NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2003-KA-1551**
VERSUS	*	**COURT OF APPEAL**
PERCY SMITH	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 385-526, SECTION "F"
Honorable Dennis J. Waldron, Judge
* * * * * *
Judge Patricia Rivet Murray
* * * * * *

(Court composed of Judge Patricia Rivet Murray, Judge Dennis R. Bagneris, Sr., Judge David S. Gorbaty)

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AFFIRMED

The sole issue in this appeal is whether the sentence the trial court imposed was excessive. For the reasons that follow, we find it was not and affirm.

STATEMENT OF THE CASE

On October 4, 1996, Percy Smith was charged with possession of cocaine with intention to distribute, a violation of La. R.S. 40:967(A). On October 15, 1996, he was arraigned and pleaded not guilty. On November 1, 1996, following a hearing, the trial court found probable cause and denied the defense motion to suppress the evidence. On November 13, 1996, a twelve-member jury found Mr. Smith guilty as charged. On January 15, 1997, the state filed a multiple bill, charging Mr. Smith as a second felony offender. Mr. Smith pleaded not guilty to that bill. On April 18, 1997, the trial court denied Mr. Smith's motion for a new trial.

At the June 20, 1997 multiple bill hearing, Mr. Smith pleaded guilty to that bill. On July 21, 1997, the trial court sentenced him as a second

felony offender to the minimum term of fifteen years at hard labor without benefit of probation, or suspension of sentence. On April 15, 2003, the trial court granted Mr. Smith an out-of-time appeal.

STATEMENT OF THE FACTS

At trial, three New Orleans Police Department officers testified regarding Mr. Smith's arrest. On September 5, 1996, Detective Robert Hickman testified he was working undercover wearing plain clothes and driving an unmarked truck. As he drove onto Forstall Street from North Claiborne Avenue, he noticed Mr. Smith. According to Detective Hickman, Mr. Smith flagged him down, approached his truck, and handed him two small pieces of cocaine. Detective Hickman then handed Mr. Smith a marked twenty-dollar bill. Mr. Smith responded that he was going to get "change." Translated, Detective Hickman testified he understood this response to mean that he was going to get additional cocaine. Although Mr. Smith approached a nearby group of people, he was unable to obtain any additional cocaine.

Mr. Smith then put his bicycle in the back of Detective Hickman's truck. After trying unsuccessfully to enter the passenger side (that door was broken), he climbed into the back of the truck. At Mr. Smith's instructions,

Detective Hickman drove to the corner of Miro and Flood Streets. Mr. Smith then exited the truck with his bicycle and rode around the corner. Suspecting that he was leaving the area, Detective Hickman drove up to the corner so that he could see where Mr. Smith was going. He observed Mr. Smith enter a house at 2100 Flood Street. Detective Hickman radioed Detective David Duplantier, a member of his backup team, to alert him to Mr. Smith's location. Mr. Smith returned to Detective Hickman's truck and handed him two more pieces of cocaine. Mr. Smith asked if the officer was coming back and instructed him: "remember me," "just ask for Lil' P," and "remember the red bandana." Detective Hickman asked him where he would be, and he answered that he would be at the corner of Forstall and Johnson Streets.

Detective Hickman testified that his truck was equipped with a secreted audio and video device and that the entire transaction was taped. The video tape was played to the jury.

Detective Duplantier testified that he was working as backup to Detective Hickman and that he observed Mr. Smith engage in two hand-to-hand transactions with Detective Hickman. He described his backup role as observing and listening in through the radio transmitter.

Detective Calvin Brazley testified that he was part of the takedown

team and that he arrested Mr. Smith. He stated that, at the time of the arrest, Mr. Smith was wearing a red scarf around his head and that he was not carrying any money or drug paraphernalia. After the arrest, Detective Hickman turned over to Detective Brazley the four pieces of cocaine that Mr. Smith had sold him. The parties stipulated that those four pieces were tested and proved to be cocaine.

Mr. Smith testified on his own behalf. He testified that he was eighteen-years old and that he dropped out of school after the eighth grade. On cross-examination, he admitted that he sold cocaine to Detective Hickman and that it was him on the video tape. He also admitted to a prior conviction for possession of cocaine and to being on probation for that offense. He still further admitted to failing to report to his probation officer for drug testing because he did not have the hundred dollars he was told to bring with him. He stated he sold drugs to support his cocaine habit. He maintained that his mother was also a cocaine addict. And, he asked the jury for a chance to rehabilitate himself.

ASSIGNMENT OF ERROR

In a single assignment of error, Mr. Smith contends that his sentence is excessive. As noted, he was sentenced as a second offender under La.

R.S. 15:529.1, which provided for a sentencing range of fifteen to sixty years at hard labor. Although Mr. Smith concedes that he received the minimum sentence, he contends that sentence was excessive given the non-violent nature of the instant offense, his lone prior conviction for possession of cocaine, and his "relatively clean record."

The state counters that there is no evidence that Mr. Smith is a cocaine user as opposed to a seller. The state stresses that no drug paraphernalia was found on him at the time of his arrest. The state further counters that Mr. Smith is a recidivist and that he has not shown by clear and convincing evidence that he is the exceptional case warranting a departure from the minimum sentence.

In *State v. Cottrell*, 2002-0068 (La. App. 4 Cir. 5/8/02), 817 So. 2d 1211, we reviewed the applicable principles governing this issue, stating:

> The minimum sentences imposed on multiple offenders by the Habitual Offender Law are presumed to be constitutional. *State v. Johnson*, 97-1906 (La. 3/4/98), 709 So. 2d 672. The defendant bears the burden of rebutting the presumption that the mandatory minimum sentence is constitutional. *State v. Short*, 96-2780 (La. App. 4 Cir. 11/18/98), 725 So. 2d 23. A court may only depart from the minimum sentence if it finds that there is clear and convincing evidence in the particular case before it that would rebut the presumption of constitutionality. *State v. Johnson*, 97-1906 at p. 7, 709 So. 2d at 676. After reviewing the law on point as to the "rare circumstances" under which a court may depart from the mandatory minimum sentence, the Louisiana Supreme Court has stated:

> 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.

State v. Lindsey, 99-3256, p. 5 (La. 10/17/00), 770 So.2d 339, 341, 343. (Emphasis added).

Moreover, in *State v. Soraporu*, 97-1027 (La. 10/13/97), 703 So. 2d 608, the Louisiana Supreme Court stated:

> On appellate review of sentence, the only relevant question is "'whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate.' " *State v. Cook*, 95-2784, p. 3 (La. 5/31/96), 674 So.2d 957, 959 (quoting *State v. Humphrey*, 445 So.2d 1155, 1165 (La.1984)), cert. denied, 117 S.Ct. 615, 136 L.Ed.2d 539 (1996). For legal sentences imposed within the range provided by the legislature, a trial court abuses its discretion only when it contravenes the prohibition of excessive punishment in La. Const. art. I, § 20, i.e., when it imposes "punishment disproportionate to the offense." *State v. Sepulvado*, 367 So.2d 762, 767 (La.1979). In cases in which the trial court has left a less than fully articulated record indicating that it has considered not only aggravating circumstances but also factors militating for a less severe sentence, *State v. Franks*, 373 So.2d 1307, 1308 (La.1979), a remand for resentencing is appropriate only when "there

> appear[s] to be a substantial possibility that the defendant's complaints of an excessive sentence ha [ve] merit." *State v. Wimberly*, 414 So.2d 666, 672 (La.1982).

Cottrell, 2002-0068 at pp. 3-4, 817 So. 2d at 1212-13.

As the state contends, the record reflects that this is not such an exceptional case. At the June 20, 1997 multiple bill hearing, the trial court reviewed with Mr. Smith his *Boykin* rights and then told him:

> Those are the rights, however, that you give up at this time. The sentencing range will be . . . fifteen to sixty years. This Court has agreed that it will consider the minimum sentence for you. Your attorney has indicated that you wish to discuss with him further what you will do with the charge involving simple escape. I have told your attorney that it is my position that I will grant you the following: A two year sentence which is the minimum for the simple escape if you do indeed enter you plea of guilty on that condition, the Court will grant you the minimum sentence of fifteen years in this case. Those must run consecutively under the law . . . .
>
> With that understanding, do you admit that you're one in [sic] the same Mr. Smith at this time?

Mr. Smith answered affirmatively.

At the July 21, 1997 sentencing hearing, the trial court imposed the bargained for minimum sentence of fifteen-years without benefit of probation or suspension of sentence. La. R.S. 15:529.1. As the trial court's statements at the multiple bill hearing indicate, a plea bargain agreement was entered into pursuant to which Mr. Smith agreed that in return for pleading

guilty, he would receive a fifteen-year minimum sentence. As a result, Mr. Smith cannot object to the sentence that he not only agreed to, but also benefited from. In any event, the record reflects that the minimum sentence was not excessive. We thus find his assignment of error to be without merit.

DECREE

Accordingly, the defendant's conviction and sentence are affirmed.

AFFIRMED