

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA** \* **NO. 2004-KA-1345**  
**VERSUS** \* **COURT OF APPEAL**  
**DAMION C. LEWIS** \* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**  
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**APPEAL FROM**  
**CRIMINAL DISTRICT COURT ORLEANS PARISH**  
**NO. 443-583, SECTION "B"**  
**Honorable Lynda Van Davis, Judge**  
\* \* \* \* \*  
**Judge Patricia Rivet Murray**  
\* \* \* \* \*

(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray,  
Judge Dennis R. Bagneris Sr.)

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**CONVICTION AFFIRMED;  
REMANDED FOR  
RESENTENCING**

On November 18, 2003, the State filed a bill of information charging Damion Lewis with possession of a firearm by a convicted felon in violation of La. R.S. 14:95.1. On November 21, 2003, Mr. Lewis entered a plea of not guilty at arraignment. On January 29, 2004, following a hearing, the trial court found probable cause and denied the defense motion to suppress the evidence. On April 28 and 29, 2003, a two-day jury trial was held in this matter. A twelve-person jury found Mr. Lewis guilty as charged. On May 12, 2003, the trial court sentenced him to serve ten years at hard labor without benefit of probation, parole, or suspension of sentence. This appeal followed.

**FACTS**

On August 5, 2003, at about 1:00 a.m., Officer Russell Philibert and his partner, Officer John Barbetti, were on a routine patrol in a marked police car on Annunciation Street when they spotted a Honda Accord stopped in the middle of the street. The Accord had a Mississippi license plate; a computer check revealed the car to be reported as stolen. The car

was running, and the car lights were turned on. There were two occupants inside the car. When the two occupants spotted the police, the driver accelerated and ran a stop sign. Although Officer Philibert activated his siren and police lights, the driver failed to stop the car. A chase ensued. During the chase, the car ran into a concrete barrier on a corner, and the car began to smoke. At the corner of Second and Constance Streets, the officers observed both front doors of the car open, and the two occupants flee. The two officers followed them. Officer Philibert chased the driver of the car, who was later identified as Donell Scott; Officer Barbetti chased the passenger, who was later identified as Mr. Lewis.

Officer John Barbetti testified that when Mr. Lewis jumped out of the passenger side of the car, the police unit was about ten to fifteen feet behind the Accord. Officer Barbetti further testified that he observed Mr. Lewis discard a weapon with his right arm. Based on the way Mr. Lewis exited the vehicle, Officer Barbetti denied the possibility that the weapon was possessed by anyone else. Officer Barbetti stated that the area was well lit and that he was sure Mr. Lewis was in possession of the weapon because he saw him discard the weapon to the ground. After discarding the weapon, Officer Barbetti testified that Mr. Lewis ran down Constance Street. As several police cars approached him, Mr. Lewis turned and ran into a fence.

Officer Barbetti was only five feet behind him at that point. When he bounced off the fence and turned around, Mr. Lewis ran right into Officer Barbetti. Mr. Lewis was handcuffed and arrested.

Terez Smith, a police technician, testified that she processed the crime scene at Second and Constance Streets on August 5, 2003, at about 2 a.m. Ms. Smith testified that she retrieved a weapon (a loaded 380 Bryco Arms pistol) from the street and that she took photographs of the crime scene. Those photographs were displayed to the jury.

The defense presented two witnesses: Mr. Lewis' mother, Dionne Lewis; and his grandmother, Frances Lewis.

Dionne Lewis testified that she resides at 2426 Constance Street. She further testified that on August 5, 2003, she was woken up by the sound of sirens, and she looked out her door to see what was happening four doors away. A policeman appeared at her door with Donell Scott. According to Ms. Lewis, the officer informed her that her "damn son just dropped his ... gun." She replied that Donell Scott was not her son. A few minutes later another officer arrived at her door with her son; that officer informed her that her son, Mr. Lewis, was "going to jail for being in a stolen car." She further testified that she observed the gun on the ground and that an officer told her that the gun belonged to Donell Scott.

Dionne Lewis further testified that her son and Donell Scott had been friends for years. She testified that she was aware that Donell Scott carried a gun; however, she testified that she had never known her son to carry a gun. When she was shown a picture of the arrest scene, Dionne Lewis stated that the gun was not in the correct position. In the photograph, the gun and a charger were adjacent to each other. She stated that when she arrived at that corner, the gun was fourteen or fifteen steps from the corner, and the charger was seven or eight steps behind the car. On cross-examination, Dionne Lewis admitted that she had a 2001 conviction for identify theft.

Frances Lewis, Mr. Lewis's grandmother, testified that she lives next door to her daughter, Dionne Lewis, and that she too heard the police officer tell her daughter that the gun belonged to Donell Scott.

### **ERROR PATENT**

A review of the record reveals one error patent. The trial court sentenced Mr. Lewis under La. R.S. 14:95.1 only to imprisonment. However, La. R.S. 14:95.1 provides that a person convicted of this offense shall be sentenced to imprisonment and "fined not less than one thousand dollars nor more than five thousand dollars." La. R.S. 14:95.1(B). The State

neither objected to the illegally lenient sentence, nor raised the issue on appeal.

In *State v. Williams*, 2003-0302, pp. 3-4 (La. App. 4 Cir. 10/6/03), 859 So. 2d 751, 753, we noted that this court, by *en banc* vote, has adopted the line of jurisprudence holding that a trial court's failure to impose a mandatory fine mandates a remand for the imposition of such a fine, regardless of the State's failure to object or to appeal to the illegally lenient sentence. Based on *Williams*, we are required to remand this case to the trial court for the imposition of the mandatory fine.

#### **ASSIGNMENT OF ERROR**

In his sole assignment of error, Mr. Lewis argues that the trial court erred in imposing an illegal or unconstitutionally excessive sentence. In support, he cites his youth (he was nineteen years old at the time of sentencing); the fact he was not the driver of the vehicle that the gun came from; the non-violent nature of his prior offense (possession of marijuana with intent to distribute); and the fact that he expressed at sentencing his clear intent to change his behavior.

The sentence range under La. R.S. 14:95.1 is not less than ten nor more than fifteen years without benefits of parole, probation, or suspension of sentence. The trial court thus sentenced Mr. Lewis to the minimum

mandatory sentence of ten years.

In reviewing the excessiveness of a sentence, the only relevant question is whether the trial court abused its broad discretion and not whether another sentence would have been more appropriate. *State v. Soraparu*, 97-1027 (La.10/13/97), 703 So.2d 608. A trial court abuses its discretion only when it contravenes the prohibition against excessive punishment set forth in La. Const. art. I, § 20, which bars "punishment disproportionate to the offense." *State v. Sepulvado*, 367 So.2d 762, 767 (La.1979). 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*, 96-3041 (La. 3/4/98), 709 So.2d 672. 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. *State v. Baxley*, 94-2982, p. 9 (La. 5/22/95), 656 So.2d 973, 979.

Even a sentence within the statutory limits can 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. However, "[c]ourts must apply these [legislatively defined] penalties unless they are found to be

unconstitutional.” *Baxley*, 94-2982 at p. 10, 656 So.2d at 979. Sentences within the legislatively provided range are presumed constitutional, and “[a] trial judge may not rely solely upon the non-violent nature of the instant crime or of past crimes as evidence which justifies rebutting the presumption of constitutionality” of a mandatory minimum sentence. *State v. Johnson*, 97-1906, p. 7 (La. 3/4/98), 709 So. 2d 672, 676.

Applying those principles, we find Mr. Lewis’ reliance on the non-violent nature of his prior offense to rebut the presumption of constitutionality of the sentence he received misplaced. Nor do we find any of the other factors Mr. Lewis cites sufficient to rebut the presumption of constitutionality of the sentence he received. We thus find this assignment of error unpersuasive.

### **DECREE**

The conviction of Damion Lewis is affirmed. This case is remanded to the trial court for imposition of a fine. In all other aspects, Mr. Lewis’ sentence is affirmed.

**CONVICTION AFFIRMED; REMANDED FOR  
RESENTENCING**