

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA** \* **NO. 2008-KA-0853**  
**VERSUS** \*  
**TWDARRYL TONEY** \* **COURT OF APPEAL**  
\* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**  
\* \* \* \* \*

**APPEAL FROM**  
**CRIMINAL DISTRICT COURT ORLEANS PARISH**  
**NO. 448-917, SECTION "E"**  
**Honorable Byron C. Williams, Judge Pro Tempore**

\* \* \* \* \*

**Judge Patricia Rivet Murray**

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(Court composed of Chief Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge David S. Gorbaty)

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**AFFIRMED**

This is a criminal case. The defendant, Twdarryl Toney, appeals his conviction on one count of manslaughter and his forty years sentence as a multiple offender. Finding no error, we affirm.

#### **STATEMENT OF THE CASE**

This case arises out of a double homicide that occurred on February 8, 2004. The two victims were Edward “Chocolate” Mr. Taylor and Lamondo “Flair” Allen. On May 27, 2004, Mr. Toney was charged by grand jury indictment with two counts of second degree murder, violations of La. R.S. 14:30.1—Count One pertained to the killing of Mr. Allen, and Count Two pertained to the killing of Mr. Taylor. On June 2, 2004, Mr. Toney pleaded not guilty at his arraignment. On June 15, 2005, the trial court denied Mr. Toney’s motion to suppress the evidence. On March 3, 2006, the trial court granted Mr. Toney’s motion for speedy trial. On June 26, 27, and 28, 2006, Mr. Toney was tried by a twelve-person jury. The jury could not reach a verdict as to Count One; the trial court thus declared a mistrial as to that count. The jury found Mr. Toney guilty of manslaughter as to Count Two.

On December 14, 2006, the trial court denied Mr. Toney's motion for post-verdict judgment of acquittal; Mr. Toney waived all legal delays and was sentenced to forty years at hard labor. On April 12, 2007, Mr. Toney pleaded not guilty to a habitual offender bill of information filed by the State.<sup>1</sup> On April 30, 2008, Mr. Toney was adjudicated a second-felony habitual offender, and the trial court vacated the original sentence and re-sentenced Mr. Toney to forty years at hard labor. On that same date, the State *nolle prosequied* Count One of the indictment. On May 1, 2008, the trial court denied Mr. Toney's motion to reconsider sentence. This appeal followed.

### **STATEMENT OF THE FACTS**

At trial, five witnesses testified on behalf of the State: (i) New Orleans Police Department ("NOPD") Detective Carlton Lawless, the lead detective on the double homicide at issue; (ii) Bruce "Woo Woo" Moore; (iii) Burnell Thompson, the father of Mr. Allen, one of the victims; (iv) NOPD Officer Kenneth Leary, who was stipulated to be an expert in the examination and identification of firearms and ballistics testing; and (v) Dr. Paul McGarry, who was stipulated to be an expert in forensic pathology. The sole defense witness was Detective Lawless, who was recalled.

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<sup>1</sup> On October 4, 2007, this court granted Mr. Toney's writ application and ordered that it be transferred to the trial court to be considered as motion for appeal. *State v. Toney*, 07-1214 (La. App. 4 Cir. 10/4/07)(unpublished). On November 5, 2007, the trial court granted Mr. Toney's motion for appeal. On April 4, 2008, this court denied Mr. Toney's writ application seeking an appeal, noting that he already had been granted an appeal. *State v. Toney*, 08-0360 (La. App. 4 Cir. 4/10/08)(unpublished).

(i) *Detective Lawless*

Detective Lawless testified that the double homicide at issue occurred at about 10:30 p.m. on February 8, 2004, at 2339 Martin Luther King Boulevard in New Orleans. When he arrived on the scene, Detective Lawless found Mr. Taylor's body at the bottom of a stairway leading down to the courtyard; and he found Mr. Allen's body on the stairway leading to the second floor landing, with his head and shoulders resting on the landing. The stairways and landings were on the outside of the building. The shootings appeared to have occurred in the courtyard or on the first floor, and Mr. Allen appeared to have been shot downstairs and climbed the stairs to the second floor landing before collapsing.

On the night of the homicides, Detective Lawless interviewed Mr. Thompson, Mr. Allen's father.<sup>2</sup> Detective Lawless described Mr. Thompson's demeanor on the night of the homicides as "nonchalant." Mr. Thompson told Detective Lawless that earlier that day he had received a call from his son asking him for a ride from 2339 Martin Luther King Boulevard. Mr. Thompson indicated that his son appeared to be nervous. When he arrived at the location, Mr. Thompson went to look for his son where he knew he hung out. When he arrived on the second floor landing, he observed his son, who had been shot, on the ground. He then called the police. Mr. Thompson denied knowing who was responsible for the homicides.

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<sup>2</sup> On the night of the double homicide, Detective Lawless also interviewed Shannail Allen, who told him that "Limbo" had put out a hit on Mr. Allen because of a turf war between them involving their respective heroin sales in the area.

During his investigation, Detective Lawless interviewed Brandy Dwyer, who hung out in the area where the double homicide occurred.<sup>3</sup> Ms. Dwyer informed Detective Lawless that Mr. Moore killed Mr. Allen as the result of a hit put out on him. Based on his interview of Ms. Dwyer, Detective Lawless developed Mr. Toney and Mr. Moore as suspects in the homicides.

Detective Lawless obtained an arrest warrant for both Mr. Toney and Mr. Moore and a search warrant for the apartment of Mr. Moore's girlfriend, Joandrika Franklin (2401 Martin Luther King Blvd., Apt. 2-B). Although the police found no contraband in Ms. Franklin's apartment, they found several weapons and ammunition in the abandoned next door apartment (Apt. 2-A) that they also searched.<sup>4</sup> The police also recovered two spent .45 auto cartridge casings at the crime scene. A .45 caliber firearm linked to the double homicide was recovered later during an unrelated drug investigation involving one of the individuals who was in Ms. Franklin's apartment when the search warrant was executed. At Detective Lawless's request, the weapons were tested for fingerprints; none was found.

During Detective Lawless's testimony, defense counsel was permitted to play an audio recorded statement of Mr. Allen's aunt, Rachel Allen Hankton, in which she stated that Mr. Thompson admitted to her that "he pulled the trigger." Detective Lawless testified that Mr. Thompson was arrested subsequent to the

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<sup>3</sup> At one point in his investigation, Detective Lawless also arrested Ms. Dwyer for possession of cocaine.

<sup>4</sup> In the abandoned apartment, the police found several weapons and ammunition—a .357 Magnum revolver with six spent cartridge casings next to it; two AK-47 semiautomatic assault rifles, one a Norinco brand; and live 7.62 x 39 millimeter cartridges for the AK-47s.

homicides and charged with aggravated burglary and aggravated assault. These charges were based on an incident in which Mr. Thompson forcefully entered a house and threatened to kill his ex-wife, Ester Allen (Mr. Allen's mother), and her sister (Mr. Allen's aunt), Ms. Hankton.

Detective Lawless interviewed Mr. Moore on two occasions. During the first interview, Mr. Moore told him that he was at his mother's home when Mr. Toney came and got him, and Mr. Moore left with his nine millimeter handgun. Detective Lawless testified that during the first interview, Mr. Moore provided him with enough information about the shootings to lead him to believe that Mr. Moore was present at the scene of the shootings. During the second interview, Mr. Moore told Detective Lawless that Mr. Toney called him on the phone while Mr. Toney was at his mother's home. Detective Lawless stated that cellular phone records from Mr. Allen's phone reflected an incoming call to him from Mr. Moore at 9:13 p.m. on the night of the homicides, and an outgoing call about a minute or two before that to Mr. Moore.

*(ii) Mr. Moore*

Mr. Moore testified that he turned himself in ten days after the murders. He was originally charged with second degree murder, but pleaded guilty to being an accessory after the fact. He received a five-year sentence in exchange for testifying on behalf of the State. Mr. Moore admitted to having been convicted or pleaded guilty to possession of crack cocaine in 1998, aggravated assault in 1999, and manslaughter (after having been originally charged with murder) in 2003.

Mr. Moore testified that he knew Mr. Toney and that he, Mr. Toney, and Mr. Allen all sold drugs. Mr. Moore testified that Mr. Taylor was a contract killer—he took contracts to kill people. On the day of the double homicide, Mr. Moore, Mr. Allen, and Mr. Toney met at Ms. Franklin’s apartment. Mr. Allen was concerned because Mr. Taylor wanted them to go with him “[t]o go get somebody else who shot somebody that was kin to him.” Mr. Allen, on the other hand, wanted to kill Mr. Taylor. Mr. Moore said that he kept telling Mr. Allen “not to f--- with Mr. Taylor.” Mr. Moore said that Mr. Thompson came to the apartment, and all four of them—Mr. Moore, Mr. Allen, Mr. Toney and Mr. Thompson—went in Mr. Thompson’s pickup truck to get Mr. Taylor. Mr. Moore and Mr. Allen each had an AK-47, and Mr. Toney had a .357 revolver. Mr. Thompson did not have a weapon.

After picking up Mr. Taylor, they returned to Ms. Franklin’s apartment. They exited the vehicle and began walking up the stairs. Mr. Moore walked up the stairs first and entered the apartment because he wanted to get out of the way of the shootout that he knew was coming. He heard some shots and then Mr. Toney ran inside the apartment announcing that Mr. Allen had been shot. Mr. Moore went outside and found Mr. Allen on the stairs. Mr. Moore grabbed the AK-47 from underneath Mr. Allen and brought it inside the apartment. Mr. Moore said that he did not see Mr. Taylor, but he heard him hollering downstairs. Mr. Moore told Mr. Toney to hit Mr. Taylor in the head a few times. Mr. Toney took the AK-47 that Mr. Allen had been carrying, went downstairs and shot Mr. Taylor several more times to make sure he was dead.

Mr. Moore testified that he was on the stairs near Mr. Allen's feet when he observed Mr. Toney shoot Mr. Taylor. Mr. Moore said that Mr. Toney told him he had not shot Mr. Allen. Mr. Moore denied ever firing his AK-47 that night. Mr. Moore stated that after the shooting they put the AK-47s in an abandoned apartment next to Ms. Franklin's apartment. Mr. Moore acknowledged that he knew Ms. Dwyer, but he testified that that he did not know why she would say that he shot Mr. Allen.

Mr. Moore admitted that he lied regarding several matters relating to the double homicides.<sup>5</sup> Mr. Moore also admitted that he had given two previous statements in which he never said that he observed Mr. Toney shoot anyone. Mr. Moore denied that he had done everything he said Mr. Toney did. He also denied conspiring with Mr. Thompson while they were both in jail to place the blame on Mr. Toney. He stated that while they were both in jail he only saw Mr. Thompson through a window. Mr. Moore denied telling police that he learned the details of the shootings, including that Mr. Toney committed them, while he was at the barber shop before Mr. Allen's funeral.

*(iii) Mr. Thompson*

Mr. Thompson identified a plea bargain agreement signed by him, and he admitted that he was testifying pursuant to that agreement. In that agreement, Mr. Thompson pleaded guilty to being an accessory after the fact. The agreement

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<sup>5</sup> These matters included: telling the police that he was at his mother's house at the time of the murders; telling defense counsel that Jessie "Too Too" Reed had supposedly ripped off some of Limbo's drug dealers on Martin Luther King Boulevard and that Limbo believed Mr. Reed had done it on behalf of Mr. Allen; telling the police on March 16, 2004 that he was at his sister's house at the time of the murders; and telling defense counsel on March 7, 2006, that he never saw Mr. Toney shoot anyone. Mr. Moore acknowledged that he too had heard that Limbo had a hit out on Mr. Allen.



provided that he would be released as soon as Mr. Toney's trial was over. The agreement further provided that in exchange for his testimony Mr. Thompson would not be prosecuted for any crimes arising out of the aggravated burglary and aggravated assault arrests from the incident involving his ex-wife and her sister. The agreement still further provided that he would not be charged as a habitual offender.

Mr. Thompson admitted to having pled guilty in 1982 to illegally carrying a weapon; in 1990 to possession with intent to distribute crack cocaine; and in 1993 to two more crack cocaine charges, possession with intent to distribute or distribution, and to being a convicted felon in possession of a firearm.

Mr. Thompson testified that he and his son, Mr. Allen, were very close and that he knew his son was a heroin dealer. Mr. Thompson further testified that Mr. Moore and Mr. Allen were very close and that they sold heroin together.

Recounting the events of the day of the double homicide, Mr. Thompson stated that his son, Mr. Allen, contacted him that day to ask him for a ride. Mr. Thompson arrived to find his son standing on the corner of Martin Luther King Boulevard and South Liberty Street. They went into a woman's (Ms. Franklin's) apartment. Present in the apartment were Mr. Toney, Mr. Moore, and Ms. Franklin. According to Mr. Thompson, his son stated that some people wanted to kill him and that he wanted to get them before they got him. Mr. Thompson testified that both he and Mr. Moore attempted to dissuade his son from doing so. Mr. Toney, however, also wanted to get Mr. Taylor.

According to Mr. Thompson, the four of them—him, his son, Mr. Moore, and Mr. Toney—left the apartment in his pickup truck to get Mr. Taylor. Mr. Thompson and Mr. Toney rode in the front of the pickup truck, and Mr. Allen and Mr. Moore rode in the bed of the truck. Mr. Allen and Mr. Moore both were armed with an AK-47. Mr. Toney was armed with a .357 Magnum revolver. When Mr. Taylor got into the back of the pickup truck, he was carrying a nine millimeter gun wrapped in a towel. They returned to 2339 Martin Luther King Boulevard. Mr. Thompson parked his truck. The four passengers exited the truck and headed up the stairs in the following order: Mr. Moore, Mr. Taylor, Mr. Toney, and Mr. Allen. Mr. Thompson stayed by the passenger side of his truck.

In describing the shootout, Mr. Thompson testified that when Mr. Toney reached the top of the steps, he shot Mr. Taylor at close range with the .357 Magnum.<sup>6</sup> He estimated that Mr. Toney was about two steps above Mr. Taylor. Mr. Thompson also saw his son shooting his AK-47. Mr. Thompson said that he did not see who shot his son; however, he said that he knew his son had been hit because he saw him stumble back down the stairs during the shootout. Mr. Thompson went around to another stairway to the second floor where he saw his wounded son coming up the stairway. Mr. Thompson then attempted to get his son back down the steps and into his truck so that he could take him to a hospital, but was unable to do so. According to Mr. Thompson, at this point his son did not have his AK-47. Mr. Thompson stated that he did not know what happened to that

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<sup>6</sup> Mr. Thompson initially testified that he did not actually see Mr. Taylor get hit, but he knew it was a shot right behind the head area.

AK-47. Contemporaneously, Mr. Toney was downstairs shooting at someone, who Mr. Thompson assumed was Mr. Taylor. Mr. Thompson said that he did not see Mr. Moore, who was standing on the second-floor level, do anything. Mr. Thompson testified that later that night he told the police that his son had called him to come and pick him up and that he was in trouble. He testified that he did not lie to the police that night, but he acknowledged that he did not tell them the full story.

Mr. Thompson testified that he was not in agreement with his son's decision to go after Mr. Taylor, and he felt responsible for his son's death. Mr. Thompson denied threatening to kill his ex-wife or her sister. He also denied telling them that he did not kill his son, he just pulled the trigger. Mr. Thompson acknowledged that he saw Mr. Moore in parish prison, but only through a window. He denied conspiring with Mr. Moore to blame Mr. Toney for the homicides.

*(iv) Officer Leary*

Officer Leary, the firearms expert, testified that the 7.62 x 39 millimeter casings recovered from the crime scene—nine from the ground near the walkway by the stairs and six from near the steps—were all fired from the same gun. Officer Leary testified that a 7.62 x 39 millimeter bullet and fragment found at the scene, as well as a bullet fragment recovered during Mr. Taylor's autopsy, were fired by the same gun. Officer Leary testified that he matched all of these cartridge casings, the bullet, and the bullet fragments to the Norinco AK-47 that had been submitted to him for examination in the case (one of the AK-47s found in the

abandoned apartment). He also matched another bullet fragment and a casing found at the scene to that same gun. Officer Leary stated that every spent cartridge casing, bullet, and bullet fragment he examined was fired by or through the Norinco AK-47. None of these specimens matched the other AK-47 seized by police from the abandoned apartment. Officer Leary stated that the other AK-47 was functional. Officer Leary also testified that two .45 caliber casings recovered from the crime scene had been fired by the same gun. He matched the two .45 caliber casings found at the crime scene to a .45 caliber handgun recovered by police during an unrelated drug investigation. He confirmed that there was one nine millimeter cartridge casing found at the scene, which he could not match to any weapon.

(v) *Dr. McGarry*

Dr. McGarry, the forensic pathology expert, testified that he performed the autopsies of both victims. Mr. Taylor sustained more than thirty gunshot wounds, including wounds to his head that blew most of his brain out through a five-inch hole in the left side of his head. Mr. Taylor's wounds reflected that he was shot several times from different angles, meaning that he was moving or the bullets were coming from different directions. Mr. Taylor then was shot at least twenty more times while in a stationary position. All the bullets that struck Mr. Taylor in his shoulder, neck, upper chest, and head while he was stationary came from the same direction, suggesting that one person was doing the shooting with what Dr. McGarry referred to as an automatic weapon. Dr. McGarry testified that Mr. Allen

was struck by one bullet that caused two wounds, one of which penetrated his heart and went into his right lung and caused his death.

### **ERRORS PATENT**

A review of the record reveals no errors patent.

### **ASSIGNMENT OF ERROR NO. 1**

Mr. Toney argues that the evidence is insufficient to support his conviction. When reviewing the sufficiency of the evidence to support a conviction, Louisiana appellate courts are controlled by the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307 (1979). Under the *Jackson* standard, the appellate court “must determine that the evidence, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt.” *State v. Neal*, 00-0674, p. 9 (La. 6/29/01), 796 So.2d 649, 657 (citing *State v. Captville*, 448 So.2d 676, 678 (La. 1984)).

Although Mr. Moore and Mr. Thompson testified pursuant to a favorable plea agreements, the jurisprudence holds that an accomplice is qualified to testify against a co-perpetrator even if the prosecution offers him inducements to testify; such inducements merely affect the witness's credibility. *Neal*, 00-0674 at pp. 11-12, 796 So.2d at 658. A conviction can be based on the uncorroborated testimony of an accomplice even if the prosecution has offered the accomplice inducements, provided the testimony is not incredible or otherwise insubstantial on its face. *Neal*, 00-0674 at p. 12, 796 So.2d at 659 (citing *United States v. Osum*, 943 F.2d

1394, 1405 (5th Cir. 1991)). The jury, however, should be instructed to treat such testimony with great caution. *State v. Tate*, 01-1658, pp. 4-5 (La. 5/20/03), 851 So.2d 921, 928. Information about a witness's convictions can form an important source for impeachment of such witnesses. *See State v. Bright*, 02-2793, p. 8 (La. 5/25/04), 875 So.2d 37, 43.

In this case, Mr. Toney does not argue that the events as testified to by Mr. Moore and Mr. Thompson could not have transpired or that such a scenario was inconsistent with the physical evidence. Nor does he argue that their testimony was internally inconsistent and for that reason unworthy of belief. Rather, he argues that their testimony was not credible. Mr. Toney points out that Mr. Moore was an accomplice to the murders, had a horrific criminal record, and a history of lying about the facts of this matter at trial. Similarly, Mr. Thompson was a critical player in this double homicide, a habitual convicted felon, a drug user, and a habitual liar. Mr. Toney thus contends that no rational trier of fact could have credited these two witnesses' testimony.

The State counters that the jury chose to accept the testimony of these two witnesses and to reject Mr. Toney's contention that these witnesses conspired to frame him. The State further counters that a rational juror could have accepted the accounts of these witnesses. We agree.

At trial, Mr. Toney's attorney advanced the theory that Mr. Moore did everything he testified that Mr. Toney did. However, no evidence was presented to support that theory. Both Mr. Moore and Mr. Thompson denied conspiring

together in jail to frame Mr. Toney. Both witnesses testified that Mr. Toney shot Mr. Taylor. Viewing all of the evidence in a light most favorable to the prosecution, a rational trier of fact could have found all of the essential elements of the offense of manslaughter present beyond a reasonable doubt.

### **ASSIGNMENT OF ERROR NO. 2**

Mr. Toney contends that the forty-year sentence the trial court imposed on him as a second-felony habitual offender is unconstitutionally excessive. In reviewing a claim that a sentence is excessive, 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)). For sentences falling within the range provided by the Legislature, a trial court abuses its discretion only when it contravenes the constitutional prohibition of excessive punishment set forth in La. Const. art. I, § 20, which prohibits “punishment disproportionate to the offense.” *State v. Sepulvado*, 367 So.2d 762, 767 (La. 1979). A sentence is disproportionate to the offense 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 (La. 5/22/95), 656 So.2d 973, 979. A trial court is entitled to consider the defendant’s entire criminal history in determining the appropriate sentence to be imposed. *State v. Ballett*, 98-2568, p. 25 (La. App. 4 Cir. 3/15/00), 756 So. 2d 587, 602. Thus, arrests can be considered.

Mr. Toney was charged with and tried for two counts of second degree murder, but was convicted of only one count of manslaughter, a violation of La. R.S. 14:31. The sentence for manslaughter under the circumstances of the instant case is imprisonment at hard labor for not more than forty years. Mr. Toney was adjudicated of being a second-felony habitual offender pursuant to La. R.S. 15:529.1(A)(1)(a), which provides for a sentence of imprisonment for a determinate term not less than one-half the longest term and not more than the twice the longest term prescribed for a first offense. The trial court therefore could have sentenced Mr. Toney as a second-felony habitual offender convicted of manslaughter to imprisonment at hard labor for not less than twenty years and not more than eighty years. Mr. Toney's sentence of forty years at hard labor is twice the minimum and one-half the maximum possible sentence. This was the same sentence the trial court originally imposed on the manslaughter conviction alone.

The record reflects that Mr. Toney has a lengthy criminal record. He was arrested multiple times between 2000 and 2003 for criminal trespass. (No records were available for the dispositions of these trespass offenses.) Between October 2000 and December 2001, he was arrested (excluding trespass) for the following: resisting arrest, obstructing an officer, domestic violence, second offense possession of marijuana, and public drunkenness. The possession of marijuana charge was refused. (No records were available as to the dispositions of the other offenses.) In January 2002, Mr. Toney was arrested for resisting an officer, which charge was eventually refused, and illegal use of a weapon, which offense he



pleaded guilty to and received a sentence of one year imprisonment. It is this conviction for which he was adjudicated as a second felony habitual offender. The incident that gave rise to that incident occurred when Mr. Toney fired an AK-47 and retreated into 2339 Martin Luther King Boulevard, which is the same address as the double homicide in question.

Mr. Toney was convicted in 2004 for first offense possession of marijuana and received a six month suspended sentence. A charge of unauthorized entry into an inhabited dwelling was refused in April 2003, and a charge of possession of a stolen automobile was refused in July 2003. A charge of unauthorized use of a motor vehicle arising out of that same incident was *nolle prosequied* in July 2005. Mr. Toney was arrested for two counts of attempted first degree murder and one count of first degree murder in May 2003. He was charged in that case, but all charges were *nolle prosequied* on January 28, 2004, eleven days before the February 8, 2004 double homicide at issue occurred.

The trial court, without giving any reasons, sentenced Mr. Toney as a second-felony habitual offender to forty years. Considering Mr. Toney's extensive criminal history, the seriousness of the instant offense, his prior conviction for firing an AK-47 assault rifle in almost the same location where the homicide for which he was convicted of manslaughter occurred, and that the sentence imposed is one-half the maximum eighty year sentence he could have received, the sentence imposed is not unconstitutionally excessive. This assignment of error thus lacks merit.

**DECREE**

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

**AFFIRMED**