NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2008 KA 2129

STATE OF LOUISIANA

VERSUS

DOUGLAS D. SMITH

Judgment rendered May 8, 2009.

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Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. 424757-1
Honorable Peter J. Garcia, Judge

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BEFORE: PETTIGREW, McDONALD, AND HUGHES, JJ.

PETTIGREW, J.

The defendant, Douglas D. Smith, was charged by bill of information with three counts of armed robbery (counts one, three, and four) and one count of attempted armed robbery (count two), violations of La. R.S. 14:64 and La. R.S. 14:27. The defendant entered a plea of not guilty and was tried before a jury. The jury found the defendant guilty as charged on the three counts of armed robbery (counts one, three, and four), and guilty of the responsive offense of attempted first degree robbery on count two (a violation of La. R.S. 14:64.1 and La. R.S. 14:27). On counts one, three, and four, the trial court sentenced the defendant to thirty years imprisonment at hard labor. On count two, the trial court sentenced the defendant to five years imprisonment at hard labor. The trial court ordered that all four sentences be served concurrently.

The State filed a habitual offender bill of information, seeking the enhancement of count one. A hearing was held on the habitual offender bill of information, and the defendant was adjudicated a third-felony habitual offender. The trial court vacated the prior sentence imposed on count one and sentenced the defendant to ninety years imprisonment at hard labor without the benefit of probation or suspension of sentence. The trial court denied the defendant's motion to reconsider sentence. The defendant now appeals, challenging the constitutionality of the enhanced sentence. The defendant alternatively argues that the sentencing minute entry should be corrected to conform to the sentencing transcript. Finally, the defendant assigns error to the trial court's failure to inform him of the delays for applying for post-conviction relief. For the following reasons, we affirm the convictions, habitual offender adjudication, and sentences.

STATEMENT OF FACTS

On or about November 26, 2006, the defendant entered a Shell gas station located on Gause Boulevard in Slidell, Louisiana, at approximately 11:40 p.m., armed with a partially obscured shotgun in his jacket. The defendant lifted the shotgun, laid it on the counter, and demanded that the attendant, Jace Burton (the victim in count one), empty the cash register. Burton complied by placing the money from the register, approximately six hundred dollars, in the defendant's hand.

On or about November 28, 2006, the defendant entered Quick Check, located on Fremaux Avenue in Slidell, in an attempt to take money. Eyad Hamad (the victim in count two), evaded the defendant in fear, and the defendant fled from the store without obtaining any money on this occasion. According to an eyewitness, Mark Daeumer, the defendant was carrying "some sort of long arm weapon" as he fled from the store.

On or about November 29, 2006 (count three), the defendant entered a Dollar Tree Store in Slidell, armed with a shotgun. According to Bridget Canady, a customer present at the time, the robbery took place near 6:30 p.m. The defendant had the shotgun partially wrapped in a gray shirt and instructed an attendant to give him money. The attendant began beating on the cash register in an effort to open it and asked the defendant if she could complete the transaction with Canady. The defendant responded negatively, demanding that he be given the money immediately and slamming his shotgun on the counter. Canady pushed her six-year-old daughter to the lady who was standing behind her, who then handed the child off to Canady's husband. The defendant then walked to an opened cash register, pushed the cashier to the side, and retrieved over one hundred dollars from the register.

Later that night, at approximately 11:00 p.m., the defendant entered another Shell gas station, located on Pontchartrain Drive, in Slidell, while armed with a shotgun. The defendant pointed the shotgun at the face of the attendant, Chris Neal (the victim in count four), and demanded money. Neal removed the cash register drawer and gave it to the defendant. The drawer had approximately six hundred and fifty-nine dollars in cash in it at the time. The defendant then asked for cigarettes and Neal began throwing cigarettes toward the defendant. The defendant gathered the cigarettes (approximately three cartons), placed them on the register drawer, and exited the store.

ASSIGNMENT OF ERROR NUMBER ONE

In the first assignment of error, the defendant contends that the enhanced sentence imposed as to count one is excessive. The defendant notes that his two prior convictions were substance-abuse offenses, namely third-offense DWI and possession of MDMA. The defendant argues that the Louisiana legislature has ineffectively chosen

to apply long sentences for substance abusers as opposed to mental health and substance abuse care and treatment. The defendant contends that the instant offenses were committed to feed his addiction. While acknowledging that what he did was "bad" and "put a number of innocent people in fear," the defendant argues that he did not use a "real gun" and did not cause anyone harm. Noting that he was thirty-two years old at the time of the robberies, the defendant further contends that the ninety-year imprisonment term is effectively a double life sentence. The defendant concludes that the ninety-year imprisonment sentence is shocking, grossly out of proportion to the severity of the crime, and is nothing more than the purposeless and needless imposition of pain and suffering.

Article I, Section 20 of the Louisiana Constitution explicitly prohibits excessive sentences. Although a sentence is within the statutory limits, the sentence may still violate a defendant's constitutional right against excessive punishment. In reviewing a sentence for excessiveness, the appellate court must consider the punishment and the crime in light of the harm to society and gauge whether the penalty is so disproportionate as to shock its sense of justice or that the sentence makes no reasonable contribution to acceptable penal goals and, therefore, is nothing more than the needless imposition of pain and suffering. See **State v. Guzman**, 99-1528, 99-1753, p. 15 (La. 5/16/00), 769 So.2d 1158, 1167. The trial court has wide discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Loston**, 2003-0977, pp. 19-20 (La. App. 1 Cir. 2/23/04), 874 So.2d 197, 210, writ denied, 2004-0792 (La. 9/24/04), 882 So.2d 1167.

Louisiana Code of Criminal Procedure article 894.1 sets forth items that must be considered by the trial court before imposing sentence. The trial court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the criteria. **State v. Leblanc**, 2004-1032, p. 10 (La. App. 1 Cir. 12/17/04), 897 So.2d 736, 743, writ denied, 2005-0150 (La. 4/29/05), 901 So.2d 1063, cert.

denied, 546 U.S. 905, 126 S.Ct. 254, 163 L.Ed.2d 231 (2005); **State v. Faul**, 2003-1423, p. 4 (La. App. 1 Cir. 2/23/04), 873 So.2d 690, 692.

In **State v. Dorthey**, 623 So.2d 1276, 1280-81 (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 amounts to nothing more than the purposeful imposition of pain and suffering and is grossly out of proportion to the severity of the crime, he is duty bound to reduce the 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 that are punishable as crimes are purely legislative functions. 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.

Pursuant to La. R.S. 14:64B, for the underlying offense of armed robbery, the defendant was subject to a sentence of not less than ten years and not more than ninety-nine years imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. As noted, the defendant's predicate convictions are for third-offense DWI and possession of a schedule I controlled dangerous substance (MDMA). As a third-felony offender, the defendant was subject, under La. R.S. 15:529.1A(1)(b)(i), to a minimum of sixty-six years imprisonment and a maximum of one-hundred ninety-eight years imprisonment. See also La. R.S. 14:64B; La. R.S. 14:98D; La. R.S. 40:966C, and La. R.S. 40:964 Schedule I C(10). As previously stated, the defendant was sentenced to ninety years imprisonment at hard labor. In imposing sentence, the trial court considered the victims involved and considered the probability that the defendant committed the crimes to feed a drug habit "particularly egregious." The trial court further noted that all of the trial witnesses, including a hunter, testified that the defendant used what they perceived as a real shotgun in the commission of the offenses. Based on the record before us, we do not find that the trial court abused its

discretion in imposing an enhanced sentence. Considering the facts of the offense, the sentence is not shocking or grossly disproportionate to the defendant's behavior. Assignment of error number one is without merit.

ASSIGNMENT OF ERROR NUMBER TWO

In the second assignment of error, the defendant notes that the transcript does not reflect a restriction on parole for the enhanced sentence of ninety years imprisonment at hard labor, while the sentencing minute entry states that the sentence was imposed without the benefit of probation, parole, or suspension of sentence. The defendant contends that the trial court should be ordered to amend the minute entry.

We note that the trial court imposed the enhanced sentence without the benefit of probation or suspension of sentence, as La. R.S. 15:529.1(G) does not place any restrictions on parole eligibility. Nevertheless, additional restrictions may be imposed on the sentence provided those additional restrictions are provided in the underlying offense of conviction. See **State v. Bruins**, 407 So.2d 685, 687 (La. 1981); **State v. Shields**, 614 So.2d 1279, 1285 (La. App. 2 Cir.), writ denied, 620 So.2d 874 (La. 1993). The underlying offense is armed robbery. Louisiana Revised Statutes 14:64B provides that any sentence imposed for the commission of armed robbery under the statute be served without the benefit of parole, probation, or suspension of sentence. Thus, after adjudicating the defendant a habitual offender, the trial court was required to impose the sentence without the benefit of parole, probation, or suspension of sentence. The trial court erred in not restricting parole. Nonetheless, as **State v. Williams**, 2000-1725, p. 10 (La. 11/28/01), 800 So.2d 790, 799 and La. R.S. 15:301.1A provide, the "without benefits" provision is self-activating. Thus, we need not take corrective action.[1] Due to the foregoing reasons, this assignment of error is without merit.

[1] In accordance with La. R.S. 14:64B and La. R.S. 14:64.1, the trial court also erred in not restricting the parole for the sentences imposed on counts two, three, and four. As with the enhanced sentence imposed on count one, we need not take corrective action since the "without benefits" provisions are self-activating. **Williams**, 2000-1725 at 10, 800 So.2d at 799; La. R.S. 15:301.1A.

ASSIGNMENT OF ERROR NUMBER THREE

In the final assignment of error, the defendant notes that the trial court failed to inform him of the delays for applying for post-conviction relief in imposing the enhanced sentence, although the sentencing minute entry notes otherwise. The defendant contends that the trial court should be directed to provide such written notice.

The State notes that the defendant was given notice of the time period for filing for post-conviction relief at the original sentencing but concedes that notice was not given upon resentencing. The State does not oppose the defendant's request for notice. Louisiana Code of Criminal Procedure article 930.8C provides that, at the time of sentencing, the trial court shall inform the defendant of the prescriptive period for applying for post-conviction relief. However, this Article contains merely precatory language and does not bestow an enforceable right upon an individual defendant. **State v. Godbolt**, 2006-0609, p. 7 (La. App. 1 Cir. 11/3/06), 950 So.2d 727, 732. While La. Code Crim. P. art. 930.8C directs the trial court to inform the defendant of the prescriptive period at the time of sentencing, a failure to do so on the part of the trial court has no bearing on the sentence and is not grounds to reverse the sentence or remand the case for re-sentencing, and the Article does not provide a remedy for an individual defendant who is not told of the limitation period.

Moreover, as the issue has been raised by the defendant, it is apparent that the defendant has notice of the limitation period and/or has an attorney who is in the position to provide him with such notice. Although we have done so in the past, we decline to remand. **Godbolt**, 2006-0609 at 8, 950 So.2d at 732. Out of an abundance of caution and in the interest of judicial economy, we note that Article 930.8A generally provides that no application for post-conviction relief, including applications that seek an out-of-time appeal, shall be considered if it is filed more than two years after the judgment of conviction and sentence have become final under the provisions of La. Code Crim. P. arts. 914 or 922.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.