NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 1163

STATE OF LOUISIANA

VERSUS

MARVIN BROWN

Judgment Rendered: December 21, 2007

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On Appeal from the 22nd Judicial District Court
In and For the Parish of Washington
Trial Court No. 03 CR10 88664

Honorable William J. Knight, Judge Presiding

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BEFORE: WHIPPLE, GUIDRY, AND HUGHES, JJ.

HUGHES, J.

The defendant, Marvin Brown, was charged by bill of information with four counts of obscenity, violations of LSA-R.S. 14:106(A)(1). After entering a plea of not guilty, the defendant was tried before a jury. The jury found the defendant guilty as charged on Counts I, II, and IV, and not guilty on Count III. Defendant was sentenced on each count to two years at hard labor to run consecutively to each other and to the sentence he was already serving.

The State instituted habitual offender proceedings seeking to have the defendant adjudicated as a third felony habitual offender. Pursuant to a plea agreement, the defendant agreed with the allegations of the habitual offender bill of information. The trial court vacated the previously imposed sentences on Counts I, II, and IV, and sentenced the defendant, on Counts I, II, and IV to three years at hard labor on each count, to run consecutively to each other and to the sentence the defendant was already serving.

In a prior unpublished opinion issued by this Court, **State v. Brown,** 2004-2545 (La. App. 1 Cir. 9/23/05), 912 So.2d 113 (table), the defendant's convictions on Counts I, II, and IV were affirmed, but his habitual offender adjudications and sentences on Counts I, II, and IV were vacated and the matter was remanded for further proceedings.

Following remand, the defendant was again adjudicated a third felony habitual offender and sentenced to three years at hard labor on each enhanced obscenity conviction, to run consecutively to each other and to any sentence the defendant was already serving. Defendant filed a motion to reconsider sentence, which was denied by the trial court.

Defendant appeals. We affirm his habitual offender adjudications, amend the habitual offender sentences, affirm the habitual offender

sentences as amended, and remand for correction of minute entry and commitment papers.

FACTS

Defendant's three obscenity convictions arose from three separate episodes where he was seen masturbating in the presence of a female employee of Washington Correctional Institute.[1] In our prior opinion, we affirmed the defendant's obscenity convictions, but because of an error under LSA-C.Cr.P. art. 920(2), we vacated his habitual offender adjudications and sentences, and remanded the matter for further proceedings. **State v. Brown**, 2004-2545 at p. 8.

On remand of this matter, the trial court held a hearing on December 14, 2006 to determine the defendant's habitual offender status. Thereafter, the defendant was again adjudicated a third felony habitual offender based on his predicate convictions entered on January 7, 1991[2] and March 23, 1993.[3]

EXCESSIVE SENTENCE

In his first assignment of error, the defendant argues that his total sentence is excessive and unreasonable. In support of his argument that his sentence is excessive, the defendant contends that the prison setting for these crimes is substantially mitigating for several reasons. First, the defendant argues his behavior must be regarded as less serious because it occurred in a prison and was an "obvious consequence" of the forced sexual abstinence

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[1] The dates of the offenses were November 6, 2001, April 22, 2002, and October 25, 2002, and the victims were Washington Correctional Institute employees Frances Spears, Sonya Hess, and Amy Penny, respectively. The detailed facts surrounding the defendant's convictions can be found in this Court's prior opinion, **State v. Brown**, 2004-2545 at pp. 3-5.

[2] On January 7, 1991, the defendant pled guilty to possession of cocaine with intent to distribute in the Sixth Judicial District Court, Madison Parish (Docket Number 60365).

[3] Also in the Sixth Judicial District Court, Madison Parish, on March 23, 1993, the defendant pled guilty to simple kidnapping, three counts of distribution of cocaine, and simple burglary (Docket Numbers 60196, 67919, 67920, 67921, and 67922, respectively).

accompanying incarceration. Second, the defendant argues that these victims differed from the average citizen because they were professional employees of an all-male prison facility and were well aware of the prevalence of such behavior. Third, the defendant argues he has already faced disciplinary proceedings and loss of good-time credit for this behavior. Finally, the defendant argues the prison itself had a responsibility to protect these victims. Defendant argues the prison had control over him and officials were well aware of his tendency to commit these type of acts, to the extent that he was provided a special jumpsuit designed to deter him from committing these type of acts.

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, pp. 10-11 (La. App. 1 Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962.

The applicable penalty provision for a first conviction for the crime of obscenity is a fine of not less than one thousand dollars nor more than two thousand five hundred dollars, or imprisonment, with or without hard labor,

for not less than six months nor more than three years, or both. LSA-R.S. 14:106(G)(1).

Louisiana Revised Statutes 15:529.1, in pertinent part provides:

> A. (1) Any person who, after having been convicted within this state of a felony ... thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows:
>
> . . . .
>
> (b) If the third felony is such that upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life then:
>
> (i) The person shall be sentenced to imprisonment for a determinate term not less than two-thirds of the longest possible sentence for the conviction and not more than twice the longest possible sentence prescribed for a first conviction... .

In sentencing the defendant, the trial court noted that as a third felony habitual offender, the defendant was eligible to receive a term of two to six years imprisonment on each count. The trial court then sentenced the defendant to terms of three years at hard labor on each count, half of the maximum sentence he could have received.

In reviewing the defendant's sentences, we note that none of his arguments in favor of mitigation are recognized under either LSA-C.Cr.P. art. 894.1 (Sentencing Guidelines) or LSA-R.S. 14:106 (Obscenity statute). Furthermore, we reject the defendant's assertion that his incarceration should be considered as a mitigating factor.

During the original sentencing hearing, the trial court articulated reasons for the sentences imposed. These reasons included the following: "There are certain basic rules of human conduct which cannot be ignored and which this Court will not tolerate to be violated. This is one of them. The crime of obscenity is one which is totally distasteful to everyone involved in the process."

We do not find the trial court abused its discretion in sentencing the defendant to three years at hard labor on each count, to be served consecutively.

This assignment of error is without merit.

SENTENCING ERROR

In his second assignment of error, the defendant argues the trial court imposed a sentence on Count III, despite the fact he was acquitted of this charge. The jury convicted the defendant of Counts I, II, and IV. Although the defendant was originally sentenced on these counts, following remand and resentencing, the trial court imposed sentences on Counts I, II, and III. Clearly, this was a misstatement by the trial court. We note that the defendant should not have been sentenced on Count III, but rather, Count IV, and we hereby correct the defendant's sentence to reflect an enhanced term of imprisonment of three years at hard labor for his obscenity conviction for Count IV, to be served consecutively to all of the other sentences he is serving. We remand this matter to the trial court for the limited purpose of correction of the minute entry and, if necessary, correction of the commitment papers.

HABITUAL OFFENDER ADJUDICATIONS AFFIRMED; HABITUAL OFFENDER SENTENCES AMENDED; HABITUAL OFFENDER SENTENCES AFFIRMED AS AMENDED; AND REMANDED FOR CORRECTION OF MINUTE ENTRY AND COMMITMENT PAPERS.