

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 0752

STATE OF LOUISIANA

VERSUS

FRANK JAMES CELESTINE, JR.

Judgment Rendered: December 21, 2011.

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On Appeal from the
32nd Judicial District Court,
in and for the Parish of Terrebonne
State of Louisiana
District Court No. 497,233

The Honorable David W. Arceneaux, Judge Presiding

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* * * * *

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

Higginbotham, J. dissents in part and assigns reasons.

CARTER, C.J.

The defendant, Frank James Celestine, Jr., was charged by bill of information with armed robbery, a violation of Louisiana Revised Statutes section 14:64. After entering a plea of not guilty, the defendant waived his right to a trial by a jury and elected to proceed with a bench trial. The defendant was convicted as charged and sentenced to imprisonment for ten years at hard labor, without the benefit of probation, parole, or suspension of sentence. The defendant filed a motion for reconsideration of the sentence, which the trial court denied after a hearing. The defendant appeals, urging in a single assignment of error that his sentence is excessive.

Finding merit in the assigned error, we affirm the defendant's conviction, vacate the sentence, and remand the matter to the trial court for resentencing.

FACTS

On October 10, 2007, at approximately 9:30 p.m., Lakisha Ray and Kimberly Johnson, employees at the Dollar Tree in Houma, Louisiana, completed their closing procedures and prepared to make the nightly deposit. As was routine, Johnson, the cashier, was to follow Ray, the assistant manager, to a nearby bank to make the deposit. Ray placed the sealed deposit bag inside a Dollar Tree bag with some of her personal belongings. As the women exited the store, they observed a man, clad in all black clothing, standing outside an adjacent store. Because there were other stores in the area still open, the women did not find the man's presence alarming. Ray walked Johnson over to her vehicle, and the women conversed briefly. Shortly thereafter, Ray observed the man, who was now wearing an orange ski mask, running toward her. The man was armed with what Ray described as a pointed object in his hand. Ray dropped the bag and all of its

contents and ran to a nearby restaurant to call the police. As she ran, she looked back and observed the man rummaging through the Dollar Tree bag she had been holding.

Officer Milton Rodrigue, of the Terrebonne Parish Sheriff's Office, was dispatched to the area to locate the perpetrator. The defendant was observed walking from behind a Home Depot store located within a mile of the Dollar Tree. The defendant was holding, among other things, a Dollar Tree bag. The defendant voluntarily told Officer Rodrigue that someone ran up to him and gave him money. During a pat down for officer safety, a clear plastic deposit bag with cash was removed from the defendant's right pants pocket. A black-handled knife with a six-inch blade was later found inside the Dollar Tree bag.

The defendant provided a taped statement wherein he admitted to committing the robbery. At trial, the defendant testified and gave a detailed account of how he carried out the robbery. He explained that at the time of the offense, he and Kimberly Johnson were engaged. He stated that Johnson was not aware of his intent to commit the robbery and that she had no involvement in the commission of the robbery. The defendant claimed he was deeply depressed and decided to commit the robbery with the hopes of being caught and killed. The defendant explained that at some point after the offense was committed, he changed his mind about wanting to get caught and told the police that an unidentified individual had approached him with a gun and gave him the money.

Kimberly Johnson testified at the trial and corroborated the defendant's claim that they were engaged when he committed the offense. Johnson indicated she was unaware that the defendant intended to commit the robbery. She claimed

the defendant had never done anything like this. Johnson further testified that the defendant is currently still her boyfriend, and they intend to get married.

Tina Celestine, the defendant's mother, also testified at the trial. She explained that the defendant was an honor graduate from Ellender High School and a member of the National Honor Society. In high school, the defendant was the school drum major and vice-president of the high school band. Ms. Celestine further testified that the defendant suffered from mental illness stemming back to the age of fifteen. She explained that the defendant once attempted to commit suicide by hanging himself. The defendant was treated at Chabert Medical Center and later treated for mental health issues at River Oaks Hospital in New Orleans. The defendant was placed on Zoloft and Abilify for depression. Ms. Celestine testified that prior to the incident, the defendant had stopped taking his medication. She explained that when the defendant first got off his medication, he appeared fine; however, he entered into a "depression slump." Ms. Celestine stated that prior to the instant offense, the defendant had never been arrested. She did not understand why the defendant committed the instant offense.

EXCESSIVE SENTENCE

In his sole assignment of error, the defendant argues the trial court erred in imposing an excessive sentence and in failing to give adequate consideration and weight to the relevant mitigating factors of the sentencing guidelines set forth in Louisiana Code of Criminal Procedure article 894.1. Specifically, he contends the trial court failed to consider in mitigation that he accepted responsibility for the offense, he was under psychiatric care when he committed the offense, he had no prior criminal history, he had no history of drug or alcohol abuse, he graduated from high school with honors, he was only eighteen years old when he committed

the offense, he was gainfully and steadily employed, and all of the money taken was eventually recovered by Dollar Tree.

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. *State v. Sepulvado*, 367 So. 2d 762, 767 (La. 1979). Generally, a sentence is considered excessive if it is nothing more than the needless imposition of pain and suffering. *State v. Reed*, 409 So. 2d 266, 267 (La. 1982). 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. *Id.* A trial court 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 a manifest abuse of discretion. *State v. Lanclos*, 419 So. 2d 475, 478 (La. 1982).

The Louisiana Code of Criminal Procedure sets forth items that must be considered by the trial court before imposing sentence. La. Code Crim. Proc. Ann. art. 894.1. The trial court need not cite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the criteria. *State v. Herrin*, 562 So. 2d 1, 11 (La. App. 1st Cir.), *writ denied*, 565 So. 2d 942 (La. 1990). In light of the criteria expressed by Article 894.1, a review for individual excessiveness should consider the circumstances of the crime and the trial court's stated reasons and factual basis for its sentencing decision. *State v. Craddock*, 10-1473 (La. App. 1 Cir. 3/25/11), 62 So. 3d 791, 795, *writ denied*, 11-0862 (La. 10/2/11), 73 So. 3d 380.

In *State v. Dorthey*, 623 So. 2d 1276, 1280-81 (La. 1993), the Louisiana Supreme Court recognized that if a trial court determines that the minimal mandated punishment 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.

In *State v. Johnson*, 97-1906 (La. 3/4/98), 709 So. 2d 672, the Louisiana Supreme Court re-examined the issue of when *Dorthey* permits a downward departure from mandatory minimum sentences. The court held that to rebut the presumption that the mandatory minimum sentence was constitutional, the 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 (quoting *State v. Young*, 94-1636 (La. App. 4 Cir. 10/26/95), 663 So. 2d 525, 531 (Plotkin, J., concurring), writ denied, 95-3010 (La. 3/22/96), 669 So. 2d 1223). It is not the role of the sentencing court to question the wisdom of the legislature in setting mandatory minimum punishments for criminal offenses. See *Johnson*, 709 So. 2d at 677. Rather, “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 our constitution.” *Johnson*, 709 So. 2d at 677.

Armed robbery carries a penalty of imprisonment at hard labor for not less than ten years or more than ninety-nine years, without benefit of parole, probation,

or suspension of sentence. La. Rev. Stat. Ann. § 14:64B. As previously noted, the defendant herein was sentenced to the statutory minimum imprisonment of ten years at hard labor, without benefit of parole, probation, or suspension of sentence.

Our review of the record in this case reveals that prior to imposing the sentence, the trial court reviewed the facts of the offense and specifically stated that consideration was given to the sentencing guidelines set forth in Article 894.1. Contrary to the defendant's assertions, the court specifically considered, in mitigation, the defendant's youthful age, that the weapon used was a knife, that no one was physically harmed during the offense, and that the defendant had no prior criminal history and was an honor student in high school. The court further noted:

Well I'll state for the record that I have absolutely no objection to any special programs that the Department of Public Safety and Corrections can offer Mr. Celestine.

It appears to me, based on everything that I've observed and seen in connection with this case, that this incident was an aberration. There's something terribly inconsistent with the life that Mr. Celestine led and this incident on that particular night, and I don't know what it was. But hopefully the Department of Public Safety and Corrections, through whatever special programs it has, can find a way to put Mr. Celestine back on the right path.

So I have no objection to any work release program or any special program that he may be eligible to participate in.

I still don't know, Mr. Celestine, what happened to you, and you're going to have to serve this sentence which is the minimum that I could give you under the law. Unless the Department of Public Safety and Corrections has some other angle that I'm not aware of, and sometimes they do, but I suspect that I won't see you back here again. But, let's see if I'm wrong, all right.

Based upon our review of the record and the circumstances in this case, we find the ten-year mandatory minimum sentence, without benefit of parole, probation, or suspension of sentence, to be constitutionally excessive. While the instant offense of armed robbery is undoubtedly a serious offense, we note that the

defendant admitted to committing the offense. The record reflects that the defendant, an otherwise exemplary citizen, suffers from bouts of deep depression. The defendant has clearly and convincingly shown exceptional circumstances demonstrating that he is a victim of the legislature's failure to assign a sentence meaningfully tailored to his culpability, the gravity of the offense, and the circumstances of the case. Considering all of the mitigating factors established in the record and the trial court's reasons, which demonstrate a clear reluctance to impose the ten-year sentence, we find that a downward departure from the mandatory minimum sentence was warranted in this case.¹ A sentence of imprisonment at hard labor for ten years, without benefit of parole, probation, or suspension of sentence, for this defendant, on this record, is "disproportionate" to the harm done and shocks "one's sense of justice." *See State v. Hayes*, 97-1526 (La. App. 1 Cir. 6/25/99), 739 So. 2d 301, 304, *writ denied*, 99-2136 (La. 6/16/00), 764 So. 2d 955. Thus, the sentence is constitutionally excessive. This assignment of error has merit.

CONCLUSION

For the foregoing reasons, we affirm the defendant's conviction, vacate the sentence, and remand the matter to the trial court for resentencing.

CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED FOR RESENTENCING.

¹ The trial court reasoned: "If I could have given you less, Mr. Celestine, I would have because of the particular circumstances for your case. But under the law I could not. I gave you the minimum, ten years."

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

HIGGINBOTHAM, J., AFFIRMS IN PART, DISSENTS IN PART, AND ASSIGNS WRITTEN REASONS.

HIGGINBOTHAM, J., affirming in part and dissenting in part.

TMH
I respectfully disagree in part with the majority opinion, because I would affirm both the conviction and the sentence. The trial judge in this case specifically considered and found that the mandatory minimum sentence of ten years imprisonment at hard labor was not unconstitutional as it applied to this particular defendant. While the defendant admitted to committing the crime, he gave no compelling reason or excuse for choosing to commit a violent crime. Based upon my review of the record, I do not find that the defendant has clearly and convincingly shown that he is exceptional in order to warrant a downward departure from the mandatory minimum sentence.

A trial judge has wide discretion in imposing a sentence within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of a manifest abuse of that discretion. *State v. Lanclos*, 419 So.2d 475, 478 (La. 1982). Given the trial judge's well-articulated reasons that he considered prior to imposing the mandatory minimum sentence, which took into consideration all of the mitigating factors outlined by the defendant in his brief, the trial judge did not abuse his discretion.

For these reasons, I respectfully dissent in part.