

STATE OF LOUISIANA

*

NO. 2003-KA-0921

VERSUS

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COURT OF APPEAL

ROBIN CARTER

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 427-260, SECTION "A"
Honorable Charles L. Elloie, Judge

JUDGE

JOAN BERNARD ARMSTRONG

(Court composed of Judge Joan Bernard Armstrong, Judge David S. Gorbaty
and Judge Edwin A. Lombard)

EDDIE J. JORDAN, JR.

DISTRICT ATTORNEY

ZATA W. ARD

ASSISTANT DISTRICT ATTORNEY

619 SOUTH WHITE STREET

NEW ORLEANS, LA 70119

COUNSEL FOR PLAINTIFF/APPELLEE

MARY CONSTANCE HANES

LOUISIANA APPELLATE PROJECT

P. O. BOX 4015

NEW ORLEANS, LA 70178-4015

COUNSEL FOR DEFENDANT/APPELLANT

**CONVICTION AFFIRMED,
SENTENCE AMENDED,
AND AFFIRMED AS
AMENDED.**

The defendant, Robin Carter, was charged by bill of information on January 11, 2002, with two counts of possession of heroin, in violation of La. R.S. 40:966(C), and with one count of possession of cocaine, in violation of La. R.S. 40:967(C). At arraignment on January 22, 2002 she pleaded not guilty. After trial on March 12, 2002 a twelve-member jury found her guilty of one count of possession of heroin and not guilty as to the other two counts. She was sentenced on March 18, 2002 to serve four years at hard labor. The State filed a multiple bill charging Ms Carter as a second offender, and after a hearing on August 2, 2002 she was adjudicated a habitual offender. On that same day, her earlier sentence was vacated, and she was sentenced to serve five years at hard labor under La. R.S. 15:529.1. She was granted an out-of-time appeal on March 31, 2003.

At trial three officers testified as to the charge on which the defendant was convicted. Detectives Christian Vernado and Patrick Evans testified that on January 31, 2001, they were conducting surveillance on a residence where they suspected that drug transactions were occurring. They watched

the defendant go into the house and then leave almost immediately. The detectives stopped her in the 800 block of Prieur Street, and during a pat down for weapons, Detective Vernado found a crack pipe in her right jacket pocket. She was placed under arrest and given her Miranda rights. She was found in possession of one foil of heroin after a search incident to arrest; she also had two syringes.

Officer Karen Louis Holmes, an expert in the testing and analysis of controlled dangerous substances, testified that the powder in the foil found on the defendant's person was subjected to three different tests and proved to be heroin. The two syringes did not test positively for any controlled dangerous substance.

A review of the record for errors patent reveals one. The district court erred when imposing Ms Carter's sentence without parole. She was convicted of possession of heroin as a second offender; at the time of the offense both statutes restricted only probation or suspension of sentence but did not prohibit parole eligibility. La. R.S. 40:966(C)(1) and La. R.S. 15:529.1G. The transcript of sentencing indicates the court mistakenly ordered that the sentence be served "without benefit of probation, parole, or suspension of sentence." The court erred by so ordering. Therefore, the sentence is illegal, and the prohibition on parole eligibility is deleted.

In a single assignment of error, the defendant contends that her sentence is excessive. Ms Carter was sentenced under La. R.S. 40:966(C), which provides for a term of four to ten years, and under La. R.S. 15: 529.1 of the Habitual Offender Law, which provides:

(a) If the second felony is such that, upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life then: the sentence to imprisonment shall be for a determinate term not less than one-half the longest prescribed for a first conviction and not more than twice the longest possible sentence prescribed for a first conviction.

She was sentenced as a second felony offender to serve five years and thus received the minimum term mandated by law.

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, 99-3256, 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 an affirmation 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, 97-1906, p. 8 (La. 3/04/98), 709 So. 2d 672, 676-677.

As noted above, defendant's sentence is the minimum under the statute and is thus presumed constitutional. Therefore, the defendant must

rebut the presumption. At the sentencing hearing the district court expressed disappointment that the defendant had not been able to benefit from the opportunities offered her. She had been released for drug treatment after her arrest for possession of heroin and cocaine in January of 2001. The judge had been lenient with her then because she is the mother of five small children. However, on May 18, 2001, she was arrested at 3 a.m. for public intoxication. A search incident to arrest revealed two foil packages of powder that proved to be cocaine.

She now argues that as a twenty-nine year old mother of five young children she should be considered exceptional and deserving of a sentence below the statutory minimum. She maintains that the judge held her to a higher standard because she is the mother of five children. However, the minimum sentence was imposed, and the judge's words at sentencing are expressions of sorrow for her children and of frustration at the futility of his own efforts to help her.

The defendant's prior offense was aggravated battery in 1992. Aggravated battery is listed as a crime of violence under La. R.S. 14:2(13) (e). She received probation at that time, and she was also released after her January 31, 2001, offense with the admonition to turn her life around. Unfortunately, leniency has not seemed to help Ms Carter live within the

law.

Under the circumstances of this case, the defendant has failed to demonstrate that she is exceptional or that she is the victim of the legislature's failure to assign a meaningful sentence tailored to the gravity of the offense and her particular circumstances.

For the foregoing reasons, the defendant's conviction is affirmed. The defendant's sentence is amended to delete the prohibition on parole, and, as amended, her sentence is affirmed.

AMENDED.

**CONVICTION AFFIRMED,
SENTENCE AMENDED,
AND AFFIRMED AS**