NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 KA 1252

STATE OF LOUISIANA

VERSUS

LOUIS BRADY

Judgment Rendered: February 11, 2011

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case Number 07-08-0074
Honorable Richard D. Anderson, Presiding

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BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Hughes, J., concurs.

GUIDRY, J.

Defendant, Louis Brady, was charged by bill of information with simple burglary, a violation of La. R.S. 14:62. He pled not guilty and, following a trial by jury, was convicted as charged. Thereafter, the state filed a habitual offender bill of information, seeking to enhance defendant's sentence pursuant to La. R.S. 15:529.1A(1)(c)(ii).[1] Following a hearing, the trial court adjudicated defendant to be a fourth-felony habitual offender and sentenced him to life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. Defendant filed an untimely pro se motion to reconsider sentence, which the trial court denied. Thereafter, defendant filed a pro se motion for out-of-time appeal, which the trial court granted. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence.

ASSIGNMENTS OF ERROR

Counseled Assignment of Error:

1. The trial court erred in imposing an unconstitutionally excessive sentence.

Pro Se Assignments of Error:

1. The trial court violated defendant's constitutional rights by failing to request that he enter a plea during the habitual offender hearing.

2. The trial court violated defendant's constitutional rights by failing to advise him of his triad of rights under *Boykin*.

3. The trial court erred in imposing an excessive sentence by stating that the sentence was mandatory in accordance with La. R.S. 15:529.1.

4. Defendant requests a review for error under La. C.Cr.P. art. 920.

[1] All references made herein to La. R.S. 15:529.1 are made to that provision as it existed prior to its amendment by 2010 La. Acts, No. 911, §1 and No. 973, §2.

FACTS

In the early morning hours of May 11, 2008, an unknown person threw a large rock through a plate glass window at the Olympic Insurance Agency in Baton Rouge, Louisiana, and entered the building through the resulting hole in the window. The office was ransacked and certain computer equipment was removed. Sergeant Otis Nacoste of the Baton Rouge Police Department was one of the officers dispatched to the location in response to a burglar alarm. As he approached the business, he saw someone on the insurance agency's property. He observed that person get on a bicycle and begin riding away with computer equipment balanced on the handlebars. However, the person proceeded only a short distance before falling off the bicycle, at which point he was apprehended and placed under arrest. Sergeant Nacoste also recovered the computer equipment, which was later identified as belonging to the insurance agency. At trial, Sergeant Nacoste identified defendant as the person he observed on the bicycle with the computer equipment. Also, a pay stub with defendant's name on it was found inside the building. The owner of the business testified that defendant was neither an employee nor a customer of the insurance agency.

HABITUAL OFFENDER ADJUDICATION

In his first pro se assignment of error, defendant contends the trial court failed to give him an opportunity to enter a plea to the habitual offender bill of information, as required by La. R.S. 15:529.1D(1)(a). He further contends the trial court did not meet the additional requirement under this provision that the defendant be informed of the allegations contained in the bill of information and advised that he has a right to trial thereon. In his second pro se assignment of error, defendant asserts he was prejudiced with respect to the habitual offender allegations because the trial court failed to advise him of his right to remain silent,

his right to a hearing, his right to have the state prove the case against him, and his right to counsel.

In support of his contention that the trial court violated La. R.S. 15:529.1D(1)(a), defendant points to the fact that he did not enter a plea, nor was he advised of the allegations against him or his right to trial, during the habitual offender hearing itself. However, the minutes reflect that defendant was earlier arraigned on the habitual offender bill of information on September 16, 2009. At that time, defendant, through counsel, waived formal arraignment and entered a plea of not guilty. Therefore, defendant's allegation that he was not permitted to enter a plea is totally unfounded.

It is true that this Court has held that, before a defendant pleads guilty or stipulates to the charges in a habitual offender bill of information, the trial court must advise the defendant of the specific allegations contained in the habitual offender bill of information, his right to be tried as to the truth thereof, and his right to remain silent. See La. R.S. 15:529.1D(1)(a); State v. Denomes, 95-1201 (La. App. 1st Cir. 5/10/96), 674 So.2d 465, 472, writ denied, 96-1455 (La. 11/8/96), 683 So.2d 266. However, defendant, through counsel, actually entered a plea of not guilty in the instant case. Since the record does not contain a transcript of the arraignment, it is unclear whether or not defendant was advised at that time of his right to be tried as to the truth of the habitual offender allegations and his right to remain silent. Regardless, even if defendant was not specifically advised of these rights, any such error was harmless, because defendant did not plead guilty or stipulate to the charges in the habitual offender bill. Instead, a habitual offender hearing actually was conducted, at which defendant was represented by counsel and did not testify. Moreover, the state presented evidence at the hearing to establish the habitual offender allegations and defendant's identity. Therefore, under the circumstances present herein, any error that may have occurred in failing

to inform defendant of the specific allegations in the habitual offender bill, of his right to be tried as to the truth thereof, and his right to be silent, constitutes harmless error. See La. C.Cr.P. art. 921; Denomes, 674 So.2d at 472; State v. Mickey, 604 So.2d 675, 678 (La. App. 1st Cir. 1992), writ denied, 610 So.2d 795 (La. 1993).

These assignments of error are meritless.

EXCESSIVE SENTENCE

In the only counseled assignment of error, as well as in pro se assignment of error number three, defendant contends his life sentence is unconstitutionally excessive.

In his counseled brief, defendant merely argues the trial court did not properly consider appropriate sentencing criteria, without articulating any specific reason why the sentence was excessive as to him. In his pro se brief, he argues the trial court erred in stating that the imposition of a life sentence was mandatory in this case. Apparently, this assertion is based on defendant's belief that he should have been sentenced under La. R.S. 15:529.1A(1)(c)(i), which provides for a sentence of twenty years to life, rather than under La. R.S. 15:529.1A(1)(c)(ii), which provides for a mandatory life sentence. Defendant argues further that the life sentence is excessive, because he is not the worst type of offender, and most of his predicate offenses had no victims.

At the habitual offender hearing, defense counsel orally objected to the imposition of a life sentence as being an excessive sentence amounting to cruel and unusual punishment. Moreover, defendant filed a pro se motion to reconsider sentence, which requested reconsideration of the sentence on the grounds that it was excessive. However, no other specific ground for reconsideration was stated in the motion.

Under La. C. Cr. P. art. 881.1E, a defendant must file a motion to reconsider sentence setting forth the "specific ground" upon which the motion is based in order to raise an objection to the sentence on appeal. If the defendant does not allege any specific ground for his claim of excessiveness or present any argument or evidence not previously considered by the court at original sentencing, he is relegated on appeal to a review of his bare claim of excessiveness. See State v. Mims, 619 So.2d 1059 (La. 1993) (per curiam). Accordingly, since neither the oral objection to defendant's sentence nor his pro se motion to reconsider sentence alleged any specific grounds for reconsideration of his sentence, our review is limited on appeal to a bare claim of constitutional excessiveness.

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of excessive punishment. Even when a sentence is within statutory limits, it may be unconstitutionally excessive. See State v. Sepulvado, 367 So.2d 762, 767 (La. 1979). A sentence is considered unconstitutionally 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 grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it shocks the sense of justice. State v. Andrews, 94-0842 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 454. A trial court has wide, although not unbridled, discretion in imposing a sentence within statutory limits. State v. Trahan, 93-1116 (La. App. 1st Cir. 5/20/94), 637 So.2d 694, 708. The sentence imposed will not be set aside absent a showing of manifest abuse of the trial court's wide discretion. Andrews, 655 So.2d at 454.

For the crime of simple burglary, defendant ordinarily would have been exposed to a fine of not more than $2,000.00, imprisonment with or without hard labor for not more than twelve years, or both. See La. R.S. 14:62B. However,

since defendant was adjudicated a fourth-felony habitual offender, and the instant offense, as well as all of his predicate offenses, were crimes punishable by imprisonment for twelve years or more, he was subject to a mandatory life sentence, without benefit of parole, probation, or suspension of sentence. See La. R.S. 15:529.1A(1)(c)(ii). Thus, the life sentence imposed upon defendant not only complied with statutory requirements, but actually was the minimum sentence statutorily permissible.

In State v. Dorthey, 623 So.2d 1276, 1280-81 (La. 1993), the Louisiana Supreme Court opined that if a trial judge were to find that the punishment mandated by La. 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," he has the option, indeed the duty, to reduce such 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 examined the issue of when Dorthey permits a downward departure from the mandatory minimum sentences under the Habitual Offender Law. Under Johnson, 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. Moreover, a trial court may not rely solely upon the non-violent 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 non-violent should not be discounted, this factor has already been taken into account under the Habitual Offender Law for third and fourth offenders. Johnson, 709 So.2d at 676.

To rebut the presumption that a mandatory minimum sentence is constitutional, a 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. Johnson, 709 So.2d at 676. 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. However, departures downward from the minimum sentence under the Habitual Offender Law should occur only in rare situations. Johnson, 709 So.2d at 677.

In the instant case, defendant contends a life sentence is excessive, because he is not the worst type of offender, and most of his criminal acts, including most of his predicate offenses, did not have victims. However, in sentencing defendant to the mandatory life sentence, the trial court indicated in both its oral and written reasons that it had considered the pre-sentence investigation report (PSI), which reveals that defendant has an extensive criminal history going back over a period in excess of twenty years.

In adjudicating defendant to be a fourth-felony habitual offender, the trial court relied, in addition to the instant offense, on two other convictions for simple burglary and one conviction for simple burglary of an inhabited dwelling. The basis for defendant's contention that three of these four offenses were victimless crimes is unclear. Perhaps he mistakenly believes the fact that three of the convictions were for simple burglary, rather than for burglary of an inhabited

dwelling, means there were no victims in those cases. However, nothing could be further from the truth, as the present case demonstrates. Even though the instant conviction was for simple burglary of a business, the owner of the business testified at trial that she incurred thousands of dollars in damages as a result of the burglary.

Further, the PSI reveals that defendant also has convictions for aggravated criminal damage to property, simple criminal damage to property, misdemeanor theft, criminal trespass, simple assault, and simple battery of a police officer. At the time of sentencing, there was also a charge pending against him for aggravated burglary.

Defendant has an extensive criminal history extending over a period of many years. He has been given the benefit of probation on several occasions, as well as having served periods of incarceration. Nevertheless, he continues to display a propensity for continued criminal conduct. One of the major reasons for the Habitual Offender Law is to deter and punish recidivism. Johnson, 709 So.2d at 677.

Thus, the record reflects nothing particularly unusual about defendant's circumstances in this case that would justify a downward departure from the mandatory life sentence imposed under La. R.S. 15:529.1A(1)(c)(ii). Given his criminal history, defendant has not proven by clear and convincing evidence that he is exceptional, such that a life sentence would not be meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case. See Johnson, 709 So.2d at 676. The mandatory life sentence imposed upon defendant is not unconstitutionally excessive.

These assignments of error are without merit.

REVIEW FOR ERRORS

In his fourth pro se assignment of error, defendant requests that this Court review the record for errors under La. C.Cr.P. art. 920. Such a request is unnecessary, as this Court routinely reviews all criminal appeals for such error, whether or not a request is made by a defendant. See State v. White, 96-0592 (La. App. 1st Cir. 12/20/96), 686 So.2d 96, 98. Under La. C.Cr.P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we have found no reversible errors.

Defendant asserts the fact that the trial court imposed his sentence at hard labor constitutes such error, since La. R.S. 15:529.1 does not provide that sentences imposed therein should be at hard labor. However, this argument ignores the fact that the underlying offense of simple burglary, for which defendant was adjudicated and sentenced as a fourth-felony habitual offender, authorizes the imposition of the sentence at hard labor, if the trial court so chooses. See La. R.S. 14:62B; State v. Bruins, 407 So.2d 685, 687 (La. 1981).

This assignment of error is without merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.