NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2004-KA-1425**
VERSUS	*	**COURT OF APPEAL**
ELLIOT J. SCOTT A/K/A CALVIN SCOTT	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 387-788, SECTION "D"
Honorable Frank A. Marullo, Judge
* * * * * *
Judge David S. Gorbaty
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Terri F. Love, Judge David S. Gorbaty)

JONES, J., DISSENTS.

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AFFIRMED

This appeal concerns only the defendant's sentence of life imprisonment. Finding no error, we affirm.

FACTS

On February 17, 1997, the State filed a bill of information charging Calvin Scott with one count of simple robbery, in violation of La. R.S. 14:65. On June 17, 1997, he was convicted in a bench trial. A multiple bill hearing was held on August 8, 1997. The defendant, charged as a third offender, was found by the court to be a second offender. The State objected and filed a writ. This Court granted the writ, reversed the trial court's ruling, and remanded the case for resentencing. *State v. Scott*, unpub., 97-1842 (La. App. 4 Cir. 9/16/97). He was sentenced as a triple offender to life imprisonment at hard labor on May 1, 1998. He appealed, and, in an unpublished opinion, this Court affirmed his conviction and remanded the case to the trial court for ruling on the motion for reconsideration of sentence. *State v. Scott*, unpub., 99-2470 (La. App. 4 Cir. 11/6/00). At a hearing on January 12, 2004, the trial court denied the motion. The defendant's motion to appeal his sentence was granted.

The facts as presented in his first appeal are as follows:

> On January 19, 1997, Elliott Scott (a/k/a

> Calvin Scott), the defendant, entered the Winn-Dixie grocery store on Almonaster Boulevard and got in the checkout line. When the cashier rang up a sale and opened the cash drawer, the defendant pushed ahead of the customer in front of him, jumped over the counter, grabbed cash from the drawer and attempted to flee. The cashier screamed, and this alerted the manager. The manager then ran after and apprehended the defendant, who had stuffed the cash in his mouth. When the police arrived, the manager was restraining the defendant on the ground in the store parking lot.

State v. Scott, 99-2470, p. 2 (La. App. 4 Cir. 11/6/2000).

DISCUSSION

The defendant makes four assignments of error concerning his sentence: (1) the sentence is excessive, (2) the sentence is cruel and unusual, (3) the statute under which he was sentenced violates the Eighth Amendment to the Constitution, and (4) that statute also violates his constitutional right to a jury trial.

In his first assignment the defendant claims that his life sentence as a third offender is excessive. He received the mandatory sentence pursuant to La. R. S. 15:529.1(A)(1)(b)(ii) as a third felony habitual offender because he had three felony convictions, and at least one of his crimes was listed as violent under La. R.S. 14:2(13). Actually, this defendant had two crimes of violence. His 1994 felony conviction for aggravated battery and his 1997

felony offense for simple robbery are listed as crimes of violence under La. R.S. 14:2(e) and (y) respectively.

The defendant maintains that his most recent crime—stealing $120 from an open cash register in the Winn-Dixie—does not merit life imprisonment. However, Mr. Scott's sentence is based on three offenses, and two of which were violent crimes. At the motion to reconsider the sentence hearing on January 12, 2004, the trial court addressing the defendant, stated:

> I have new information that has been brought to my attention this morning. There's an allegation that in this case here was the –[sic] involved in the store in Winn-Dixie, but there was a previous case which the State is telling me of allegations that you had robbed vending machines at universities with a crowbar and that when people went to see if they could stop it that you used the crowbar on them and one person was shot.

The prosecutor then told the court that a UNO police officer was hit on the head with a crowbar and shot during the incident. That offense occurred in 1994 and resulted in a conviction of aggravated battery and simple burglary. He also has a simple burglary conviction from 1986.

The defendant argued that in the 1994 incident he did not hit the victim with the crowbar and that the officer's gun went off during the

scuffle. He explained his actions and justified his request for a reduced sentence by saying he was a drug addict when he committed the crime and while he has been in prison he has stopped taking drugs and become a born-again Christian.

The trial court denied the motion to reconsider the sentence after finding that the facts of defendant's case did not support a downward departure under *State v. Dorthey*, 623 So.2d 1276 (La. 1993).

On appeal, Mr. Scott acknowledges that his sentence is legislatively mandated under the state law governing multiple offenders. However, he argues that a sentence falling within the statutory limits may still violate the constitutional prohibition against excessive punishment. *State v. Sepulvado*, 367 So. 2d 762 (La.1979). A sentence is unconstitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless and needless imposition of pain and suffering, and/or is grossly out of proportion to the severity of the crime. *State v. Lobat*o, 603 So. 2d 739 (La.1992).

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 accordingly bears the

burden of rebutting this presumption. *State v. Short*, 96-2780 (La. App. 4 Cir. 11/18/98), 725 So. 2d 23. A court may only depart from a minimum sentence if there is clear and convincing evidence before it that rebuts the presumption. *Johnson*, 97-1906, 709 So. 2d at 676.

The defendant cites *State v. Burns*, 97-1553 (La. App. 4 Cir. 11/10/98), 723 So. 2d 1013, in which a fourth felony offender's life sentence was vacated, and argues that his case is similar. In *Burns*, police observed the defendant sell one rock of crack cocaine to a third person. At the time of his arrest, the defendant possessed two more rocks and fifty-seven dollars. Defendant testified at trial that he was addicted to cocaine. Noting that two of defendant's prior convictions were for possession of cocaine, this Court concluded, "thus it is safe to assume he deals to support his habit," *Id.*, at p. 9, 723 So.2d at 1019. The defendant was twenty-five years old, and this Court felt that the defendant was "young enough to be rehabilitated." *Id.* This Court noted that a sentence less than life would "afford him the opportunity to partake in self-improvement classes while incarcerated and the possibility of a productive future." *Id.* The defendant's father testified at trial, stating that the defendant was well liked in the community and would go out of his way to help anyone. Though recognizing the fact that the defendant's felonies were non-violent alone was insufficient to override the

legislatively designated sentences of the Habitual Offender Law, this Court cited *Johnson,* 97-1906, 709 So.2d 672, for the proposition that this fact should not be discounted. This Court also noted that there were no allegations that the defendant ever possessed a dangerous weapon.

In *State v. Finch*, 97-2060 (La. App. 4 Cir. 2/24/99), 730 So.2d 1020, this Court declined to extend *Burns* to a case where there was no evidence that the defendant was driven by his addiction to sell drugs to support his drug habit, and where the record was devoid of any testimony suggesting that the defendant might possess any redeeming virtues. This Court stated:

> Where a minimum sentence does not transcend constitutional limits, it may not be reformed by this Court merely because it seems harsh. This Court does not have the authority to second guess the legislature concerning the wisdom of minimum sentencing on any ground other than that of constitutional excessiveness.

Id., at p. 13, 730 So.2d at 1027-28.

In *State v. Long*, 97-2434 (La. App. 4 Cir. 8/25/99), 744 So.2d 143, this Court affirmed a mandatory life sentence imposed on a third-felony habitual offender convicted of distribution of marijuana and cocaine, who had prior convictions for distribution of false drugs and possession of cocaine. There was no evidence introduced at trial to indicate that the defendant was addicted to drugs, as there had been in *Burns*, and the record revealed no testimony concerning any redeeming virtues the defendant

might have possessed, as there had been in *Burns.* The Court held that the defendant had failed to meet his burden of showing by clear and convincing evidence that his sentence was unconstitutionally excessive as required by *State v. Johnson*, 709 So.2d 672, 677.

In this case, there was little mitigating evidence presented by the defendant. Calvin Scott was thirty-six years old in 1997 at the time of the commission of the present offense. He has prior convictions for simple burglary in 1986 and aggravated battery and simple burglary in 1994. Moreover, at the time of his arrest for the instant offense, Mr. Scott was on parole for his 1994 crime. Additionally, this Court notes that Mr. Scott has had two chances to rehabilitate himself but has failed to do so.

The trial court heard testimony from Calvin Scott's wife at a hearing on September 22, 2003. She told the court that they had been married since 1979 and had two grown children. She said that she had abused alcohol for many years and her husband had been a drug abuser. She stated that she no longer drinks excessively and she has become a born-again Christian. She hoped to help her husband if he was released from prison.

Considering these circumstances, the positive fact that he has a family member willing to offer some support against the negative facts of his criminal history, we find that Mr. Scott has failed to present substantial

evidence to clearly and convincingly show that the mandatory minimum life sentence under the Habitual Offender Law is unconstitutionally excessive as applied to him. The record does not provide support for a finding that the sentence imposed is unconstitutionally excessive as applied to this defendant. This assignment of error has no merit.

Mr. Scott next argues that his sentence is cruel and unusual because it imposes a life sentence for the act of simple robbery. As discussed above, we note that his sentence was not for one offense but resulted from three offenses over an eleven-year period. He also claims that no other state imposes such a Draconian penalty for such a criminal history and that Louisiana law is no longer as harsh as when he was sentenced. However, Mr. Scott chose to commit his offenses when and where he did. The Louisiana Constitution defines conduct as criminal and provides penalties for the conduct. The Louisiana Supreme Court has repeatedly held that the Habitual Offender Law is constitutional and the minimum sentences imposed under the law should be accorded great deference by the judiciary. *State v. Lindsey*, 1999-3302 (La. 10/17/00), 770 So. 2d 339; *State v. Johnson*, 97-1906 (La. 3/4/98), 709 So. 2d 672; State *v. Dorthey*, 623 So. 2d 1276 (La. 1993). Accordingly, the defendant's argument is one for the legislature not the judiciary.

Finally, Mr. Scott notes that his crimes were the result of his drug addiction, and therefore, he does not deserve a life sentence. Although Mr. Scott's behavior might have been prompted by an addiction to cocaine, none of his offenses involves drugs. He has no possession or distribution of cocaine offenses. In *State v. Burns*, 723 So. 2d 1013, this Court found reason for a downward departure in sentencing a twenty-five year old defendant whose prior convictions were for possession of cocaine and whose last offense was for selling one rock. Calvin Scott does not have the advantage of youth, and he cannot blame an addiction for his violent crimes. This assignment of error has no merit.

In his third assignment of error, the defendant reiterates his last claim that his sentence should not be enhanced because he was a drug addict whose repeat offenses were the result of his addiction. He maintains that the Habitual Offender Law offends the Eighth Amendment's prohibition of cruel and unusual punishment. He relies upon *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417 (1962), where the Supreme Court held that imprisonment of a person simply because he was a drug addict, when he had committed no criminal offense, was cruel and unusual punishment. However, as noted above, this defendant committed overt and violent

criminal acts that resulted in his sentence. As such, we find that there is no merit in this assignment of error.

In his final assignment of error, the appellant argues that the multiple offender statute violates the Fourteenth and the Sixth Amendments to the U. S. Constitution because the statute allows a sentence to be increased beyond the statutory maximum without requiring the fact of the prior convictions to be submitted to the jury and proved beyond a reasonable doubt. The appellant bases his argument on the Supreme Court's opinion in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348 (2000). However, in *Apprendi* the Court stated: "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Id.* The Supreme Court plainly made an exception of prior offenses. Thus, under *Apprendi* the appellant's prior convictions were not required to be submitted to a jury. We reject this assignment of error as well.

CONCLUSION

Accordingly, for the foregoing reasons, the defendant's sentence is affirmed.

AFFIRMED