Judgment rendered February 25, 2009
Application for rehearing may be filed
within the delay allowed by Art. 922,
La. C.Cr.P.

No. 43,884-KA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

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STATE OF LOUISIANA Appellee

versus

TROY V. GILMORE Appellant

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Appealed from the
Second Judicial District Court for the
Parish of Claiborne, Louisiana
Trial Court No. 23972

Honorable Jenifer Ward Clason, Judge

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JAMES E. BEAL
Louisiana Appellate Project
Counsel for
Appellant

WALTER E. MAY, JR.
District Attorney
Counsel for
Appellee

JAMES R. HATCH
KENNETH P. HAINES
Assistant District Attorneys

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Before WILLIAMS, CARAWAY and PEATROSS, JJ.

CARAWAY, J.

Troy Gilmore was convicted by a jury of distribution of cocaine. Upon his subsequent adjudication as a third felony offender, Gilmore was sentenced to 20 years at hard labor without benefit of probation, parole, or suspension of sentence. Gilmore appeals his sentence as constitutionally excessive. We affirm the sentence as amended.

Facts

In March 2006, Gilmore was indicted for distribution of cocaine, in violation of La. R.S 40:967(A), after he sold cocaine to an undercover officer in Claiborne Parish in June 2003. In May 2006, following a jury trial, Gilmore was found guilty as charged.

Gilmore was adjudicated a third felony offender in January of 2008 as the result of the present offense and two 1997 guilty pleas to possession with intent to distribute a Schedule II-CDS and possession of a Schedule II-CDS. He was immediately sentenced by the trial court. Prior to sentencing, the court observed that Gilmore had two DWI misdemeanor convictions in addition to his felonies and reviewed Gilmore's family information, education, and work history. The court noted that the present offense was Gilmore's third felony drug conviction. The court alluded to the provisions of La. C. Cr. P. art. 894.1, stating that factors used in determining whether to impose a suspended sentence were not applicable. The court also stated that it was persuaded by Gilmore's criminal history that the only appropriate sentence was "an executory hard labor sentence." Gilmore received a

sentence of 20 years at hard labor without benefit of probation, parole, or suspension of sentence. This appeal of his sentence followed.

Discussion

Gilmore argues that the imposed sentence is grossly disproportionate to the severity of the offense and serves no useful purpose. He contends that the court failed to give due consideration to mitigating factors in fashioning the sentence including his age of 30 years at the time of arrest which occurred some two and one-half years after the offense. Gilmore argues that the sentence will result in his release from custody at age 50 with no training or experience in the outside world, and no likelihood of rehabilitation. He also notes that his first two convictions occurred "within the same time period, less than thirty days apart." Finally, Gilmore argues that he had no prior conviction for any violent crime, and asserts that the trial court failed to comply with La. C. Cr. P. art. 894.1.

Because the sentence imposed for a habitual offender adjudication is prescribed by statute, the trial court's compliance with La. C. Cr. P. art. 894.1 is not required. *State v. Gay*, 34,371 (La. App. 2d Cir. 4/4/01), 784 So. 2d 714; *State v. Owens*, 32,642 (La. App. 2d Cir. 10/27/99), 743 So. 2d 890, *writ denied*, 00-0438 (La. 9/29/00), 769 So. 2d 553. It would be an exercise in futility for the trial court to discuss the factors enumerated in that article when the court has no discretion in sentencing the defendant. *State v. Johnson*, 31,448 (La. App. 2d Cir. 3/31/99), 747 So. 2d 61, *writ denied*, 99-1689 (La. 11/12/99), 749 So. 2d 653, *cert. denied*, 529 U.S. 1114, 120 S.

Ct. 1973, 146 L. Ed. 2d 802 (2000). Thus, this portion of Gilmore's argument is rejected.

Moreover, the habitual offender law is constitutional in its entirety and the minimum sentences it imposes upon recidivists are presumed to be constitutional. *State v. Johnson*, 97-1906 (La. 3/4/98), 709 So. 2d 672; *State v. Gay*, *supra.* The burden is on the defendant to rebut the presumption that a mandatory minimum sentence is constitutional. To do so 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." *Johnson, supra*, 709 So. 2d at 676; *State v. Henry*, 42,416 (La. App. 2d Cir. 9/19/07), 966 So. 2d 692, *writ denied*, 07-2227 (La. 8/29/08), 989 So.2d 95; *State v. Wade*, 36,295 (La. App. 2d Cir. 10/23/02), 832 So. 2d 977, *writ denied*, 02-2875 (La. 4/4/03), 840 So. 2d 1213.

After his adjudication as a third felony offender, Gilmore faced maximum sentencing exposure of 60 years imprisonment and minimum sentencing exposure of 20 years. La. R.S. 40:967(B)(4)(b); La. R.S. 15:529(A)(1)(b). Although receiving the minimum possible sentence, Gilmore has failed to argue that he is the exceptional defendant for which downward departure from the mandatory minimum sentence is justified. Nor does the record support such an argument by clear and convincing evidence. Gilmore was not a youthful offender and had repeated offenses

for drugs and alcohol, obviously failing to be rehabilitated from prior leniency in sentencing. His work history was sporadic and he continued to participate in drug-related activities as a means of financial support. These facts establish that the imposed sentence is meaningfully tailored to Gilmore's culpability, the gravity of the offense and the facts of the case. Thus, we find no merit to Gilmore's arguments.

Gilmore also argues that the trial court erred in denying parole eligibility to him because the habitual offender statute requires sentences to be imposed without benefit of probation or suspension of sentence only.

La. R.S. 40:967(B)(4)(b) provides that the first two years of a sentence imposed for a conviction of distribution of cocaine shall be served without benefit of parole, probation or suspension of sentence. La. R.S. 15:529.1(G) provides that habitual offender sentences are to be imposed without benefit of probation or suspension of sentence only. Nevertheless, when the underlying offense of conviction requires the sentence or a portion of the sentence to be imposed without benefit of parole, the habitual offender sentence is to be imposed likewise without parole despite La. R.S. 15:529.1(G). *State v. Thomas,* 42,322 (La. App. 2d Cir. 8/15/07), 962 So.2d 1119, *writ denied,* 08-0316 (La. 10/24/08), 992 So. 2d 1031.[1] Thus, although the trial court erred when it eliminated parole eligibility on the entire term of imprisonment, it was proper to restrict

[1]La. R.S. 15:574.4 states that a person convicted of a third or subsequent felony offense shall not be eligible for parole. The Louisiana Supreme Court has consistently held that when a defendant is sentenced under a statute that contains no prohibition of parole, the district court must sentence the defendant to a term that does not include such a prohibition because parole eligibility under La. R.S. 15:574.4 is to be determined by the Department of Corrections. *St. Amant v. 19th Judicial Dist. Court,* 94-0567 (La. 9/3/96) 678 So. 2d 536.

Gilmore's parole eligibility on the first two years of the sentence imposed. *State v. Davis,* 07-1208 (La. 12/14/07), 970 So. 2d 982; *State v. Coleman,* 41,764 (La. App. 2d Cir. 1/24/07), 949 So. 2d 570, *writ denied,* 07-0459 (La. 10/12/07), 965 So. 2d 398. For these reasons, we amend the trial court judgment to delete the denial of parole eligibility as to all but the first two years of the sentence.

Our error patent review reveals that the trial court failed to advise Gilmore at sentencing that he has two years from the time of finality of his conviction and sentence to seek post-conviction relief as required by La. C.Cr. P. art. 930.8. The statute contains supplicatory language which does not bestow an enforceable right on an individual defendant. *State v. Henry*, *supra*.

This defect has no bearing on whether the sentence is excessive and, thus, is not grounds to reverse the sentence or to remand the case for re-sentencing. *Id.* Defendant is therefore advised by this opinion that no application for post-conviction relief, including applications which seek an out-of-time appeal, shall be considered if it is filed more than two years after the judgment of conviction and sentence have become final under the provisions of La. C. Cr. P. arts. 914 and 922.

Conclusion

For the reasons set forth above, Gilmore's conviction is affirmed. His sentence is amended to remove the denial of eligibility for parole for all but the first two years of the sentence and as amended is affirmed.

CONVICTION AFFIRMED; SENTENCE AMENDED, AND, AS AMENDED, AFFIRMED.