STATE OF LOUISIANA	*	**NO. 2004-KA-0094**
VERSUS	*	**COURT OF APPEAL**
MICHAEL V. THOMAS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 426-179, SECTION "F"
HONORABLE DENNIS J. WALDRON, JUDGE
* * * * * *
JUDGE MICHAEL E. KIRBY
* * * * * *

(Court composed of Judge Michael E. Kirby, Judge Edwin A. Lombard, Judge Roland L. Belsome)

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This case concerns a resentencing only. Finding no error in the sentence, we affirm.

On November 15, 2001, Michael Thomas was indicted for one count each of distribution of heroin and distribution of a drug falsely represented to be a controlled dangerous substance, charges to which he subsequently pled not guilty. At trial on January 8, 2002, a jury found him guilty of attempted distribution of heroin and not guilty of the second count. On March 27, the court sentenced him to serve seven years at hard labor and denied his motion to reconsider the sentence. The court granted his motion for appeal. The State noted its objection to the sentence and its intent to seek writs. The State's writ application was consolidated with the appellant's appeal, and this Court affirmed the conviction, vacated the sentence, and remanded the case for resentencing. *State v. Thomas*, 2002-1561 (La. App. 4 Cir. 2/19/03), 841 So. 2d 45.

He was resentenced on April 2, 2003, to serve eight years at hard labor.

The facts of the case as presented in the earlier appeal are as follows:

> DEA Special Agent Carlton Simmons testified that on April 5, 2001, he and the

defendant met in Simmons' car in the parking lot of the Spur Station on the corner of Magazine Street and Washington Avenue. The defendant sold Simmons two grams of heroin for $600.00. Simmons paid the defendant with pre-recorded currency. At the time of the transaction, Simmons had been wired for sound. Fellow agents set up surveillance, and manned videotape equipment from a concealed location across the street from the Spur Station. The audio and video recordings, played for the jury at trial, capture the defendant negotiating the purchase price, and delivering the heroin to Agent Simmons.

On May 10, 2001, Simmons and the defendant had a second meeting during which the defendant sold Simmons three grams of a white powdered substance, purported to be heroin, for $900.00. Once again, Simmons paid for the reported contraband with marked currency. Like the first, this second transaction was captured on audio and videotape, and played for the jury at trial. Subsequent testing proved the substance was counterfeit. The defendant was arrested minutes after the second transaction. At the time of arrest, agents confiscated $80.00 in marked bills from the defendant's pants pockets.

The defendant testified that on April 5, 2001, "Joe" and another man approached him, and told him he could make $100.00 by delivering an item for them. The defendant said he suspected what he was doing was wrong but was unaware of the contents of the item he was delivering. The defendant accompanied "Joe" to the Spur Station on Magazine Street where the defendant gave Agent Simmons the item in exchange for $600.00. The defendant admitted that he had a second meeting with Agent Simmons on May 10, 2001, at the same location, except that this time he delivered an item to the agent in exchange for

> $900.00. "Joe" gave the defendant $80.00 from the proceeds of the second transaction. The $80.00 was confiscated when the defendant was arrested.

State v. Thomas, p. 1-3, 841 So. 2d at 47-48.

Before addressing the defendant's assignment of error, we note an error patent. Under La. R.S. 40:979(B), the sentence should be imposed without benefit of parole, probation, or suspension of sentence. Paragraph A of La. R.S. 15:301.1 provides that in instances where the statutory restriction are not recited at sentencing, they are included in the sentence given, regardless of whether or not they are imposed by the sentencing court. *See State v. Williams*, 2000-1725 (La. 11/28/01), 800 So.2d 790. Hence, this Court need take no action to correct the trial court's failure to specify that the defendant's sentence be served without benefit of parole, probation or suspension of sentence. The correction is statutorily effected. (La. R.S. 15:301.1A).

He now appeals the minimal eight-year sentence he received, arguing that it is excessive.

At the resentencing hearing, the defense attorney told the judge that Michael Thomas had been taking courses towards achieving his GED while he was incarcerated and asked that this mitigating factor be considered when he was sentenced. The judge stated that this Court had "ordered me to

impose the minimum sentence of eight years." (Sentencing transcript, p. 2). The judge then imposed that term.

The defense argues that the judge did not realize that under *State v. Dorthey*, 623 So. 2d 1276 (La. 1993), he had discretion to impose a lesser sentence than the minimum term. However, in the earlier opinion, this Court reviewed the criterion for finding a sentence excessive under jurisprudence and stated:

> When seeking to rebut the presumption of constitutionality, the defendant must show by clear and convincing evidence that he is "exceptional, which ... 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.03/04/98), 709 So.2d 672, 676, citing *State v. Young*, 94-1636 (La. App. 4 Cir. 10/26/95), 663 So.2d 525. Downward departures should only occur in rare situations. *Johnson*, p. 9, 709 So.2d at 677.
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> As justification for the downward departure in sentencing in this case, the trial judge cited the defendant's age (seventeen at the time of the offense), lack of maturity, that the pre-sentence report recommended the defendant for intensive incarceration/intensive parole supervision and that the penalties for the crimes for which the defendant was convicted have been recently reduced. The trial judge also indicated that he identified with the defendant because the trial judge's father died when he was eleven years old and the defendant's father died when he was eight

> or nine years old.
>
> However, the pre-sentence investigation report indicates that in less than three years' time, the defendant accumulated a juvenile record of eight arrests, resulting in two adjudications – one for simple burglary of an inhabited dwelling in 1997 and the other for possession of marijuana in 1999. His adult record includes five arrests in little more than one year with convictions for criminal trespass, possession of marijuana and attempted distribution of heroin. The report also discloses that the defendant did not finish school and in fact "was suspended from school for fighting and was a habitual violator of school rules. He showed willful disrespect for school authorities and cursed the staff at the group home." He admitted to the daily use of marijuana since 1996 and has never held a job. The defendant's record shows that his criminal behavior is escalating. His youth and immaturity do not justify a downward departure in the sentence as required by *Dorthey*, especially in light of his recidivist behavior.

State v. Thomas, p. 7-8, 841 So. 2d at 50-51.

This Court found that Mr. Thomas had a serious and escalating criminal history that outweighed any mitigating factors the trial judge had considered. We note also a letter to the trial judge in the record indicates that when Mr. Thomas was offered the opportunity to participate in the Intensive Incarceration Program, he did not enroll, and, because participation must be voluntary, he was not part of the program. At the first sentencing the judge stated that the seven- year sentence was imposed so that

Mr. Thomas would be eligible for that program. Thus, it appears that Mr. Thomas did not take advantage of the judge's benevolence in reducing his sentence. Furthermore, the fact that Mr. Thomas is working toward his GED while laudatory is not sufficient to support a reduction of the minimum mandatory sentence.

The defense cites *State v. Combs*, 2002-1920 (La. App. 4 Cir. 5/21/03), 848 So. 2d 672, for the proposition that the sentence should be reduced because after Mr. Thomas's offense occurred the legislature decreased the penalty. In *Combs* the defendant, who was in the same position concerning the change in the law, was sentenced to life imprisonment as a third offender for a conviction for possession of cocaine with intent to distribute. This Court vacated the life sentence as excessive and remanded the case with the instruction that the defendant "merits serious punishment" and should receive a substantial sentence. *State v. Combs*, 2002-1920, p. 7, 848 So. 2d at 676. The case at bar can be distinguished from *Combs* because Mr. Thomas received the minimum eight-year sentence, and while a serious punishment it is probably less than the new sentence the defendant in *Combs* received. The *Combs* defendant was also convicted of distribution of cocaine, and for that offense he received a sentence of seven and one-half years to which he did not object.

We find the eight-year sentence in the case at bar is not excessive.

There is no merit to this assignment.

Accordingly, the defendant’s sentence is affirmed.

AFFIRMED