porter's sole assignment of error is that his sentence is excessive.

He was sentenced as a fourth offender under the Habitual Offender Law, La. R.S. 15:529.1, which at the time of the offense provided for a sentencing range of between twenty years and life. Mr. Porter's underlying three felony convictions were a 1993 conviction for carnal knowledge of a juvenile, a 1991 conviction for indecent behavior with a juvenile, and a 1987 conviction for possession of pcp. As a fourth offender, Mr. Porter received a twenty-five year term, which was five years over the minimum sentence. Mr. Porter argues not only that his twenty-five year sentence is excessive, but also that even the twenty-year minimum sentence would be excessive.

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*, 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 *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).

The minimum sentences imposed by the Habitual Offender Law are presumed to be constitutional. *State v. Johnson*, 97-1906 (La. 3/4/98), 709 So. 2d 672. A court may depart from the minimum sentence only if it finds clear and convincing evidence in the particular case sufficient to rebut that presumption. *Johnson*, 97-1906 at 7, 709 So. 2d at 676. Characterizing as "rare" the circumstances in which a departure is warranted, the Louisiana Supreme Court in *State v. Lindsey*, 99-3302, 99-3256, p. 5 (La. 10/17/00), 770 So. 2d 339, 343, *cert. denied*, 532 U.S. 1010, 121 S.Ct. 1739, 149 L.Ed. 2d 663 (2001), reasoned:

> 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.

In reviewing an excessive sentence claim, an appellate court generally must determine whether the trial judge has adequately complied with the 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. At the multiple bill hearing, the trial court found Mr. Miller was a quad offender and sentenced him to twenty-five years, yet gave no explanation of sentencing considerations as called for by La. C.Cr.P. art. 894.1. Full compliance with the requirement of La. C.Cr.P. art. 894.1 that the court state for the record the considerations taken into account in imposing a particular sentence, however, is not required where the record reveals an adequate factual basis for the sentence imposed. *State v. Albercht*, 2001-1664 (La. App. 4 Cir. 1/30/02), 809 So. 2d 472.

Although on its face the twenty-five year sentence Mr. Porter received appears to be harsh, an examination of the facts establishes otherwise.

Before trial, the state offered Mr. Porter a five-year term if he pleaded guilty, but he refused and opted instead to attempt to establish his innocence based on the absence of a surveillance videotape of him committing the crime. Mr. Porter emphasizes that the trial court, in initially sentencing him, did not even impose the maximum two-year sentence; rather, the court only imposed a twenty-month sentence. He additionally argues that we should compare the maximum sentence he could have received for theft of goods valued at $100 to $500 (two years) and the sentence he would have received had he been charged for theft (six months). Such a comparison is not germane to the issue before us. Mr. Porter is being sentenced as a multiple offender; consequently, "the sentence in this case is to punish him for being a repeat offender." *State v. Jason*, 99-2551, p. 7 (La. App. 4 Cir. 12/6/00), 779 So. 2d 865, 870, *writ denied*, 2001-0037 (La. 11/9/01), 801 So. 2d 357.

Mr. Porter next argues that none of his three underlying convictions was a crime of violence as defined by La. R.S. 14:2(13). The non-violent nature of the underlying convictions, however, is not a sufficient basis for finding a minimum sentence under the Habitual Offender Law excessive. Explaining why the non-violent nature of the underlying offenses cannot be the only or the major reason for finding a sentence excessive, the Louisiana Supreme Court reasoned that "the defendant's history of violent or non-

violent offenses has already been taken into account under the Habitual Offender Law for third and fourth offenders, which punishes third and fourth offenders with a history of violent offenses more severely than those with a history of non-violent offenses." *Lindsey*, 99-3302, 99-3256, p. 5, 770 So. 2d at 343 (citing *Johnson*, *supra*).

Mr. Porter further emphasizes that he has a physical disability—a bone disease that occasionally requires him to use a wheel chair and for which he receives disability benefits—and claims that his disability has forced him into poverty and that his poverty has forced him into crime. We find this argument unpersuasive.

Mr. Porter's final argument is that he has been a law-abiding citizen since his last offense in 1993. The record, however, reflects to the contrary. Mr. Porter admitted at trial that he was arrested for shoplifting at Macy's during this interval. Moreover, He was sentenced to five years for his 1993 offense and apparently was incarcerated for the majority of the period that he claims to have been a law-abiding citizen.

Given that Mr. Porter's sentence of twenty-five years was on the low end of the sentencing range (which extended from twenty years to life) and given the facts of this case, we cannot say that the trial court imposed an excessive sentence as to this particular defendant under these particular

circumstances.

ERROR PATENT

A review of the record shows no error patent.

DECREE

For reasons stated above, we affirm the conviction and sentence.

AFFIRMED.