NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KJ 1281

STATE OF LOUISIANA

IN THE INTEREST OF D.Y., JR.

On Appeal from the 20th Judicial District Court
Parish of West Feliciana, Louisiana
Docket No. J-1354, Division "B"
Honorable William G. Carmichael, Judge Presiding

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BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

Judgment rendered November 9, 2011

PARRO, J.

D.Y.,[1] a child, was alleged to be delinquent by a petition, based on one count of aggravated rape, a violation of LSA-R.S. 14:42. He denied the allegation. Following an adjudication hearing, he was adjudged delinquent as alleged. He was committed to the custody of the Department of Public Safety and Corrections to be confined in secure placement without parole until attaining the age of twenty-one years. He appealed to this court, designating four assignments of error. See **State in the Interest of D.Y., Jr.,** 10-1898 (La. App. 1st Cir. 2/11/11), 57 So.3d 613 (table), 2011 WL 2178785. We found merit in assignment of error number 3 regarding the disposition process, affirmed the adjudication of delinquency, vacated the disposition, and remanded the matter to the juvenile court for reimposition of disposition, recommending that the court allow D.Y. the benefit of a disposition hearing. **Id.** Following a disposition hearing, the court committed D.Y. to the custody of the Department of Public Safety and Corrections, Office of Juvenile Justice, to be confined in secure placement until his twenty-first birthday, without benefit of parole, probation, suspension, or modification. He now appeals, challenging the disposition as excessive and alleging the juvenile court failed to render a written judgment of disposition. For the following reasons, we affirm the disposition.

FACTS

The facts were set forth in our original decision in this matter.

EXCESSIVE DISPOSITION

In assignment of error number 1, the child argues that his disposition was excessive, by both its length and its terms: (1) because his psychosexual evaluation indicated he had a low risk of reoffending, and it did not label him a pedophile or a sexual predator; and (2) because he passed his GED exam and earned a vocational certificate.

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[1] The record reflects that the juvenile's name is D.Y., Jr. However, for purposes of this opinion, he will be referred to as D.Y.

Article I, Section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Hurst**, 99-2868 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 00-3053 (La. 10/5/01), 798 So.2d 962.

After adjudicating a child to be delinquent, a court is required to impose the "least restrictive disposition" authorized by Articles 897 through 900 of the Children's Code "which the court finds is consistent with the circumstances of the case, the needs of the child, and the best interest of society." LSA-Ch.C. art. 901(B). Commitment of the child to the custody of the Department of Public Safety and Corrections may be appropriate under any of the following circumstances: (1) there is an undue risk that during the period of a suspended commitment or probation the child will commit another crime; (2) the child is in need of correctional treatment or a custodial environment that can be provided most effectively by his commitment; (3) a lesser disposition will deprecate the seriousness of the child's delinquent act; and (4) the delinquent act involved the illegal carrying, use, or possession of a firearm. LSA-Ch.C. art. 901(C); **State in the Interest of J.W.**, 95-1131 (La. App. 1st Cir. 2/23/96), 669 So.2d 584, 586, writ denied, 96-0689 (La. 4/26/96), 672 So.2d 911.

Louisiana Children's Code article 897.1(A) provides, in pertinent part:

> After adjudication of a felony-grade delinquent act based upon a violation of ... R.S. 14:42, aggravated rape ..., the court shall commit the child who is fourteen years or older at the time of the commission of the offense to the custody of the Department of Public Safety and Corrections to be confined in secure placement until the child attains the age of twenty-one years without benefit of parole, probation, suspension of imposition or execution of sentence, or modification of sentence.

Upon remand, the juvenile court committed the child to the custody of the Department of Public Safety and Corrections, Office of Juvenile Justice, to be confined in secure placement until his twenty-first birthday, without benefit of parole, probation, suspension, or modification of sentence.

A juvenile court has the authority to deviate below the mandatory minimum disposition set forth in LSA-Ch.C. art. 897.1(A) when a juvenile has been adjudged delinquent after adjudication of a felony-grade delinquent act based on a violation of LSA-R.S. 14:42, aggravated rape. See **State ex rel. A.A.S.**, 98-1505 (La. 10/16/98), 726 So.2d 900, 901. Any such disposition shall be made according to the criteria set forth in **State v. Johnson**, 97-1906 (La. 3/4/98), 709 So.2d 672. **Id.**

In **State v. Dorthey**, 623 So.2d 1276, 1280 (La. 1993), the Louisiana Supreme Court recognized that if a trial judge determines that the punishment mandated by the Habitual Offender Law 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," he has the duty to reduce such sentence to one that would not be constitutionally excessive.

However, the holding in **Dorthey** was made only after, and in light of, express recognition by the court that, "the determination and definition of acts which are punishable as crimes is purely a legislative function. It is the Legislature's prerogative to determine the length of the sentence imposed for crimes classified as felonies. Moreover, courts are charged with applying these

punishments unless they are found to be unconstitutional." **Dorthey**, 623 So.2d at 1278 (citations omitted).[2]

In **Johnson**, the Louisiana Supreme Court reexamined the issue of when **Dorthey** permits a downward departure from the mandatory minimum sentences in the Habitual Offender Law. The court held that to rebut the presumption that the mandatory minimum sentence was constitutional, a defendant had to "clearly and convincingly" show that:

> [he] is exceptional, which in this context 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.

Johnson, 709 So.2d at 676.

At the disposition hearing held upon remand in this matter, the defense introduced into evidence an October 18, 2008 "[p]sychosexual [e]valuation" of D.Y. The report began with the following caveat:

> ***Disclaimer: The contents contained in this report are based on the availability of information and data at the time of the evaluation. It should be noted that the introduction of new information could materially change the conclusions herein.***

According to the report, the fourteen-year-old child had been arrested for aggravated rape of a three-year-old victim.[3] The child also had previously been charged with battery, but had not been adjudicated for that offense. He self-reported a history of suspensions for "bad conduct," physical fights with peers, and disrespectful behavior, and had been expelled from the eighth grade due to multiple suspensions. The report stated the child's IQ estimate was 73 "which falls in the *Borderline* range of intelligence; this may be a slight underestimate of his actual ability." The report also indicated the child "expressed no empathy,

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[2] The sentencing review principles espoused in **Dorthey** were not restricted in application to the mandatory minimum penalties provided by LSA-R.S. 15:529.1. **State v. Henderson**, 99-1945 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 760 n.5, writ denied, 00-2223 (La. 6/15/01), 793 So.2d 1235.

[3] The report apparently misstated the age of the victim. There is no indication in the record that the three-year-old victim was a different victim than the five-year-old victim.

remorse or guilt for any sexually inappropriate behaviors." However, the report noted the child maintained that the incidents never occurred. Nevertheless, the report included a clinical recommendation that the child should have no contact with anyone under the age of twelve without the presence of a responsible adult. A supplement to the report included a clinical estimate of the level of risk the child presented. In the supplement, it was indicated that the child's level of risk was probably in the "low to low medium" risk range for reoffending sexually and "high medium to low high" risk range for reoffending non-sexually.

The defense also introduced into evidence documentation indicating the child had been granted his equivalency diploma and had successfully completed equipment and engine training tests on four-stroke-cycle engines.

In imposing the disposition upon remand, the juvenile court noted:

> The [court in **Johnson**] emphasized the departure's downward for mandatory minimum sentences should only occur in rare situations. For the following reasons[,] I find that this is not one of those rare situations. In terms of potential sentence, aggravated rape is one of the most serious crimes in our criminal law. Only capital crimes carry a more severe sentence. In this case, the victim was a five[-]year[-]old child, which in my opinion, makes this offense all the more troubling. I have viewed both the offender and the victim. The offender is at least average size and build for his age. He appears to be in excellent physical shape. The victim, on the other hand, is slight and shy and appears younger than his age. Though there was no indication of a struggle, considering the differences in age, size and demeanor of the juvenile and the victim, the victim was essentially helpless at the time at the hands of the offender. This five[-]year[-]old child was subjected to one of the most heinous acts defined in the Criminal Code. If the offender was an adult, he would be sentenced to the custody of the Department of Public Safety and Corrections for the remainder of natural life without the benefit of probation, parole, or suspension of sentence. The offender has not presented evidence to rebut the presumption that the mandatory minimum sentence provided in Article 897.1 is constitutional under the circumstances of this case. No downward departure from the mandatory minimum sentence is required.
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> Therefore, [D.Y.], the disposition of this Court is that you are committed to the custody of the Office of Juvenile Justice, Department of Public Safety and Corrections to be confined in secure placement until your 21st birthday without the benefit of parole, probation, suspension, or modification of sentence. Thank you.

After a thorough review of the record, we find the juvenile court was not required to deviate from the mandatory disposition in this case. The court did not abuse its discretion in finding that the child failed to clearly and convincingly show that he is "exceptional," *i.e.*, because of unusual circumstances, he was a victim of the legislature's failure to assign dispositions that were meaningfully tailored to his culpability, the gravity of the offense, and the circumstances of the case. Further, the disposition imposed was not unconstitutionally excessive, and it was not grossly disproportionate to the severity of the offense.

This assignment of error is without merit.

WRITTEN JUDGMENT

In assignment of error number 2, the child argues the juvenile court failed to issue a written judgment of disposition in accordance with LSA-Ch.C. art. 903.

Louisiana Children's Code article 903, in pertinent part, provides:

> B. The court shall enter into the record a written judgment of disposition specifying all of the following:
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> (1) The offense for which the child has been adjudicated a delinquent.
> (2) The nature of the disposition.
> (3) The agency, institution, or person to whom the child is assigned.
> (4) The conditions of probation, if applicable.
> (5) Any other applicable terms and conditions regarding the disposition.
> (6) The maximum duration of the disposition and, if committed to the custody of the Department of Public Safety and Corrections, the maximum term of the commitment.
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> . . .
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> D. An extract of the minutes of court specifying the information required by Paragraph B of this Article and signed by the court shall be considered a written judgment of disposition.
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> E. The date of entry of the judgment of disposition shall be recorded on the judgment.
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> . . .

A thorough review of the record reveals the presence of an extract of the minutes of court, dated April 7, 2011 (the date of disposition), signed by the juvenile court, stating, "OJJ until 21st B-day w/o benefit of parole, probation or

suspension of sentence." The extract of minutes specifies all of the information required by LSA-Ch.C. art. 903(B), with the exception of setting forth the offense for which the child was adjudicated a delinquent. However, the adjudication of the child was not before the juvenile court upon remand in this matter. Accordingly, the extract of minutes satisfied the requirements of LSA-Ch.C. art. 903.

This assignment of error is without merit.

DISPOSITION AFFIRMED.