NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1040

V.S.W. by JMM

JMM

STATE OF LOUISIANA

VERSUS

PATRICK W. MATTHEWS

Judgment Rendered: DEC 2 2 2010

Appealed from the
Twenty-Second Judicial District Court
in and for the Parish of St. Tammany, State of Louisiana
Trial Court Number 467460

Honorable August J. Hand, Judge Presiding

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McClendon, J. Concurs and assigns reasons. (by JMM)

WHIPPLE, J.

The defendant, Patrick W. Matthews, was charged by bill of information with simple burglary (count one), and two counts of theft (counts two and three), in violation of LSA-R.S. 14:62 and LSA-R.S. 14:67. The defendant entered a plea of not guilty. After a trial by jury, the defendant was found guilty as charged on all counts. The trial court originally sentenced the defendant to ten years imprisonment at hard labor on count one, and to seven years imprisonment at hard labor on each of counts two and three. The State filed separate habitual offender bills of information as to counts one and two. After a hearing, the defendant was adjudicated a fourth-felony habitual offender under both habitual offender bills of information. The trial court vacated the previous sentences imposed on counts one and two and sentenced the defendant to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence on count one, and twenty years imprisonment at hard labor without the benefit of probation or suspension of sentence on count two.[1] The trial court ordered that the sentences be served concurrently. The defendant appeals, contending that the enhanced life sentence imposed by the court on count one is excessive. For the following reasons, we affirm the convictions, habitual-offender adjudications, and sentences.

STATEMENT OF FACTS

On or about April 16, 2009, the defendant and his co-perpetrator, Jason Blackwell, went to the residence of Leonard and Beatrice Sollberger, located on Bayou Liberty Road in Slidell, Louisiana. The Sollbergers' daughter, Kelsey Sollberger, was home alone at the time. After knocking on the door and ringing the doorbell, Kelsey opened the door. The defendant and Blackwell asked her about purchasing a vehicle on the property, and she informed them that it was not

[1]While the minute entry states that the trial court restricted parole on count two, the sentencing transcript indicates it did not. Where, as here, there is a discrepancy, the transcript prevails over the minute entry. State v. Lynch, 441 So. 2d 732, 734 (La. 1983).

for sale. After Sollberger closed the door, she heard noises outside as the defendant and Blackwell stole a welding machine from the property before leaving. The welding machine belonged to Jerry Domecq and was being used by his son, Robert Brown, whom the Sollbergers had hired to add an elevator to their home. Demecq had purchased the welding machine for seven hundred fifty dollars. On the same date, the defendant and Blackwell took tools from a tool shed owned by Lester Nunez, Jr., located on Laurent Road in Slidell, Louisiana.

The next morning, on or about April 17, Michelle Parker and her two sons were at their residence in Slidell when the defendant and Blackwell arrived and began ringing the doorbell, knocking on the door, and banging on the front windows of the home. Parker contacted her husband, Travis Parker, and the police. The defendant and Blackwell stole a generator from the back yard of the home before leaving the property. Mr. Parker had purchased the generator for approximately seven hundred fifty to eight hundred dollars. The victims were recovering and rebuilding after Hurricane Katrina at the time of the offenses. The victims' property was recovered and returned.

ASSIGNMENT OF ERROR

In the sole assignment of error, the defendant argues that the life sentence imposed on count one is excessive. Specifically, the defendant notes that he has never been convicted of a crime of violence, that his predicate offenses consist of simple burglary convictions, and that he has a substance abuse problem that has never been properly addressed. The defendant further argues that he should have been required to undergo substance abuse evaluation and counseling earlier in his criminal career and that he was not warned that he faced a potential life sentence for another simple burglary conviction. The defendant notes that he was eighteen years of age at the time of his first guilty plea to simple burglary and twenty-two years old when he was sentenced to life imprisonment at hard labor in the instant

case. The defendant contends that the life sentence imposed is grossly out of proportion to the crime and his criminal history as a serial burglar, and that a minimum, twenty-year sentence would be justifiable. The defendant does not contest the sentences imposed on counts two or three.

The Eighth Amendment to the United States Constitution and Article I, Section 20, of the Louisiana Constitution prohibit the imposition of excessive punishment. Although a sentence falls within statutory limits, it may be excessive. State v. Sepulvado, 367 So. 2d 762, 767 (La. 1979). A sentence is considered constitutionally 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 considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks one's sense of justice. State v. Andrews, 94-0842, pp. 8-9 (La. App. 1st Cir. 5/5/95), 655 So. 2d 448, 454. The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. See State v. Holts, 525 So. 2d 1241, 1245 (La. App. 1st Cir. 1988). Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the trial court to consider when imposing sentence. While the entire checklist of LSA-C.Cr.P. art. 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. State v. Brown, 2002-2231, p. 4 (La. App. 1st Cir. 5/9/03), 849 So. 2d 566, 569.

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 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.

In State v. Johnson, 97-1906, p. 8 (La. 3/4/98), 709 So. 2d 672, 676, the Louisiana Supreme Court reexamined the issue of when Dorthey permits a downward departure from a mandatory minimum sentence. 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, 97-1906 at p. 8, 709 So. 2d at 676. A trial judge may not rely solely upon the nonviolent nature of a crime before the court or of past crimes as evidence that justifies rebutting the presumption of constitutionality. Johnson, 97-1906 at p. 7, 709 So. 2d at 676.

As noted by the defendant, the predicate convictions used to enhance the sentences imposed on counts one and two consist of prior simple burglary convictions.[2] Regarding the sentence at issue, as a fourth-felony offender, the defendant clearly was subject, under LSA-R.S. 15:529.1A(1)(c)(ii), to a mandatory sentence of life imprisonment. See LSA-R.S. 14:62B. Contending the sentence is

[2]While the trial court adjudicated the defendant a fourth-felony habitual offender, four prior simple burglary convictions support the multiple offender bills of information and the trial court found that the evidence presented by the State was sufficient to prove all four prior convictions.

excessive, the defendant cites State v. Hayes, 97-1526, p. 4 (La. App. 1st Cir. 6/25/99), 739 So. 2d 301, 303-04, writ denied, 99-2136 (La. 6/16/00), 764 So. 2d 955, wherein this court found, based on the facts and circumstances of the particular defendant therein, clear and convincing evidence that the defendant was 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.

In Hayes, the defendant was convicted of theft by misappropriating or taking over five hundred dollars. The criminal record of the defendant therein contained the following convictions: two thefts under $100.00, one theft over $100.00, several counts of issuing worthless checks, check forgery, simple robbery, and the underlying offense, one theft of over $500.00. The simple robbery occurred when the defendant pushed a minor and stole his bicycle. Although the defendant was a third-felony habitual offender, none of his crimes involved a dangerous weapon. Pursuant to the version of LSA-R.S. 15:529.1A(1)(b)(ii) in effect at that time, the defendant was sentenced to life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. This court vacated the sentence and remanded to the district court for resentencing based on the defense counsel's ineffectiveness in failing to object to the constitutionally excessive sentence. State v. Hayes, 97-1526, p. 7 (La. App. 1st Cir. 5/15/98), 712 So. 2d 1019, 1022-23. The State applied for a writ of certiorari and the Louisiana Supreme Court remanded the case to this court for reconsideration. State v. Hayes, 98-1603 (La. 12/11/98), 729 So. 2d 584. After reconsideration, this court held that the life sentence was constitutionally excessive. Hayes, 97-1526 at p. 4, 739 So. 2d at 304. While recognizing the seriousness of the offense, theft of approximately one thousand dollars, we noted that the defendant in that case admitted the thefts after the police began to question

him, and returned six hundred ninety-three dollars, which was the remainder of the money.[3] Thus, the defendant returned approximately sixty-nine percent of the money. See Hayes, 97-1526 at pp. 2-3, 712 So. 2d at 1020.

In the instant case, the defendant similarly possesses a history of non-violent offenses, including the instant offenses. However, as set forth by the Louisiana Supreme Court, we are required to recognize that the defendant's history of violent or non-violent offenses has already been taken into account under the Habitual Offender Law for third and fourth offenders, which punishes third and fourth offenders with a history of violent offenses more severely than those with a history of non-violent offenses. Thus, in our review, we are bound by the legislature's dictates and the Louisiana Supreme Court's ruling that downward departures from mandatory minimum sentences should only be made in rare cases. State v. Lindsey, 99-3302, 99-3256, p. 5 (La. 10/17/00), 770 So. 2d 339, 343, cert. denied, 532 U.S. 1010, 121 S. Ct. 1739, 149 L. Ed. 2d 663 (2001).

Applying these precepts, we find the circumstances of this case are distinguishable from those in Hayes. In this case, the defendant invaded the victims' residential property. Notably, these invasions occurred even though some of the victims were home at the time of the offenses. The trial testimony also indicates, in particular, the effect of the defendant's crimes upon one of the victims, Michelle Parker, who was very distraught following the incident. Considering the above, we reject the defendant's characterization of his offenses as mere property crimes committed by a substance abuser. Co-perpetrator Blackwell pled guilty to the instant offenses and testified at trial. While the police ultimately recovered the items stolen in this case, the defendant did not voluntarily return any

[3]Specifically, the defendant therein went with the police to his vehicle and indicated that the money was in the glove compartment. An envelope containing six hundred dollars was found in the glove compartment. The police recovered ninety-three dollars from the defendant's person.

of the stolen property and did not cooperate with the police or admit to the offenses, unlike the circumstances in Hayes.

On review, we find that the defendant in this case has not met his burden of rebutting the presumption of constitutionality. Based on the record before us, the defendant is not the type of offender contemplated by the Louisiana Supreme Court in Dorthey and Johnson, warranting a downward deviation from the mandatory sentence.

Thus, the defendant's assignment of error lacks merit.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATIONS, AND SENTENCES AFFIRMED.

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VERSUS

PATRICK W. MATTHEWS

PMc by JMM **********

McCLENDON, J., concurs and assigns reasons.

While I am unable to find extraordinary circumstances in this case, which would allow the application of the holding in **State v. Hayes**, 97-1526, (La.App. 1 Cir. 5/15/98), 712 So.2d 1019, I do not believe that the ends of justice are met by a mandatory life sentence for this 22-year-old defendant, who did not invade any homes and whose past criminal history was limited to non-violent crimes. Thus, I am constrained to follow the mandate of the legislature and reluctantly concur.

However, I am compelled to note that the imposition of a life sentence for this particular defendant forever closes the door of hope, negates any chance of the defendant becoming a contributing member of society, and imposes an undue burden on the taxpayer, who is required to feed, house, and clothe him for life.