STATE OF LOUISIANA	*	**NO. 2004-KA-0820**
VERSUS	*	**COURT OF APPEAL**
JERRY ALLEN	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 424-657, SECTION "F"
HONORABLE DENNIS J. WALDRON, JUDGE

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JUDGE MAX N. TOBIAS, JR.

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(COURT COMPOSED OF JUDGE JAMES F. MCKAY, III, JUDGE TERRI F. LOVE, AND JUDGE MAX N. TOBIAS, JR.)

EDDIE J. JORDAN, JR.
DISTRICT ATTORNEY
ZATA W. ARD
ASSISTANT DISTRICT ATTORNEY
619 SOUTH WHITE STREET
NEW ORLEANS, LA 70119
COUNSEL FOR PLAINTIFF/APPELLEE

PAMELA S. MORAN
LOUISIANA APPELLATE PROJECT
P.O. BOX 840030
NEW ORLEANS, LA 70184-0030
COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED.

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

The defendant, Jerry Allen ("Allen"), was convicted of possession of cocaine, a violation of La. R.S. 40:967(C), by a jury on 6 March 2002. After pleading guilty to a multiple bill, Allen was sentenced as a third felony offender to serve fifteen years at hard labor. He appealed, and, in an unpublished opinion, this court affirmed his conviction but vacated his sentence and remanded the matter to the trial court for resentencing. *State v. Allen*, 2003-1148, unpub. (La. App. 4 Cir. 3/10/04), ___ So. 2d. ___(Table). He was resentenced on 1 April 2004, to serve ten years as a third felony offender. His motion for reconsideration of sentence was denied, and his motion for an appeal was granted.

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

> According to the testimony of two New Orleans police officers, Sergeant Brian Lampard and Officer Matt McCleary, on September 6, 2001, at approximately 12:45 a.m., a house in the 2300 block of Annette Street where narcotics activity frequently occurred was targeted. Officer [sic] and

Officer Robinson Del Castillo parked their police vehicle behind the fourplex at 2326 Annette Street and proceeded on foot down the alley while, simultaneously, Sergeant Lampard and Officer Mark McCort pulled up in front of the house in a marked police unit. Officers McCleary and Del Castillo observed the defendant on the porch lighting a crack pipe with a lighter and smelled the odor of burning cocaine as they approached the front of the house. After the marked unit pulled up in front of the house, the defendant left the porch and walked down the alleyway where he encountered Officers McCleary and Del Castillo. After detaining the defendant and recovering the crack pipe and lighter from his hands, Officers McCleary and Del Castillo arrested the defendant and informed him of his rights. During the search incident to the arrest, the officers recovered a baggie containing thirty-four pieces of rock like substance. A rock found in the crack pipe and the thirty-four rocks tested positive for cocaine.

Bridgett Kimball testified on behalf of the defendant that just prior to the defendant's arrest, she encountered the defendant, whom she did not know, talking to an acquaintance of hers in front of the Annette Street house. Shortly after she joined into the conversation, a man on a bicycle approached the group inquiring about a person unknown to her. Suddenly, a marked police car pulled up and two police officers grabbed the man on the bicycle. After searching him, however, the bicyclist was allowed to leave. The officers searched the defendant and, after finding nothing on him, searched the area. Ms. Kimball testified that the defendant was not smoking cocaine.

> The defendant testified, corroborating the testimony of Ms. Kimball. He stated that the police searched him but found nothing and then searched the area. The defendant denied smoking crack, but admitted that he has prior convictions for business burglary, distribution of cocaine, and possession of crack cocaine.

State v. Allen, 2003-1148, pp. 1-2 (La. App. 4 Cir. 3/10/04).

In a single assignment of error, Allen, through counsel, argues that the sentence is excessive. He complains that when he was resentenced on 1 April 2004, he received the maximum sentence under La. R.S. 40:967(C) and La. R.S. 15:529.1(A)(1)(b)(i). He contends that the ten-year term is disproportionate to the severity of his crime and unjustified by the record. We disagree.

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) (quoting *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, p.

10, 656 So. 2d at 979, citing *State v. Ryans*, 513 So. 2d 386, 387 (La. App. 4th 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, 676. "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, p. 9, 656 So. 2d at 979 (quoting *State v. Lobato*, 603 So. 2d 739, 751 (La. 1992)); *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, resentencing 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, p. 10, 708 So. 2d at 819.

In *State v. Soraparu*, 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, --- U.S. ---, 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).

Id.

In the instant case at sentencing on 1 April 2004, the trial court judge stated that the ten-year sentence was imposed "for all of the reasons the Court said previously" on 14 February 2003. On that date, Allen pleaded guilty as a third felony offender after the state amended the multiple bill in which he was originally charged as a quadruple offender. The transcript of that sentencing indicates that Allen had bargained with the state in order to avoid a sentence of twenty years to life. The judge mistakenly sentenced him to fifteen years—five years more than the maximum for a third offender under La. R.S. 40:967(C) and La. R.S. 15:529.1(A)(1)(b)(i). In his first appeal Allen did not challenge his plea agreement because it was an enormous advantage to be sentenced as a third rather than a fourth offender. He received another benefit when this court recognized that

the fifteen-year term was illegal and vacated it. Now he maintains that the ten-year term is illegal because he is not the worst kind of offender.

There is no merit in this argument. Allen has been convicted of five felony offenses in a twenty-two year period. Given his criminal history and the fact that his strategy has successfully delivered him from a minimum twenty-year term, we find the ten-year sentence, although the maximum for a third offender, is not excessive.

Accordingly, the sentence is affirmed.

AFFIRMED.