STATE OF LOUISIANA	*	**NO. 2003-KA-0415**
VERSUS	*	**COURT OF APPEAL**
MICHAEL L. JUNIOR	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 428-094, SECTION "F"
HONORABLE DENNIS J. WALDRON, JUDGE
* * * * * *
JAMES F. MCKAY III
JUDGE
* * * * * *

(Court composed of Judge Patricia Rivet Murray, Judge James F. McKay III, Judge David S. Gorbaty)

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AFFIRMED

STATEMENT OF CASE

On February 19, 2002, the defendant was charged by bill of information with distribution of marijuana. The defendant pled not guilty at arraignment. Through counsel, the defendant waived motion hearings. The case was tried to a jury on April 22, 2002. The defendant was found guilty as charged.

On May 7, 2002, the defendant filed a motion for new trial. The trial court heard argument on the motion on May 15, 2002. On May 31, 2002, the trial court denied the motion. The state filed a multiple bill of information alleging the defendant to be a fourth felony offender. The trial court ordered that a pre-sentence investigation be completed.

On August 21, 2002, the defendant pled guilty to the multiple bill, and the trial court sentenced the defendant to twenty-years at hard labor. The defendant filed a motion to reconsider sentence on August 27, 2002. On August 29, 2002, after hearing the argument of counsel, the trial court denied the motion. Defendant's motion for appeal was granted.

STATEMENT OF FACT

Charles Hustmyre, a special agent with the Bureau of Tobacco and Firearms, testified that on January 30, 2002, he and Detective Jeffrey Sandoz, of the New Orleans Police Department, were conducting a narcotics surveillance in the Florida Housing Development as participants of the NOPD Safe Home Task Force. At approximately 2:00 p.m., the officers observed the defendant, while seated in his vehicle, take a brown paper bag from somewhere between the two front seats and hand it to a woman, subsequently identified as Raynell Carter. Carter took the bag and began walking away. As the officers approached in their vehicle, Carter dropped the bag to the ground. Agent Hustmyre went to Carter and retrieved the bag while Officer Carter went to Mr. Junior who just exiting his vehicle. Inside the bag, the officers recovered another bag containing twenty-two smaller bags of marijuana. Mr. Junior was placed under arrest. The officers recovered sixty-eight dollars from the defendant in a search incident to arrest.

ERRORS PATENT

A review of the record for errors patent reveals none.

ASSIGNMENT OF ERROR NUMBER 1

The defendant assigns as error the trial court's denial of his motion for new trial. Article 851 of the Louisiana Code of Criminal Procedure provides

that on motion of the defendant the trial court shall grant a new trial whenever:

> (1) The verdict is contrary to the law and the evidence;
>
> (2) The court's ruling on a written motion, or an objection made during the proceedings, shows prejudicial error;
>
> (3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty;
>
> (4) The defendant has discovered, since the verdict or judgment of guilty, a prejudicial error or defect in the proceedings that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before the verdict or judgment; or
>
> (5) The court is of the opinion that the ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right.

The record reflects that the defendant's motion for new trial sought relief pursuant to the grounds established in parts (2) and (5) of article 851.

The complained of ruling by the trial court occurred in reference to the following statement by the prosecutor during rebuttal:

> Mr. Paige: And Let's talk about Raynelle Carter, why she isn't here today. Raynelle Carter was charged with distribution, as well. This is Michael Junior's day in court.
>
> Mr. Costa: I beg your pardon. That's – what was, did he say?
>
> Mr. Paige: I'm sorry?

> Mr. Costa: I have to dispute something that's not, was not accurate. You just said she was charged with distribution?
>
> Mr. Paige: On the date in question, if you look at the police report, that was the charge.
>
> Mr. Costa: Okay. I'm sorry.
>
> Mr. Paige: Yes. This is Michael Junior's day in court. You shouldn't concern yourself with Raynelle Carter. I'm not asking you to split hairs. I'm asking you to stay true to what we talked about earlier. This is just following the law. This is still drugs. This is still illegal. This is distribution. Let's not make this a play on words about what the charge should have been, what it could have been, what it should have been.

The defendant contends that the prosecutor misstated the facts with respect to Raynelle Carter's arrest. The defendant contends that, contrary to the prosecutor's statement, the police report in this matter states that Carter was charged with possession of marijuana. He notes that the arrest register reflects that when Carter was booked she was charged with distribution of marijuana. The defendant also states that Raynell Carter was charged in Criminal District Court with simple possession of marijuana. None of the referenced documents are contained in the record before this court. Despite this fact, the record reflects there was no objection to the alleged misstatement of fact and consequently no ruling by the trial court. Accordingly, there is no basis to urge the granting of a new trial pursuant to La. C.Cr.P. art. 851(2). The trial court correctly denied the motion for new

trial in this respect.

With respect to the trial court's denial of the motion for new trial on the "the ends of justice" claim, as set forth in La. C.Cr.P. art. 851(5), that claim is not subject to appellate review. *State v. Lewis*, 97-2854 (La. App. 4 Cir. 5/19/99) 736 So.2d 1004; *State v. Williams*, 2002-0065 (La. App. 1 Cir. 6/21/02), 822 So.2d 764.

The defendant further alleges for the first time that a new trial was warranted under La. C.Cr.P. art. 851(4). Because the defendant's motion for new trial filed in the trial court did not allege subpart 4 as a basis for new trial, he cannot now raise that issue on appeal. The assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER 2

In his second assignment, the defendant contends that his sentence is excessive. La. R.S. 15: 529.1 of the Habitual Offender Law provides in part:

> (c) If the fourth or subsequent felony is such that, upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life then:
>
> (i) The person shall be sentenced to imprisonment for the fourth or subsequent felony for a determinate term not less than the longest prescribed for a first conviction but in no event less than twenty years and not more than his natural life;

The defendant was sentenced as a fourth felony offender and thus received the minimum twenty-year term mandated by law. His previous

felony convictions included another violation of distribution of marijuana and two previous convictions for possession of cocaine.

Under La. Const. Art. I, §20, a sentence is constitutionally excessive if it makes no measurable contribution to acceptable goals of punishment or is 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. Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. *State v. Sepulvado*, 367 So.2d 762 (La. 1979).

In *State v. Lindsey*, 99-3302 pp. 4-5 (La.10/17/00), 770 So.2d 339, 342-43, the Louisiana Supreme Court held that the habitual offender statute was constitutional and that the mandatory minimum sentences contained therein should be enforced unless unconstitutionally excessive under Article I, Section 20 of the Louisiana Constitution. The standard set forth in *State v. Dorthey*, 623 So.2d 1276 (La. 1993), requires affirmance of the statutory sentence unless 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. A trial court may depart from the statutory minimum sentence only where there is

clear and convincing evidence that would rebut the presumption of constitutionality, and such cases are rare. The burden is on a defendant to rebut the presumption that a mandatory minimum sentence is constitutional. To do so, a defendant must show by clear and convincing evidence that he is exceptional, which, in this context, means that, because of unusual circumstances, this 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. *State v. Johnson*, supra, 709 So.2d at 676-677.

As noted above, the defendant's sentence is the minimum under the statute and is thus presumed constitutional. It is therefore incumbent upon the defendant to rebut the presumption. The defendant states that his current and previous convictions indicate that he is in need of drug treatment and further that his entire criminal history is free of any crimes of violence or crimes related to the use or possession of firearms. The defendant also suggests that because no sale was observed, only a transfer, the circumstances of the case are not consistent with the acts of a drug dealer. It should be noted that the brown paper bag contained twenty-two individual bags of marijuana which is consistent with distribution by sale. On these grounds the defendant contends that he is exceptional and is deserving of a

sentence below the statutory minimum.

The pre-sentence report in this matter officially classified the defendant as a sixth felony offender and noted that he has a lengthy criminal history dating back to 1973. The report further noted that the defendant has been under probation/parole supervision on four separate occasions and was revoked three of those times. At the hearing on the defendant's motion to reconsider sentence, the trial court cited the defendant's previous record as a basis for denying the defendant's motion. Under these circumstances, the defendant has failed to demonstrate that he is exceptional or that he is the victim of the legislature's failure to assign a meaningful sentence tailored to the gravity of the offense and his particular circumstances.

For the above and foregoing reasons, we affirm the defendant’s conviction and sentence.

AFFIRMED