STATE OF LOUISIANA	*	**NO. 2002-KA-2149**
VERSUS	*	**COURT OF APPEAL**
MILTON YOUNG	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 422-051, SECTION "H"
HONORABLE CAMILLE BURAS, JUDGE
* * * * * *
JUDGE MICHAEL E. KIRBY
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Michael E. Kirby, Judge Terri F. Love)

HARRY F. CONNICK, DISTRICT ATTORNEY
CLAIRE A. WHITE, ASSISTANT DISTRICT ATTORNEY
619 SOUTH WHITE STREET
NEW ORLEANS, LA 70119
COUNSEL FOR PLAINTIFF/APPELLEE

KAREN G. ARENA
LOUISIANA APPELLATE PROJECT
110 VETERANS MEMORIAL BOULEVARD
SUITE 222
METAIRIE, LA 70005
COUNSEL FOR DEFENDANT/APPELLANT

On June 4, 2001, the State filed a bill of information charging the defendant, Milton Young, with armed robbery, in violation of La. R.S. 14:64, and with attempted armed robbery, in violation of La. R.S. 14:27(64). He pleaded not guilty on both counts on June 11, 2001. The trial court found probable cause and denied the motion to suppress the evidence and identification after a hearing on June 28, 2001. A twelve-member jury found defendant guilty as charged on each count after trial on January 14, 2002. On March 15, 2002, the State filed a multiple bill, charging defendant as a third felony offender, and he pleaded not guilty to the bill. The defense filed a motion to quash the multiple bill, which the trial court denied on June 4, 2002. On that same day, a hearing on the multiple bill was held, and the defendant was found to be a third felony offender. He was sentenced as such to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence on the armed robbery conviction. On the attempted armed robbery conviction, he was sentenced to serve fifty years at hard labor without benefit of parole, probation, or suspension of sentence; the sentences are to be served concurrently. After the sentencing, the defendant filed a pro se motion for a new trial, which the trial court denied. The defendant's motion to reconsider the sentence was also denied.

At trial, Ms. Lise Kupke, one of the victims, testified that she was

vacationing in New Orleans on April 23, 2001; she and Martin Monahan, her companion, tried to get into Commander's Palace Restaurant, but when they could not, they walked toward Magazine Street. As they proceeded down Eighth Street, a young man with a gun in his hand came up behind them and ordered them to hand over their valuables. Ms. Kupke screamed, "No," and began to run. Then she realized the robber might shoot her and turned to go back to give him her purse; however, he was in the process of taking Mr. Monahan's valuables and then running toward a car waiting on the corner. The car turned off Eighth Street and sped away. A man, who was in his car on Eighth Street, saw what happened and immediately dialed 911, reported the incident, and described the robber's vehicle a maroon Grand Am.

About twenty minutes later Officer Gary LeRouge arrived. He asked Ms Kupke if she could identify her assailant, and she said she could. They got in the police car and were transported to the St. Thomas Housing Development. She went to a police car where a young man was being held, and she identified him as the man who tried to rob her. She recognized him partly by his dirty white shirt. She also remembered his eyes because he appeared scared during the robbery. Another man, later identified as Vidale T. Pope, was shown to her but she could not identify him. She suggested

that he was the driver of the car in which defendant was a passenger, but she admitted that she had not seen him. She identified the maroon Grand Am as the car she had seen stopped on Eighth Street and the one the defendant jumped into after the robbery. After she looked into the car, she saw her friend's wallet and camera. When a detective showed her the gun, she asked him to point it at her. From that angle she recognized it because of a tube within the barrel that extended beyond the barrel. She stated that she had learned since the robbery that the tube is part of a silencer. Under cross-examination, Ms. Kupke admitted having only a fleeting image of the bandana the robber was wearing on his face. She saw her assailant when he demanded her valuables, and then, after she ran, she turned around and watched him take her companion's watch.

Mr. Martin Monahan of Washington D.C. told the court that he was in New Orleans with Lise Kupke for the French Quarter Festival on April 23, 2001. At approximately 1:14 p.m., a young man who suddenly appeared behind him robbed Mr. Monahan at gunpoint of his watch, wallet and camera. The man then ran to a nearby vehicle and got in on the passenger side; the car turned off the street and drove away. About thirty minutes later, a police officer took Mr. Monahan to a nearby location, and he identified the defendant as the man who robbed him at gunpoint. Mr.

Monahan also saw the Grand Am and when he looked at the front seat, he saw there his wallet and camera. Mr. Monahan described the robber as wearing a black and white bandana over the lower half of his face. The robbery lasted about thirty seconds.

Mr. Sven Rye testified that he was in the 1100 block of Eighth Street when Mr. Monahan was robbed and Ms. Kupke was threatened with robbery. Mr. Rye was listening to his car radio when he observed a couple and a man standing together. Then the woman screamed and ran toward him, saying, "He's robbing us." Mr. Rye called 911 while the robbery was still in progress. When the robber was getting into the escape vehicle, Mr. Rye described the car to the operator.

Several officers testified at trial. Officers Ackron Davis and LeJon Roberts were parked at the intersection of Felicity and Camp Streets when they heard on their radio that a robbery had just occurred nearby. They realized that a Grand Am matching the description of the robber's car was in the block behind them. The car turned off on Felicity Street, and the officers followed it. They turned on their blue lights and siren, but the car did not pull over. They gave chase until the Grand Am stopped in the St. Thomas Housing Development. Then two men got out and attempted to run away. Officer Davis ran after the driver, and Officer Roberts, the passenger. Pope,

the driver, ran up the stairs in an abandoned building and the officer followed him. Sergeant Gary LeRouge apprehended Pope coming out of the building. Officer Roberts pursued defendant as far as another abandoned building. At that time the K-9 squad had arrived on the scene, and a dog was released into the building. The dog found the defendant in a closet on the second floor. In a search incident to arrest, the defendant was found to be carrying $133. Mr. Monahan's watch was found on a balcony of the building.

Sergeant Gary LeRouge met the victims in this case and transported them to the St. Thomas Housing Development to identify the suspects. Each victim individually identified the defendant.

A review of the record for errors patent reveals that the fifty-year sentence for defendant's attempted armed robbery conviction exceeds the statutory maximum allowable for that offense. The maximum sentence for armed robbery is ninety-nine years, and the maximum sentence for attempted armed robbery is one-half of that or forty-nine and one-half years. La. R.S. 14:27; 14:64. Under La. C.Cr.P. art. 882, an illegal sentence may be corrected at any time by the court imposing the sentence or the appellate court on review. Accordingly, the sentence on count two is hereby amended from fifty years to forty-nine and one-half years.

In a single assignment of error, the defendant maintains that both of his sentences are excessive. Article 1, Section 20 of the Louisiana Constitution of 1974 provides that "No law shall subject any person . . . to cruel, excessive or unusual punishment." A sentence within the statutory limit is constitutionally excessive if it is "grossly out of proportion to the severity of the crime" or “is nothing more than the purposeless imposition of pain and suffering." State v. Caston, 477 So.2d 868, 871 (La. App. 4 Cir. 1985). Generally, a reviewing court must determine whether the trial judge adequately complied with the sentencing guidelines set forth in La. C.Cr.P. art. 894.1 and whether the sentence is warranted in light of the particular circumstances of the case. State v. Soco, 441 So. 2d 719 (La. 1983); State v. Quebedeaux, 424 So. 2d 1009 (La. 1982).

If adequate compliance with Article 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 his case, keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged. Quebedeaux, 424 So. 2d 1009 (La. 1982); State v. Guajardo, 428 So.2d 468 (La. 1983).

At the re-sentencing hearing, the court stated:

> The Court will sentence you taking into account the sentencing guidelines as articulated in the Code of Criminal Procedure article 894.1 the seriousness

> of this crime that any lesser sentence would deprecate the seriousness of the offense. That a weapon was used in the commission of this crime. That more than one victim was involved in the perpetration of this crime and that in fact you have had a criminal history that leaves this Court to believe and I believe any reviewing Court to believe that prison is the only recourse to you. Not only under the statute, but in light of your personal and previous criminal history that probation even if it were available would not serve any purposes of rehabilitation of you as you have already been convicted once.
>
> You caught a break with the State reducing an armed robbery charge to a simple robbery charge. I note that the certified copy of conviction that Judge Bigelow had sentenced you to Blue Walter's [sic] Rehabilitation Program. I don't know if you got in that program, but that obviously did not detour you from when you were released going back to a life of crime, where you used a gun to arm rob two private citizens….

As a third felony offender, the defendant's sentence of life imprisonment was the prescribed minimum under La. R.S. 15:529.1 A (1)(b)(ii). Because the Habitual Offender Law has been held constitutional, the minimum sentences it imposes upon multiple offenders are also presumed to be constitutional. State v. Johnson, 97-1906, pp. 5-6 (La. 3/4/98), 709 So.2d 672, 675. A statutory sentence may be found constitutionally excessive only if it "'makes no measurable contribution to acceptable goals of punishment', or is nothing more than 'the purposeful imposition of pain and suffering' and is 'grossly out of proportion to the severity of the crime.'" Johnson at pp. 6-

7, 709 So.2d at 676, citing State v. Dorthey, 623 So.2d 1276, 1280-81 (La. 1993). This Court has held that a trial court does not err in imposing the sentence mandated by statute where a defendant fails to demonstrate, with clear and convincing evidence, that he is an exception and should, therefore, receive less than the mandatory minimum sentence. State v. Finch, 97-2060, p. 13 (La. App. 4th Cir. 2/24/99), 730 So.2d 1020, 1027.

In the instant case, the trial court noted prior to sentencing that the defendant had two prior felony convictions: possession of cocaine in 1998 and simple robbery in 1997. The court further stated that the 1997 charges were initially two counts of armed robbery, which were amended to two counts of simple robbery.

Although defendant contends that in his prior offenses and in his current offenses, he has not physically injured anybody, the instant convictions and the simple robbery convictions are crimes of violence under La. R.S. 14:2(13). Therefore, he fits the profile of those the Habitual Offender Law was tailored to control. Moreover, he has been treated with leniency in both of his prior offenses: in 1997 he was given a break in being charged with two counts of simple robbery rather than armed robbery and in 1998 after he was convicted of possession of cocaine, he was recommended for a rehabilitation program. Nevertheless, he committed the crimes at issue

here within months of being released from custody. Furthermore, neither the defendant nor anyone in his family produced any evidence of mitigating factors that would mandate a reduction of the sentence below the statutory minimum. Johnson, 97-1906 at p. 11, 709 So.2d at 678. Under these facts, the statutory minimum sentence of life imprisonment was not shown to be constitutionally excessive.

The defendant also complains that his sentence for attempted armed robbery is excessive. The only argument offered in support of that claim is that he is not the worst sort of attempted armed robber in that he did not shoot the victim. We find this argument unconvincing in this situation where the defendant has proven to be extremely dangerous to the community.

Therefore, this argument is also without merit

Accordingly, for reasons designated above, the defendant's convictions and his armed robbery sentence are affirmed. His sentence on the attempted armed robbery conviction is amended to run for forty-nine and one-half years, and, as amended, the sentence is affirmed.

CONVICTIONS AFFIRMED; SENTENCE FOR ARMED ROBBERY CONVICTION AFFIRMED; SENTENCE FOR ATTEMPTED ARMED ROBBERY CONVICTION AMENDED, AND AS AMENDED, AFFIRMED