NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2007-KA-0447**
VERSUS	*	**COURT OF APPEAL**
DUSTIN G. HARMON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 466-008, SECTION "G"
Honorable Julian A. Parker, Judge
* * * * * *
JUDGE MAX N. TOBIAS, JR.
* * * * * *

(COURT COMPOSED OF JUDGE MICHAEL E. KIRBY, JUDGE MAX N. TOBIAS, JR., AND JUDGE ROLAND L. BELSOME)

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CONVICTION AND SENTENCE AFFIRMED.

AUGUST 22, 2007

The appellant, Dustin G. Harmon ("Harmon"), was charged on 19 July 2006 with one count of possession of cocaine. He entered a not guilty plea on 6 September 2006. On 19 October 2006, the district court found probable cause and denied a motion to suppress the evidence. Following a jury trial on 17 January 2007, Harmon was found guilty of attempted possession of cocaine. On 5 February 2007, the district court denied motions for new trial and for post-verdict judgment of acquittal. After waiving delays, Harmon was sentenced to serve twelve months at hard labor, to run concurrently with other sentences. The appellant's motion to reconsider the sentence was denied, but his motion for appeal was granted. Though the state noted its intent to file a multiple bill of information, no bill has been filed to this court's knowledge.

The record was lodged in this court on 12 April 2007. The appellant's brief was filed on 7 May 2007, and the state responded on 8 May 2007.

On 16 May 2007, Officers Williams and Moore observed the appellant coming from behind the Mount Rose Baptist Church on Simon Bolivar Boulevard in New Orleans at approximately 9:00 p.m. The officers were patrolling the area in a marked police vehicle without a light bar on

top. Their attention was drawn to the appellant because of the rise in crime in the area post- Hurricane Katrina. Upon seeing the vehicle, the appellant acted nervously and proceeded down the street at a fast pace. Based on his actions, the officers continued to observe him; Officer Moore saw him place his right hand down next to his right leg and drop a plastic bag to the ground. Believing that the appellant had discarded contraband, the officers exited the vehicle and detained him. Officer Moore retrieved the plastic bag that was discarded, and it was found to contain what appeared to be a crack pipe and some crack cocaine. He was arrested. Both parties stipulated to the fact that the substance found in the plastic bag tested positive for cocaine.

Against the advice of his attorney, Harmon testified. He admitted that he was in the area attempting to purchase crack cocaine, and he was headed to a house where he had purchased cocaine before. Coming upon the house, he observed a police vehicle with both doors open and a group of people crowded around the vehicle. Hence, he walked away. He turned around to see that the police vehicle had since turned onto the street where he was walking. He estimated that the police were approximately a quarter of a mile away from him when he "ditched" a crack pipe that he was carrying. The police pulled alongside him, and he approached the car. The officers then asked him what he was doing in the neighborhood. Harmon admitted that he was there to purchase crack and that he threw down his crack pipe. He denied having any crack. After that, he was handcuffed and placed in the back seat of the patrol car. Officer Moore never found the discarded crack pipe. The officers then drove to the house where Harmon intended to purchase crack, and Officer Moore exited. When the officer returned, they drove towards a place named Danny's Market. There, they came upon a group of men in the parking lot that the officers investigated. Two people

from that group were also arrested and taken to the police station along with the appellant. After spending the night in jail, Harmon learned that he had been charged with a felony. Harmon denied ownership of the crack pipe and crack cocaine introduced into evidence by the state.

Harmon admitted to being previously convicted of simple robbery and two counts of forgery in Tennessee.[1]

ERRORS PATENT

The record on appeal discloses no error patent.

ASSIGNMENT OF ERROR

By his sole assignment of error, Harmon contends that the sentence the trial court imposed is excessive.

In *State v. Smith*, 01-2574, p. 7 (La. 1/14/03), 839 So. 2d 1, 4, the Court set forth the standard for evaluating a claim of excessive sentence:

> Louisiana Constitution of 1974, art. I, § 20 provides, in pertinent part, that "[n]o *law* shall subject any person to ··· *excessive*··· *punishment.*" (Emphasis added.) Although a sentence is within statutory limits, it can be reviewed for constitutional excessiveness. *State v. Sepulvado,* 367 So.2d 762, 767 (La.1979). A sentence is unconstitutionally excessive when it imposes punishment grossly disproportionate to the severity of the offense or constitutes nothing more than needless infliction of pain and suffering. *State v. Bonanno,* 384 So.2d 355, 357 (La.1980). A trial judge has broad discretion when imposing a sentence and a reviewing court may not set a sentence aside absent a manifest abuse of discretion. *State v. Cann,* 471 So.2d 701, 703 (La.1985). On appellate review of a sentence, the relevant question is not whether another sentence might have been more appropriate but whether the trial court abused its broad sentencing discretion. *State v. Walker,* 00-3200, p. 2 (La.10/12/01), 799 So.2d 461, 462; *cf. State v. Phillips,* 02-0737, p. 1 (La.11/15/02), 831 So.2d 905, 906.

[1] A discussion of record exists relating to a misdemeanor conviction for burglary of a vehicle.

See also *State v. Johnson*, 97-1906 (La. 3/4/98), 709 So. 2d 672; *State v. Baxley*, 94-2982 (La. 5/22/96), 656 So. 2d 973; *State v. Landry*, 03-1671 (La. App. 4 Cir. 3/31/04), 871 So. 2d 1235.

An appellate court reviewing a claim of excessive sentence must determine whether the trial court adequately complied with the statutory guidelines in La. C.Cr.P. art. 894.1, as well as whether the facts of the case warrant the sentence imposed. *Landry, supra*; *State v. Trepagnier*, 97-2427 (La. App. 4 Cir. 9/15/99), 744 So. 2d 181. However, as noted in *State v. Major*, 96-1214, p. 10 (La. App. 4 Cir. 3/4/98), 708 So. 2d 813:

> 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).

If the reviewing court finds adequate compliance with article 894.1, it must then determine whether the sentence the trial court imposed is too severe in light of the particular defendant as well as the circumstances of the case, "keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged." *Landry*, at p. 8, 871 So. 2d 1235, 1239. See also *State v. Bonicard*, 98-0665 (La. App. 4 Cir. 8/4/99), 752 So. 2d 184.

Here, Harmon contends that the twelve-month sentence is excessive because he is a first offender with no prospect of rehabilitation or treatment, the crime was nonviolent, and the amount of cocaine was virtually nonexistent.

Although the district court did not enumerate or refer to any of the sentencing factors listed in La. C.Cr.P. art. 894.1, it did say that it had considered the article, and the record appears to support the sentence imposed.

Notably, the appellant's twelve-month sentence is considerably less than the thirty-month maximum sentenced allowed by La. R.S. 40:979(967). Contrary to that which Harmon's counsel represents, the appellant is not a first offender; he admitted to at least three prior convictions from Tennessee. Two of those convictions were for forgery, and the third conviction was for simple burglary. Further, in addition to the cocaine residue found inside the crack pipe, evidence was presented that the appellant also possessed loose crack that had not yet been smoked.

Because of the appellant's prior convictions, the cases relied upon by his attorney in support of a suspended sentence may be distinguished. In both *State v. Monette,* 99-1870 (La. App. 4 Cir. 3/22/00), 758 So. 2d 362 and *State v. Allen*, 00-1859 (La. App. 4 Cir. 5/9/01), 794 So. 2d 25, the defendants were first offenders. The defendant in *Monette* received the maximum sentence of thirty months at hard labor that was suspended for her conviction on attempted possession of cocaine; she had two prior municipal convictions. The defendant in *Allen* received a three-year suspended sentence for possession of cocaine, and he had only a municipal arrest. This court affirmed both sentences. Unlike the case at bar, a presentence investigation was ordered in *Monette* and *Allen*. On the other hand, Harmon admitted to the prior convictions in Tennessee; hence, the court was aware that he was not a first offender.

We compare the case at bar to *State v. Thomas,* 06-1294 (La. App. 4 Cir. 3/7/07), 954 So. 2d 777. The defendant in *Thomas* was also convicted

of attempted possession of cocaine, and he received a sentence of twenty-four months at hard labor as a first offender. This court found that the sentence was justified because Thomas discarded a bag containing approximately thirty pieces of cocaine and was accompanied by his brother, who was armed. Though the facts of the case are considerably different from those here, the sentence imposed was twice as long as the twelve-month sentence received by the appellant, who has three known prior convictions.

For the foregoing reasons, we do not find Harmon's sentence to be excessive.

CONCLUSION

We affirm Dustin G. Harmon's conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED.