NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2003-KA-0146**
VERSUS	*	**COURT OF APPEAL**
ROY MOSS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 431-126, SECTION "J"
Honorable Darryl A. Derbigny, Judge
* * * * * *
Judge Terri F. Love
* * * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge Charles R. Jones, Judge Terri F. Love)

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AFFIRMED

After a trial by a jury, the defendant, Roy Moss, was convicted of simple possession of cocaine, a violation of La. R.S. 40:967. The trial court sentenced the defendant to 30 months at hard labor. The defendant now urges on appeal that his sentence is unconstitutionally excessive. For the reasons assigned below, we affirm.

On June 21, 2002, the State charged the defendant-appellant with one count of simple possession of cocaine, a violation of La. R.S. 40:967. He entered a not guilty plea at his arraignment on July 2, 2002. Defense

counsel withdrew all discovery motions and a motion for a preliminary hearing after receiving a copy of the police report on July 9, 2002; no motion to suppress evidence was filed. On July 18, 2002, the defendant proceeded to trial. The six-person jury returned a responsive verdict of guilty of attempted possession of cocaine. The trial court ordered a pre-sentence investigation report. On September 19, 2002, the court sentenced the defendant to serve thirty months at hard labor. The defendant's oral motion to reconsider sentence was denied; the motion for an appeal was granted.

The facts of the case are as follows: On June 11, 2002, at approximately 2:00 a.m., three police officers, Jody LaRoche, Nicole Barbe', and Lance Schilling, were on a routine foot patrol in the French Quarter. The officers observed the defendant sitting on the stoop of the residence at 835 St. Louis Street. Because of numerous citizens' complaints of unauthorized persons sitting on the stoops of residences in the area, the officers decided to question the defendant. When he admitted that he did not live at 835 St. Louis Street, they administered a verbal warning regarding trespassing, and the defendant immediately walked out of the area. However, thirty minutes later when the officers returned to the 800 block of St. Louis, they saw the defendant again sitting on the stoop of 835 St. Louis. As the officers approached to place him under arrest for trespassing, Officer

LaRoche saw him drop a small black plastic bag. The officer retrieved the bag and found that it contained a green clear plastic bag containing a white powder and two individually wrapped objects, which appeared to be crack cocaine. The defendant was then arrested for possession of cocaine.

Officer LaRoche testified at trial that, after the defendant was arrested, he stated that he had found the bag at the corner. Officer LaRoche searched the area indicated by the defendant but found no contraband. Officer LaRoche also testified that there was a barroom in the block, but no one was in the immediate area when the defendant dropped the contraband.

At trial, John Palm, Jr. was stipulated to be an expert in the testing of controlled dangerous substances. He identified the contents of State's exhibit two, a standard evidence envelope used by the New Orleans Police Department. He testified that he tested the powder substance inside the green baggie, but it was negative for the presence of cocaine. He also tested a piece of an off-white colored rock-like substance; it tested positive for cocaine. The third item he tested was a brown colored rock-like substance; it was negative for cocaine.

There are no errors patent on the face of the record.

In his only assignment of error, the appellant contends that the trial court imposed a constitutionally excessive sentence.

La. Const. art. I, § 20 explicitly prohibits excessive sentences. *State v. Baxley*, 94-2982, p. 4, (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, p. 17 (La. App. 4 Cir. 2/3/99), 727 So. 2d 1264, 1272, *rehearing granted on other grounds*, (La. App. 4 Cir. 3/16/99); *State v. Francis*, 96-2389, p. 6 (La. App. 4 Cir. 4/15/98), 715 So.2d 457, 461. However, the penalties provided by the legislature reflect the degree to which the criminal conduct is an affront to society. *Baxley*, 94-2984 at p. 10, 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, pp. 6-7 (La. 3/4/98), 709 So. 2d 672, 677; *State v. Lindsey*, 99-3256 (La. 10/17/00), 770 So. 2d 339. 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*, 94-2984 at p. 9, 656 So.2d at 979; *State v. Hills*, 98-0507, p. 5 (La. App. 4 Cir. 1/20/99), 727 So. 2d 1215, 1217.

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. C.Cr.P. art. 894.1, and whether the sentence is warranted under the facts established by the record. *State v. Trepagnier*, 97-2427, p. 11 (La. App. 4 Cir. 9/15/99), 744 So. 2d 181, 189; *State v. Robinson*, 98-1606, p. 12 (La. App. 4 Cir. 8/11/99), 744 So. 2d 119, 127. If adequate compliance with La. C.Cr.P. 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. Ross*, 98-0283, p. 8 (La. App. 4 Cir. 9/8/99), 743 So. 2d 757, 762; *State v. Bonicard*, 98-0665, p. 3 (La. App. 4 Cir. 8/4/99), 752 So. 2d 184, 185.

However, in *State v. Major*, 96-1214 (La. App. 4 Cir. 3/4/98), 708 So. 2d 813, this court stated:

> The articulation of the factual basis for a sentence is the goal of Art.894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, re-sentencing is unnecessary even when there has not been full compliance with Art. 894.1. *State v. Lanclos*, 419 So.2d 475 (La.1982). The reviewing court shall not set aside a sentence for excessiveness if the record supports the sentence imposed. La.C.Cr.P.art. 881.4(D).

96-1214 at p. 10, 708 So. 2d at 819.

At the sentencing in this case, the trial court stated:

> I find he has two prior felony convictions. One conviction in – looks like Fort Lauderdale, Florida for possession of cocaine. Another conviction for a robbery of a vehicle in San Jose, California. This conviction is his third felony offense.
>
> You are not eligible to receive a suspended sentence or be placed on probation because of your criminal history. The law says you cannot get probation if you are a third offender.
>
> It will be the sentence of the Court as to Mr. Moss he shall be ordered to serve 30 months Louisiana Department of Corrections at hard labor.

The court imposed the maximum sentence permissible for the offense of attempted possession of cocaine pursuant to La. R.S. 40:967 and La. R.S. 40:979. The defendant was not subject to a multiple bill because of the age of his prior convictions, which according to the pre-sentence investigation report occurred in 1984 and 1985. However, as noted by the trial court, the Department of Corrections classified the defendant as a third offender which made him ineligible for probation; he also was ineligible for the Intensive Incarceration/Intensive Parole Supervision Program, La. R.S. 15:574.4(A), according to the Department.

In his brief, the appellant argues that the trial court incorrectly stated that the defendant had a prior conviction for robbery when in fact the defendant's California conviction was for theft of a vehicle on April 5, 1985.

A review of the pre-sentence investigation report is somewhat ambiguous on this history. In one paragraph, the notation is that the defendant was convicted of "Grand Theft of Vehicle in San Francisco" on April 5, 1985. The rap sheet attached shows two charges on "4/5/85" in "SJSO-CA" for robbery and vehicle theft with a single disposition of three years in prison on July 3, 1985. In still another paragraph in the report it is noted that the defendant's "parole for Simple Robbery (sic) was transferred to Louisiana from California on July 19, 1985. He successfully completed it on September 3, 1990."

The discrepancy was not brought to the trial court's attention at the sentencing hearing. Although the appellant now argues that his prior conviction was merely theft, the record indicates that it was apparently a more serious crime, either robbery or "grand theft auto." Moreover, the pre-sentence investigation report reflects that the defendant is a fifty-two year old male with a virtual zero employment history who reported using cocaine at least twice a week and drinking at least two six-packs of beer a day. He stated that was he referred to a program for addictive disorders in 1994, but he failed to complete the program. He claimed a history of mental health problems including taking medication but could give no details of when or where he was diagnosed or hospitalized. The issue of his mental illness was

not raised in a sanity proceeding either before or after trial and sentencing. Notably, his criminal arrest history extended back to 1966 when he was age fifteen; no references to a not guilty by reason of insanity adjudication is noted anywhere. However, as noted in the appellant's brief, no actual convictions more recent than the 1985 conviction are reflected.

In *State v. Monette,* 99-1870 (La. App. 4 Cir. 3/22/00), 758 So. 2d 362, the defendant, a first-felony offender convicted of attempted possession of cocaine, received the maximum sentence, thirty months at hard labor. In that case, the sentence was suspended and the defendant was placed on probation with special conditions intended to break her drug habit. In reviewing the defendant's excessive sentence claim, this court held that the trial court sentenced the defendant to the maximum sentence in order to persuade her to comply with the terms of her probation and dissuade her from a life of cocaine addiction.

In the instant case, the defendant was not eligible for probation because of his criminal record. Although the defendant self-reported a history of drug addiction, only one of his prior convictions was for a drug offense and the other was either robbery or grand theft auto. He admitted that in 1994 he failed to complete a program for addicts. He was not eligible for the intensive incarceration program. The probation officer, who

prepared the pre-sentence investigation report, recommended jail time based upon the defendant's extensive arrest record here in Louisiana and several other states, the absence of a work history, and the fact that the fifty-two year old is a multiple substance abuser, who failed to successfully complete rehabilitation. As a result, the defendant was ineligible for probation or intensive incarceration. Therefore, the defendant's sentence, while the maximum for the offense for which he was convicted, is not excessive.

Accordingly, we affirm the defendant's conviction and sentence.

AFFIRMED