NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 0017

STATE OF LOUISIANA

VERSUS

STANLEY LINDSEY

Judgment Rendered: June 8, 2007

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On Appeal from the Nineteenth Judicial District Court
In and For the Parish of East Baton Rouge
State of Louisiana
Docket No. 03-05-0854

Honorable Richard D. Anderson, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

McCLENDON, J.

Defendant Stanley Lindsey was initially charged by bill of information with armed robbery, a violation of LSA-R.S. 14:64.[1] With counsel present, defendant pled not guilty. Following a jury trial, defendant was found guilty as charged. Defendant filed a pro se motion for stay of sentencing and for mistrial, which the trial court treated as a motion for a new trial. The trial court denied the motion. Defendant was sentenced to twenty-five (25) years at hard labor without the benefit of probation, parole, or suspension of sentence.

Defendant appealed his conviction. We affirmed defendant's conviction and sentence. **State v. Lindsey**, 06-1268 (La.App. 1 Cir. 12/28/06), 947 So.2d 850 (unpublished). Subsequently, the state filed an "Information to Establish Habitual Offender Status." Defendant pled not guilty, thereby denying the allegations of the information. Following the habitual offender hearing, defendant was adjudged a third felony habitual offender. The trial court vacated the previous twenty-five year sentence, resentenced defendant to life imprisonment without benefit of parole, probation, or suspension of sentence, pursuant to LSA-R.S. 15:529.1A(1)(b)(ii), and provided written reasons for its ruling. Defendant filed a pro se motion to reconsider sentence, which was denied. Defendant now appeals his habitual offender adjudication and sentence, designating the following three counseled assignments of error and two pro se assignments of error:

Counseled Assignment of Error No. 1

> The evidence presented at the habitual offender hearing was insufficient to prove that defendant was a third felony habitual offender where the state presented no evidence of his third

[1] Defendant was also charged with aggravated criminal damage to property, a violation of LSA-R.S. 14:55. However, the charge was subsequently dismissed.

felony conviction.

Counseled Assignment of Error No. 2

Since the state did not prove that defendant was a third felony habitual offender, a life sentence was statutorily prohibited.

Counseled Assignment of Error No. 3

Even if defendant was properly adjudged a third felony habitual offender, the life sentence is still excessive because defendant's convictions were financially motivated and nonviolent.

Pro Se Assignment of Error No. 1[2]

Defendant received a harsher punishment for exercising his constitutional right to go to trial and not accept the plea bargain offered prior to trial.

Pro Se Assignment of Error No. 2

The habitual offender adjudication was invalid because no photograph of defendant was used to establish he was the same person previously convicted, and defendant was required to give his fingerprints at the habitual offender hearing.

We affirm the habitual offender adjudication and sentence.

FACTS

On January 9, 2005, defendant entered a Circle K convenience store on Nicholson Drive in Baton Rouge and robbed the clerk, Tarongela Smith, at gunpoint.[3] Out of fear of taking too long to retrieve the money, Tarongela handed defendant the till from the cash register.[4] Defendant, who was wearing a skullcap and sunglasses, left the store with the till. Joshua Williams, a customer who was getting gas at the Circle K, saw defendant

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[2] In his pro se brief, defendant designates his two assignments of error as Assignment of Error No. 4 and Assignment of Error No. 5 and refers to his brief as a "Supplemental Brief." Defendant's uncounseled brief is a pro se brief, not a supplemental brief. Accordingly, to avoid confusion, we redesignate Assignment of Error No. 4 as Pro Se Assignment of Error No. 1, and Assignment of Error No. 5 as Pro Se Assignment of Error No. 2.

[3] The police narrative of the robbery contained in the record indicates that the handgun used by defendant was a Daisy BB handgun.

[4] The police narrative of the robbery contained in the record indicates the till contained $87.77.

walk out of the store with the till in one hand and a gun in the other hand. Williams saw defendant get in a truck and drive away. The police arrived shortly thereafter, and Williams gave them a description of the truck.

Within minutes of receiving the description of the truck that defendant was driving, Baton Rouge Police Officer Brandon Smith, who was on road patrol, noticed the truck driving on Nicholson Drive. Officer Smith got behind the truck and called for backup. Baton Rouge Police Officer Cales Eisworth arrived moments later to assist Officer Smith. The officers turned on their lights and sirens and followed defendant until he came to a stop about a minute later. Defendant then backed his truck into Officer Smith's vehicle. Following this, defendant exited the truck and ran. Defendant was the only one in the truck. The officers pursued defendant on foot, but lost sight of him. A perimeter was set up, and William Clarida, a K-9 police officer, and his police dog were called to the scene. The dog found defendant hiding behind a shed in the back yard of a residence. Defendant was handcuffed and **Mirandized**. Officer Clarida testified at trial that, prior to any officers asking defendant any questions, defendant said that he had robbed the store because he was out of work and he was tired of being broke.[5] Defendant had $78.00 on his person. Inside the truck that defendant was driving, officers found a cash register till, a handgun, and a black hat.

ASSIGNMENTS OF ERROR NOS. 1 AND 2

In his first two counseled assignments of error, defendant argues that the evidence presented at the habitual offender proceeding was insufficient to prove he was a third felony habitual offender. As such, a life sentence was statutorily prohibited. Specifically, defendant contends that, while the state presented evidence to establish his two predicate convictions, the state

[5] Officer Eisworth also heard defendant make this statement, but was unsure whether defendant made the statement before or after he was **Mirandized**.

presented no evidence to establish his third felony conviction, that is, the present underlying armed robbery conviction.

At the habitual offender hearing, the state introduced evidence establishing the two previous convictions of burglary in 1979 and 1988.[6] The state then introduced the entire record, including the bill of information and minutes, of defendant's armed robbery conviction, docket no. 03-05-0854. Defendant presented no evidence. Following arguments, the trial court found defendant to be the same person who was convicted of armed robbery "in this court after a trial by jury in docket no. 03-05-0854" and sentenced to twenty-five years on April 3, 2006, as well as the same person who was convicted of simple burglary in 1979 and convicted of three counts of simple burglary in 1988. Accordingly, the trial court adjudged defendant a third felony habitual offender, vacated the twenty-five year sentence, and resentenced defendant to life imprisonment, pursuant to LSA-R.S. 15:529.1A(1)(b)(ii).

Defendant's contention that the state presented no evidence to establish his third felony conviction is meritless. The charges to be defended against in habitual offender cases are the prior convictions alleged. Because a trial court has the right to take judicial notice of any prior proceeding in cases over which it presided, a defendant is unable to defend against the recent underlying offense. See **State v. Freeman**, 00-238, p. 12 (La.App. 3 Cir. 10/11/00), 770 So.2d 482, 490, writ denied, 00-3101 (La. 10/5/01), 798 So.2d 963. The trial court in the instant matter, having presided over defendant's armed robbery trial, took judicial notice of defendant's conviction of armed robbery at the habitual offender hearing. Furthermore, the state introduced the entire record of defendant's armed robbery

[6] Defendant's 1988 conviction was for three counts of simple burglary.

conviction at the habitual offender hearing. Defendant was properly adjudged a third felony habitual offender. Accordingly, defendant's statutorily mandated sentence of life imprisonment under LSA-R.S. 15:529.1A(1)(b)(ii) was proper.

These assignments of error are without merit.

ASSIGNMENT OF ERROR NO. 3

In his third counseled assignment of error, defendant argues that his life sentence is excessive. Specifically, defendant contends that he is an alcoholic who was mentally abused as a child, and that his crimes were all nonviolent and motivated by financial need. Further, he has never been convicted of causing physical harm to anyone.

Article I, Section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the trial court to consider when imposing a sentence. While the entire checklist of Article 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. Although a sentence falls within statutory limits, it may be excessive. **State v. Sepulvado**, 367 So.2d 762, 767 (La. 1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks one's sense of justice. **State v. Andrews**, 94-0842, pp. 8-9 (La.App. 1 Cir. 5/5/95), 655 So.2d 448, 454. The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. See **State v. Holts**, 525 So.2d

1241, 1245 (La.App. 1 Cir. 1988).

The articulation of the factual basis for a sentence is the goal of LSA-C.Cr.P. art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary, even where there has not been full compliance with Article 894.1. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982). The trial court should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than confinement. **State v. Jones**, 398 So.2d 1049, 1051-52 (La. 1981). On appellate review of a sentence, the relevant question is "'whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate.'" **State v. Thomas**, 98-1144, pp. 1-2 (La. 10/9/98), 719 So.2d 49, 50 (per curiam) (quoting **State v. Humphrey**, 445 So.2d 1155, 1165 (La. 1984)).

In **State v. Dorthey**, 623 So.2d 1276, 1280-81 (La. 1993), the Louisiana Supreme Court opined that if a trial court were to find that the punishment mandated by LSA-R.S. 15:529.1 makes no "measurable contribution to acceptable goals of punishment" or that the sentence amounted to nothing more than "the purposeful imposition of pain and suffering" and is "grossly out of proportion to the severity of the crime," it has the option, indeed the duty, to reduce such sentence to one that would not be constitutionally excessive. In **State v. Johnson**, 97-1906, pp. 7-9 (La. 3/4/98), 709 So.2d 672, 676-77, the Louisiana Supreme Court reexamined the issue of when **Dorthey** permits a downward departure from the mandatory minimum sentences in the Habitual Offender Law.

A sentencing court must always start with the presumption that a

mandatory minimum sentence under the Habitual Offender Law is constitutional. A court may only depart from the minimum sentence if it finds that there is clear and convincing evidence in the particular case before it that would rebut this presumption of constitutionality. A trial court may not rely solely upon the nonviolent nature of the instant crime or of past crimes as evidence that justifies rebutting the presumption of constitutionality. While the classification of a defendant's instant or prior offenses as nonviolent should not be discounted, this factor has already been taken into account under the Habitual Offender Law for third and fourth offenders. **Johnson**, 97-1906 at p. 7, 709 So.2d at 676.

To rebut the presumption that the mandatory minimum sentence is constitutional, the defendant must clearly and convincingly show that he is exceptional, which means that, because of unusual circumstances, this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case. Given the legislature's constitutional authority to enact statutes such as the Habitual Offender Law, it is not the role of the sentencing court to question the wisdom of the legislature in requiring enhanced punishments for multiple offenders. Instead, the sentencing court is only allowed to determine whether the particular defendant before it has proven that the mandatory minimum sentence is so excessive in his case that it violates the constitution. Departures downward from the minimum sentence under the Habitual Offender Law should occur only in rare situations. **Johnson**, 97-1906 at pp. 8-9, 709 So.2d at 676-77.

In this matter, defendant's contention that all of his convictions were for nonviolent crimes is inaccurate. Armed robbery, by definition, is a crime

of violence. See LSA-R.S. 14:2(13)(w) (prior to its 2006 amendment). At his original sentencing, the trial court noted that defendant was "quite belligerent" during the presentence investigation report and still denied committing the crime. The trial court then reviewed defendant's extensive criminal record. As a juvenile, defendant allegedly was found guilty of burglary in 1971 or 1972. In 1979, as an adult, defendant was found guilty of simple burglary and sentenced to six years. In 1988,[7] defendant pled guilty to three counts of simple burglary and was sentenced to twenty-two years. In 1988, defendant pled guilty to simple escape from the Iberville Parish Jail and was sentenced to eight years. In connection with the escape, defendant was arrested for second degree murder, but, because of insufficient evidence, the case was never billed. In 2003, defendant was found guilty of driving while intoxicated, careless operation, and a switched license plate, and was sentenced to six months in parish prison. In 2004, defendant was charged with forgery and insurance fraud, for which he was fined $250 and sentenced to ninety days.

Defendant has repeatedly engaged in criminal behavior for much of his life. It seems that no amount of time spent incarcerated, up to this point, has curbed defendant's propensity for breaking the law. There is nothing particularly unusual about defendant's circumstances that would justify a downward departure from the mandatory life sentence imposed under LSA-R.S. 15:529.1. Defendant has not proven by clear and convincing evidence that he is exceptional, such that a mandatory life sentence would not be

[7] In reviewing defendant's criminal history at sentencing, the trial court misstated, "In June of 1987 the defendant pleaded guilty to three counts of simple burglary." Defendant was arrested for these three counts on June 30, 1987, and was convicted for these three counts on January 11, 1988.

meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case. See **Johnson**, 97-1906 at p. 8, 709 So.2d at 676.

This assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NO. 1

In this pro se assignment of error, defendant argues that the state punished him for exercising his constitutional right to a jury trial. Specifically, defendant contends that he received a harsher punishment because he chose to go to trial and not accept the plea bargain offered prior to trial.

Pursuant to a discussion among defense counsel, the prosecutor, and the trial court prior to trial, defendant was advised that he would receive a sentence of twelve years if he pled guilty to armed robbery. If defendant chose to proceed to trial and was found guilty, the state would file a habitual offender bill.

If a trial court has agreed to impose a particular sentence pursuant to a plea bargain, it is not restricted from imposing a more severe sentence if the defendant elects to go to trial and is convicted. The sentencing court must nonetheless comply with constitutional standards, and the sentence should not be increased due to vindictiveness arising from the exercise of the defendant's right to stand trial. See **State v. Frank**, 344 So.2d 1039, 1045 (La. 1977). However, as the Louisiana Supreme Court has recognized, a court's "disposition to impose a lenient sentence during plea discussions should not be understood as setting a limit for the justifiable sentence under accepted principles of criminal justice. The better view . . . is that the plea proposal is a concession from the greatest justifiable sentence, the concession being made because of circumstances surrounding the plea."

Frank, 344 So.2d at 1045.

In **Bordenkircher v. Hayes**, 434 U.S. 357, 363-64, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978), the Supreme Court stated:

> To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional." But in the "give-and-take" of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.
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> While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable" - and permissible – "attribute of any legitimate system which tolerates and encourages the negotiation of pleas." It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty. (Citations omitted.)

Defendant herein chose not to accept the plea bargain offered by the state, thereby taking the risk of a greater penalty upon conviction by a jury. Under LSA-R.S. 15:529.1A(1)(b)(ii), defendant's life sentence was mandatory. Since there was no sentencing discretion involved in the trial court's sentencing of defendant, the sentence clearly was not the product of vindictiveness by the trial court.

This assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NO. 2

In this pro se assignment of error, defendant argues that his habitual offender adjudication is invalid, because he was required to give his fingerprints at the habitual offender hearing. Defendant also argues that

there was "no photo of [him] at his habitual offender proceeding to show that [he] was the same person who had been convicted previously."[8]

The defendant contends that taking his prints violated his privilege against self-incrimination. A defendant's privilege against self-incrimination is not violated by taking his fingerprints in open court. Requiring a defendant to supply evidence of his identity does not violate the Fifth Amendment. **State v. House**, 320 So.2d 181, 182 (La. 1975).

Defendant also contends that the state failed to prove his identity as the same person convicted of the previous convictions, because no photographs of him were used. In order to obtain a multiple offender adjudication, the state is required to establish both the prior felony conviction and that the defendant is the same person convicted of that felony. In attempting to do so, the state may present: (1) testimony from witnesses; (2) expert opinion regarding the fingerprints of the defendant when compared with those in the prior record; (3) photographs in the duly authenticated record; or (4) evidence of identical driver's license number, sex, race, and date of birth. **State v. Payton**, 00-2899, p. 6 (La. 3/15/02), 810 So.2d 1127, 1130-31.

Any of these methods may be sufficient to establish that the defendant is the same person convicted of a prior felony. The state was not required to introduce photographs of defendant into evidence to prove his identity. As the **Payton** court opined, "This Court has repeatedly held that [the Habitual Offender Act] *does not require the State to use a specific type of evidence to carry its burden at an habitual offender hearing and that prior convictions may be proved by any competent evidence."* **Payton**, 00-2899 at p. 8, 810 So.2d at 1132.

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[8] No objection was raised at the habitual offender hearing regarding either issue.

Further, at the habitual offender hearing, Katie Webb, a supervisor with the Louisiana State Police, testified that as part of her duties, she is trained to identify fingerprints and is also the custodian of records. Ms. Webb had searched the records and retrieved the original fingerprint cards from defendant's previous incarcerations after he was convicted on the two previous felonies. During the hearing, Ms. Webb identified defendant's existing fingerprints that were on file from his previous convictions. She then took defendant's fingerprints, compared them to the existing prints from his previous convictions, and testified that defendant was the same person who was convicted of simple burglary in 1979 and three counts of simple burglary in 1988. Ms. Webb also compared defendant's thumbprints to those on a card from his release on parole supervision in 2001, and identified defendant as the person released at that time, thereby establishing that the ten-year "cleansing period" had not elapsed.

Thus, we find this assignment of error to be without merit.

HABITUAL OFFENDER ADJUDICATION AND SENTENCE AFFIRMED.