

**STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT**

07-252

STATE OF LOUISIANA

VERSUS

MICHAEL W. COLTON

**APPEAL FROM THE
THIRTY-SIXTH JUDICIAL DISTRICT COURT
PARISH OF BEAUREGARD, NO. CR-216-06
HONORABLE HERMAN I. STEWART, JR., PRESIDING**

**OSWALD A. DECUIR
JUDGE**

Court composed of Sylvia R. Cooks, Oswald A. Decuir and Billy H. Ezell, Judges.

Cooks, J., dissents in part and assigns reasons.

**AFFIRMED AS AMENDED AND
REMANDED WITH INSTRUCTIONS.**

**David W. Burton, District Attorney
Richard A. Morton, Assistant District Attorney
36th Judicial District Court
P.O. Box 99
DeRidder, LA 70634
(337) 463-5578
COUNSEL FOR APPELLEE:
State of Louisiana**

**Sherry Watters
Louisiana Appellate Project
P.O. Box 58769
New Orleans, LA 70158-8769
(504) 599-0931
COUNSEL FOR DEFENDANT-APPELLANT:
Michael W. Colton**

DECUIR, Judge.

On August 10, 2005, the Defendant, Michael W. Colton, sold 0.10 grams of rock cocaine to undercover officer Marie Potter in DeRidder, Louisiana. A bill of information was filed charging Defendant with distribution of cocaine, in violation of La.R.S. 40:967. A jury found him guilty as charged.

The State filed a habitual offender bill, and the trial court conducted a hearing, finding Defendant to be a fourth offender. The trial court sentenced Defendant to life imprisonment. The court denied his motion to reconsider sentence.

Defendant now appeals his conviction, adjudication as a habitual offender, and sentence. He assigns four errors.

ERRORS PATENT

In accordance with La.Code Crim.P. art. 920, all appeals are reviewed for errors patent on the face of the record. After reviewing the record, we find there is one error patent involving the sentence imposed.

Prior to imposing Defendant's sentence, the judge stated, "The Court now adjudicates you to be a fourth felony habitual offender, pursuant to the Louisiana Habitual Offender Law, R.S. 15:529.1A(1)(c)(ii), and further finds you are not entitled to diminution of sentence for good behavior under R.S. 15:571.3C(1), (2) and (3)." When imposing Defendant's sentence the judge stated, "It is the sentence of the Court that you, Michael W. Colton, be incarcerated at hard labor with the Department of Corrections for the remainder of your natural life. You shall not be entitled to diminution of sentence for good behavior as provided in R.S. 15:571.3C(1), (2) and (3)." Later, when clarifying a point for the prosecutor, the judge reiterated that Defendant was not entitled to diminution of sentence for good behavior.

This court has held that similar language was not merely a La.Code Crim. P. art. 894.1(D)(1) advisement, but was an actual denial of eligibility for diminution of sentence. *See State v. Davis*, 05-543 (La.App. 3 Cir. 12/30/05), 918 So.2d 1186, *writ denied*, 06-587 (La. 10/13/06), 939 So.2d 372. La.R.S. 15:571.3(C) is directed exclusively to the Department of Corrections and prohibits the department from granting good time to defendants who have been adjudicated an habitual offender. *State v. Narcisse*, 97-3161 (La. 6/26/98), 714 So.2d 698. Therefore, a trial judge does not have authority to deny diminution of sentence under that provision. *Id.* Accordingly, we find the trial court's statements regarding diminution was improper and Defendant's sentence is hereby amended to delete the trial court's statements regarding diminution eligibility. Additionally, the district court is instructed to make an entry in the minutes reflecting this amendment.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, Defendant alleges his trial counsel had a conflict of interest that prevented the effective representation of his interests and rights. He claims his trial counsel, Charles A. "Sam" Jones III, prosecuted him for one of the prior offenses for which he was habitualized. The State responded that Defendant, through his appellate counsel, is "arguing facts which are not in the record and/or which are simply not true."

As the State points out, the transcript of Defendant's guilty plea on September 14, 1989 shows that trial counsel Jones was not involved in the plea, even though the minutes for that date show he was present. It is well-settled that when minutes and a transcript conflict, the transcript controls. Thus, Defendant's assignment lacks factual support.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, Defendant argues his habitual offender sentence is unconstitutional, because it was a life sentence and the habitual offender proceedings were not instituted by a grand jury.

As the State observes in its brief, Defendant failed to make this objection at trial. Therefore, he may not raise it for the first time on appellate review. “Constitutional issues are no exception.” *State v. Williams*, 02-1030, p. 7 (La. 10/15/02), 830 So.2d 984, 988. The *Williams* case included challenges to the constitutionality of a particular evidentiary statute which the supreme court declined to address.

Additionally, the assignment lacks substantive merit. The Louisiana Constitution does not require a grand jury indictment for habitual offender proceedings. *State v. Jolla*, 337 So.2d 197 (La.1976); *State v. Maduell*, 326 So.2d 820 (La.1976); and *State v. Williams*, 326 So.2d 815 (La.1976).

ASSIGNMENT OF ERROR NO. 3

In his third assignment of error, Defendant argues the habitual offender proceeding was unconstitutional because it caused his sentence to be enhanced based upon factual determinations made by the judge, rather than the jury. Defendant cites *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004), *rehearing denied*, 542 U.S. 961, 125 S.Ct. 21 (2004) and *U.S. v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005), for the proposition that facts used to enhance a sentence should be found by the jury, rather than the judge. However, the Supreme Court has excepted the existence of prior convictions from this requirement. *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219 (1998); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000).

As recently as April 18, 2007, in *James v. United States*, ___ U.S. ___, 127 S.Ct. 1586 (2007), the Supreme Court indicated, albeit in its eighth footnote, that the prior convictions exception remains extant. Therefore, this assignment lacks merit.

ASSIGNMENT OF ERROR NO. 4

In his final assignment of error, Defendant argues his life sentence is excessive. The trial court found Defendant to be a fourth habitual offender; thus, a life sentence was mandated by La.R.S. 15:529.1(A)(1)(c)(ii). Defendant made an oral objection to the sentence, without elaboration. In his subsequent written motion to reconsider sentence, Defendant again failed to specify a legal basis for the motion. Thus, he is now limited to review of a bare claim of excessiveness. La.Code Crim.P. arts.881.1(B), (E); 881.2(A)(1). In a review of an appeal by the State, this court explained the analysis for such excessiveness claims under La.R.S. 15:529.1:

In *State v. Johnson*, 97-1906, pp. 6-8 (La.3/4/98); 709 So.2d 672, 674-77 . . . , the supreme court addressed the circumstances under which *State v. Dorthey*, 623 So.2d 1276 (La.1993), would permit a downward deviation from a statutorily-mandated sentence:

In *State v. Dorthey*, supra, this Court held that a trial court must reduce a defendant's sentence to one not constitutionally excessive if the trial court finds that the sentence mandated by the Habitual Offender Law "makes no measurable contribution to acceptable goals of punishment," or is nothing more than "the purposeful imposition of pain and suffering" and is "grossly out of proportion to the severity of the crime." *Id.* at 1280-81. Finding a mandatory minimum sentence constitutionally excessive requires much more, though, than the mere utterance of the phrases above.

A sentencing judge must always start with the presumption that a mandatory minimum sentence under the Habitual Offender Law is constitutional. See *State v. Dorthey*, supra at 1281 (Marcus, J., concurring); *State v. Young*, supra [94-1346 (La.App. 4 Cir. 10/26/95); 663 So.2d 525]. 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 which would rebut this presumption of constitutionality.

A trial judge may not rely solely upon the non-violent nature of the instant crime or of past crimes as evidence which 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. LSA-R.S. 15:529.1 provides that persons adjudicated as third or fourth offenders may receive a longer sentence if their instant or prior offense is defined as a "crime of violence" under LSA-R.S. 14:2(13). Thus the Legislature, with its power to define crimes and punishments, has already made a distinction in sentences between those who commit crimes of violence and those who do not. Under the Habitual Offender Law those third and fourth offenders who have a history of violent crime get longer sentences, while those who do not are allowed lesser sentences. So while a defendant's record of non-violent offenses may play a role in a sentencing judge's determination that a minimum sentence is too long, it cannot be the only reason, or even the major reason, for declaring such a sentence excessive.

Instead, to rebut the presumption that the mandatory minimum sentence is constitutional, the defendant must *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.

Young, 94-1636 at pp. 5-6, 663 So.2d at 528 (Plotkin, J., concurring).

When determining whether the defendant has met his burden of proof by rebutting the presumption that the mandatory minimum sentence is constitutional, the trial judge must also keep in mind the goals of the Habitual Offender Law. Clearly, the major reasons the Legislature passed the Habitual Offender Law were to deter and punish recidivism. Under this statute the defendant with multiple felony convictions is treated as a recidivist who is to be punished for the instant crime in light of his continuing disregard for the laws of our state. He is subjected to a longer sentence because he continues to break the law. 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 our constitution.

....

Johnson, 709 So.2d 672, clearly states that a non-violent history cannot be the major reason for a downward deviation. At the reconsideration hearing the trial court acknowledged *Johnson*, but then relied upon Defendant's non-violent history as the main reason for its downward deviation. The only other factor in the trial court's reasons was its view of policy considerations. However, as explained in *Johnson*, policy decisions regarding habitual offenders have already been made by the legislature. We, therefore, find merit in the State's assignments of error.

State v. Calhoun, 00-614, pp. 17-20 (La.App. 3 Cir. 11/2/00), 776 So.2d 1188, 1198-1200, *writ denied*, 00-3309 (La. 10/26/01), 799 So.2d 1151.

At the sentencing hearing in the present case, the court explained:

The Court ordered and received a pre-sentence investigation report from the Department of Probation and Parole, even though in this case there is mandatory life imprisonment sentence required. The PSI reflects that in addition to the four felony convictions described above, you also committed and were convicted of numerous misdemeanors, including simple battery, disturbing the peace, possession of drug paraphernalia, criminal neglect of family, theft of goods and resisting an officer. You are now 40 years of age; and for no substantial period during your adult life have you not been either incarcerated, on parole or on probation. In short, you have lived a life of crime.

The mandatory sentence prescribed in R.S. 15:529.1 is found by this Court to be not constitutionally excessive, nor is it inappropriate or unlawful. Further[,] the Court specifically finds that the sentence is neither cruel nor unusual.

Defendant has failed to demonstrate that he is "exceptional" pursuant to *Johnson* and *Young*. He testified at the habitual offender hearing, but he focused on claiming that he was innocent of the underlying offense. At the end of his testimony,

he admitted being a drug user, and claimed to be an addict, but denied having sold drugs since 1993.

We find Defendant's unsupported claim that he is merely a drug user, rather than a drug distributor, is negated by his most recent conviction. The fifth circuit has held that a defendant's bare claim that he is a non-violent addict will not render the mandatory minimum sentence of La.R.S. 15:529.1 excessive. *State v. Harbor*, 01-1261 (La.App. 5 Cir. 4/10/02), 817 So.2d 223, 227, *writ denied*, 02-1489 (La. 5/9/03), 843 So.2d 388.

Pursuant to the jurisprudence discussed, we conclude the assignment lacks merit.

DECREE

Defendant's conviction is affirmed; his sentence is amended to delete the trial court's statements regarding diminution eligibility. The case is remanded and the district court is instructed to make an entry in the minutes reflecting this amendment.

AFFIRMED AS AMENDED AND REMANDED WITH INSTRUCTIONS.