STATE OF LOUISIANA

VERSUS

FARRELL W. WILLIAMS, JR.

NO. 16-KA-600

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 15-4263, DIVISION "N"
HONORABLE STEPHEN D. ENRIGHT, JR., JUDGE PRESIDING

June 29, 2017

SUSAN M. CHEHARDY
CHIEF JUDGE

Panel composed of Judges Susan M. Chehardy,
Fredericka Homberg Wicker, and Jude G. Gravois

CONVICTION AND SENTENCE AFFIRMED

SMC
JGG

WICKER, J., CONCURS WITH REASONS

FHW

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CHEHARDY, C.J.

Defendant, Farrell W. Williams, Jr., appeals his sentence as a second felony offender. For the reasons that follow, we affirm defendant's conviction and sentence.

STATEMENT OF THE CASE

On July 31, 2015, the Jefferson Parish District Attorney filed a bill of information charging defendant with possession of heroin, a violation of La. R.S. 40:966(C). A twelve-person jury found defendant guilty as charged on May 3, 2016. He was sentenced to ten years imprisonment at hard labor on May 26, 2016, after which he filed a motion to reconsider sentence and a motion for appeal. On June 3, 2016, the district court denied the former and granted the latter.

Thereafter, on July 21, 2016, the state filed a multiple offender bill of information alleging defendant to be second felony offender. At the hearing on the bill, the court adjudicated defendant a second felony offender, vacated his original sentence, and imposed an enhanced sentence of twenty years imprisonment at hard labor without the benefit of probation or suspension of sentence. Defendant filed a motion to reconsider his enhanced sentence and a motion for appeal. On July 27, 2016, the district court denied the motion to reconsider and granted defendant's appeal.

FACTS

Around 10:30 p.m. on the night of June 26, 2015, Detectives William Whittington and John Wiebelt of the Jefferson Parish Sheriff's Office ("JPSO") were conducting undercover surveillance as part of a narcotics investigation in and around the intersection of South Jamie Boulevard and U.S. Highway 90 in Avondale, Louisiana. From their separate unmarked vehicles, both detectives observed a Ford Ranger pickup truck enter a McDonald's parking lot without "too many cars" and park at a distance from the restaurant's entrance. This aroused the

detectives' suspicions since a patron of the restaurant would typically park close to the entrance in an uncrowded lot. But the driver of the truck, a female, remained in her vehicle and seemed to be waiting for something.

Approximately ten minutes later, a red Chrysler Sebring convertible entered the lot and parked next to the truck. The female exited her truck and entered the passenger side of the Sebring. The Sebring then "idled through" the parking lot and pulled up next to a fuel pump at a nearby gas station. The car remained next to the pump for approximately one or two minutes, but no one exited the vehicle and no gas was pumped. The Sebring then "idled back" next to the truck in the McDonald's parking lot. The female exited the Sebring, entered her truck, and drove off.

Suspecting that a narcotics transaction had occurred, Detective Whittington decided to stop the Sebring. His decision to stop the Sebring rather than the truck, he explained, was motivated in part by a recently-received tip from a confidential informant that defendant drove a red Chrysler Sebring convertible and was "known to sell quantities of heroin throughout Avondale." Detective Whittington requested the assistance of JPSO Deputy Joseph Waguespack to conduct the stop with his marked police vehicle. With lights and sirens, Deputy Waguespack stopped the Sebring several blocks away from the McDonald's. Upon contact with the vehicle, Detective Whittington immediately recognized the driver as defendant who had an outstanding attachment for his arrest. Defendant was placed under arrest and a search incident thereto turned up three grams of heroin in his pocket.

DISCUSSION

On appeal, defendant does not challenge his conviction, but assigns two errors regarding his sentence. He argues that the district court erred in denying his motion to reconsider his enhanced sentence and that his enhanced sentence is unconstitutionally excessive. We address these interrelated assignments together.

The failure to make or to file a motion to reconsider sentence, or to state the specific grounds upon which the motion is based, limits a defendant to a review of the sentence for constitutional excessiveness only. *State v. Brown*, 15-96 (La. App. 5 Cir. 9/15/15), 173 So.3d 1262, 1269. Here, because defendant's motion to reconsider merely argued that his enhanced sentence was excessive, we accordingly limit our review to excessiveness.

The Eighth Amendment to the United States Constitution and Article I, § 20 of the Louisiana Constitution prohibit the imposition of excessive punishment. *State v. McGowan*, 16-130 (La. App. 5 Cir. 8/10/16), 199 So.3d 1156, 1162. A sentence is considered excessive, even if it is within the statutory limits, if it is grossly disproportionate to the severity of the offense or imposes needless and purposeless pain and suffering. *Id.* A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. *State v. Hill*, 12-495 (La. App. 5 Cir. 12/18/12), 106 So.3d 1209, 1212.

An appellate court shall not set aside a sentence for excessiveness if the record supports the sentence imposed. La. C.Cr.P. art. 881.4(D); *McGowan*, *supra*. In reviewing a sentence for excessiveness, the appellate court shall consider the crime and the punishment in light of the harm to society and gauge whether the penalty is so disproportionate as to shock the sense of justice, while recognizing the sentencing court's broad discretion. *Id.* at 1162-63. When reviewing the sentencing court's discretion, three factors are considered: (1) the nature of the crime, (2) the nature and background of the offender, and (3) the sentence imposed for similar crimes by the same court and other courts. *Id.* at 1163. Before considering these three factors, we choose to note that defendant's sentence was within the statutory limits and was less than his potential sentencing exposure.

Under the law in effect at the time of the offense, possession of heroin carried a mandatory penalty of imprisonment at hard labor for not less than four nor more than ten years. La. R.S. 40:966(C). Defendant was sentenced to the maximum ten years, but this sentence was vacated when defendant was adjudicated a second felony offender on the basis of his predicate conviction for possession of heroin in 24th JDC No. 03-2308. Pursuant to La. R.S. 15:529.1, defendant's second felony offender status carried a mandatory penalty of imprisonment at hard labor for not less than five nor more than twenty years without benefit of probation or suspension of sentence. Defendant was sentenced to the maximum twenty years.

This maximum sentence was due in part to defendant's refusal to accept plea bargains from the state. Prior to trial of this matter, the state offered defendant a plea deal that was put on the record. It was acknowledged that defendant was a quadruple felony offender facing a possible life sentence if convicted of the instant offense, and that in exchange for a guilty plea, the state would charge defendant as a second felony offender for which he would receive a twelve-year sentence. In exchange for this plea, the state further offered defendant a concurrent ten-year sentence and agreed not to multiple bill him on additional charges pending against him in 24th JDC No. 13-1818—felon in possession of a firearm (La. R.S. 14:95.1), possession with intent to distribute heroin (La. R.S. 40:966(A)), and possession with intent to distribute cocaine (La. R.S. 40:967(A)).

Defendant did not accept the offered plea deal, proceeded to trial, and was convicted. The state did not bill defendant as a quadruple felony offender, but billed him as a second felony offender. At the hearing on this bill, defendant was advised that if he stipulated to the bill as a second felony offender, he would receive an enhanced sentence of fifteen years. But if he denied the allegation and forced the state to prove his second felony offender status, he would receive an

enhanced sentence of twenty years. Defendant elected the latter option, was adjudicated a second felony offender, and was sentenced to twenty years. The state then dismissed the pending charges in 24th JDC No. 13-1818 and 24th JDC No. 13-2056.[1]

With the foregoing in mind, we now turn to the three factors of our excessiveness inquiry. First, regarding the nature of the crime, defendant was sentenced to twenty years on the basis of two felony convictions for heroin possession. Though defendant was convicted of simple possession, the facts of this case and defendant's history suggest that he is involved in heroin distribution. It is difficult to overstate the serious nature of any crime involving heroin given the danger the substance presently poses to public health. According to the Centers for Disease Control and Prevention, "[h]eroin-related overdose deaths [in the United States] have more than quadrupled since 2010."[2]

Second, regarding defendant's background, the record indicates that defendant has a criminal history, including a felony conviction for heroin possession and several felony drug charges. In fact, defendant's reputation for selling "quantities of heroin throughout Avondale" contributed to his arrest in this case.

Lastly, regarding sentences for similar crimes, the Louisiana Supreme Court has approved a twenty-year enhanced sentence for a second felony offender with an underlying conviction for possession of heroin. In *State v. Thompson,* 02-333 (La. 4/9/03), 842 So.2d 330, the defendant, who had been convicted of two counts of heroin possession and adjudicated a second felony offender, received an enhanced sentence of twenty years on one of the counts, to be served concurrently with his ten-year sentence on the other. On appeal, the Fourth Circuit reversed one

[1] In 24th JDC No. 13-2056, defendant was charged with the misdemeanor offenses of resisting an officer (La. R.S. 14:108) and battery of a police officer (La. R.S. 14:34.2).

[2] https://www.cdc.gov/drugoverdose/data/heroin.html (last visited June 27, 2017).

of the convictions and the corresponding enhanced sentence, but on certiorari review, the Louisiana Supreme Court reinstated both, finding the sentence was within the sentencing court's discretion in view of the defendant's previous twenty-three felony and six misdemeanor arrests, as well as a conviction for possession of cocaine. *Id.* at 338.

Our review of the three foregoing factors as well as the facts and circumstances of this case leads us to conclude that the district court did not abuse its broad discretion in sentencing defendant to the maximum twenty years as a second felony offender. Accordingly, we likewise find that the district court did not err in denying defendant's motion to reconsider his enhanced sentence. These assignments of error are without merit.

ERRORS PATENT

The record was reviewed for errors patent according to La. C.C.P. art. 920; *State v. Oliveaux*, 312 So.2d 337 (La. 1975); and *State v. Weiland*, 556 So.2d 175 (La. App. 5 Cir. 1990). Our review indicates that defendant was not advised of the applicable prescriptive period in which to seek post-conviction relief. Accordingly, by way of this opinion, defendant is hereby advised 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 has become final under the provisions of La. C.Cr.P. arts. 914 or 922. *See State v. Brooks,* 12-226 (La. App. 5 Cir. 10/30/12), 103 So.3d 608, 615, *writ denied*, 12-2478 (La. 4/19/13), 111 So.3d 1030.

DECREE

For the foregoing reasons, defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED

WICKER, J., CONCURS WITH REASONS

I agree fully with the analysis and the majority's conclusion that Mr. Williams' sentence is not constitutionally excessive. I write separately to highlight the practical and the economic inefficiencies resulting from the decision to multiple bill a non-violent drug offender like Mr. Williams. La. R.S. 15:529.1 places the decision to multiple bill an offender squarely within the discretion of the district attorney. *See* La. R.S. 15.529.1(D)(1)(a). While the authority to multiple bill an offender may prove a very useful tool to prolong the incarceration of a dangerous offender, according to the PEW Charitable Trust, that authority is most often used to prolong the incarceration of those whose most serious offense is a conviction for a drug offense or a property offense. Indeed, for nearly three-fourths of those sentenced under La. R.S. 15:529.1 in 2015, their most serious convictions were drug or property offenses. Only 14% of those sentenced under La. R.S. 15:529.1 had a violent crime conviction. In the instant case, Mr. Williams has never been arrested for or convicted of a crime of violence. There is no evidence in the record that the State suspected Mr. Williams of committing such a crime. Although it may not be immediately obvious as La. R.S. 15:529.1 itself only limits sentencing benefit eligibility and eligibility for political office, a habitual offender conviction carries with it serious collateral consequences that can have a profound impact on the State's ability to rehabilitate offenders and to facilitate their successful reentry into the community. In an effort to encourage more cost-conscious decision-making in this area, I will outline the obstacles to rehabilitation that Mr. Williams—who was billed as a second felony offender with two possession of heroin convictions—is subject to as a result of his conviction under La. R.S. 15:529.1.

The most obvious consequence of a conviction under La. R.S. 15:529.1 is the increased sentencing range to which Mr. Williams is subject. Upon his conviction for possession of heroin, in violation of La. R.S. 40:966(C), Mr. Williams received the maximum sentence of ten years at hard labor. Thereafter, the State filed a multiple offender bill of information, alleging that Mr. Williams was a second felony offender with a 2004 conviction for possession of heroin. As a result of his conviction under La. R.S. 15:529.1(A)(1), the statute required the district court to sentence the habitual offender to "a determinate term not less than one-half the longest term and not more than twice the longest term prescribed for a first conviction."[3] Accordingly, Mr. Williams faced a sentencing range between five years and twenty years at hard labor, without benefit of probation or suspension of sentence. The district court sentenced Mr. Williams to the maximum sentence of twenty years at hard labor without benefit of probation or suspension of sentence. Thus, as a consequence of his habitual offender conviction, Mr. Williams received a sentence that was twice as long as the sentence he would have received if the State had not multiple billed him. Pursuant to recent amendments to La. R.S. 15:574.4 which will become effective on November 1, 2017,[4] Mr. Williams will become parole eligible after serving twenty-five percent of his sentence. Acts 2017, No. 280. If Mr. Williams is never granted parole, he will not be released from prison until June 27, 2035, when he will be sixty-two years of age.

Unfortunately, this is not a zero sum game either for the State or for Mr. Williams. Incarcerating Mr. Williams—whose three felony convictions have all concerned possession of narcotics—is costly. According to the Department of Corrections, it currently costs $24.39/day to house an offender. Per year, that is

[3] Effective November 1, 2017, the Legislature has shortened the sentencing range for a second felony offender to "one-third the longest term and not more than twice the longest term prescribed for a first conviction." Acts 2017, No. 282.

[4] Prior to these amendments, La. R.S. 15:574.4(A)(1)(a) denied parole eligibility to Mr. Williams because he has been convicted of three felonies, all of which are drug related.

a cost of $8,902.35. The cost to imprison Mr. Williams for twenty years will be approximately $178,047. That total does not include any additional costs, such as Mr. Williams' healthcare needs as he ages behind bars. Given this State's budget crisis, prolonged incarceration of a non-violent offender like Mr. Williams, whose latest arrest resulted from possession of three grams of heroin, would seem to be fairly low on the State's list of priorities.

While the State bears high costs for incarcerating Mr. Williams, it does not seem to reap even roughly equivalent concomitant benefits. Since at least 1993, Mr. Williams has had drug problems. Under these circumstances, it is not likely that a prolonged term of imprisonment accomplishes much in the way of deterrence. Indeed, on the margin, the risk of a lengthy prison sentence is unlikely to deter a multiple drug offender *ex ante*—that is, at the time he makes the decision to possess drugs. If Mr. Williams is an addict, as it appears he is based on his criminal record, his demand for drugs is relatively inelastic.[5] As such, he will seek to possess drugs even at increased personal cost (i.e., even if he faces the risk of more severe criminal penalties). Thus, at the moment Mr. Williams is making this decision, the risk of a twenty-year prison sentence, as opposed to a ten-year prison sentence, is unlikely to effectively deter him from engaging in this undesirable behavior. While the community does obtain some satisfaction from incarcerating those who break its laws, this satisfaction would seem to be nominal in the case of drug offenders whose drug use causes them to repeatedly victimize themselves.

Because Mr. Williams will conceivably be released from prison one day, the State does have an interest in rehabilitating him and facilitating his reentry into society. The Legislature explicitly expressed the State's interest in

[5] *See* Henry N. Butler et al., *Economic Analysis for Lawyers* 420 (3d ed. 2014).

rehabilitating the incarcerated in La. R.S. 15:828(A)(1) which provides in pertinent part,

> Persons committed to and in the physical custody of the department shall be treated in a humane manner, and the department shall direct efforts toward the rehabilitation of such persons in order to effect their return to the community as promptly as practicable.

To facilitate rehabilitation and reentry, the Legislature has created numerous programs and initiatives aimed at incentivizing offenders to develop the habit of living by the rules while in prison and to obtain the education and the skills needed to succeed once they are released. Nevertheless, despite the State's interest in rehabilitating offenders, the Legislature has barred those who have been convicted as habitual offenders under La. R.S. 15:529.1 from participating in many of these programs. For example, La. R.S. 15:571.3(B)(1)(a) provides a felony offender, "[u]nless otherwise prohibited," with the opportunity to earn "diminution of sentence by good behavior and performance of work or self-improvement activities, or both, to be known as 'good time.'" If eligible to receive good time, an inmate may earn diminution of his sentence at "the rate of one and one half-day for every one day in actual custody served on the imposed sentence."[6] However, if an offender has been convicted as a habitual offender under La. R.S. 15:529.1, La. R.S. 15:571.3(C)(1) limits the amount of good time he may accrue and the manner in which he may earn it. While most other offenders can also earn good time for their good behavior, habitual offenders cannot. Those convicted as multiple offenders under La. R.S. 15:529.1 may only earn up to 360 days of good time for participation in certified treatment and rehabilitation programs, which may include basic education, job skills training, values development and faith-based initiatives, therapeutic programs, and treatment programs. La. R.S. 15:571.3(E), 15:828(B). The opportunity to

[6] Effective November 1, 2017, the rate at which an inmate may earn good time will increase to thirteen days for every seven days in actual custody on the imposed sentence. Acts 2017, No. 280, §3.

receive behavior-related good time provides a significant incentive to those who are eligible to receive it to improve themselves and to develop the habit of living in an ordered manner. Unfortunately, a habitual offender conviction denies an inmate this important and valuable behavioral incentive.

Similarly, as a convicted habitual offender, Mr. Williams is also barred from participating in the Workforce Development Sentencing Program pursuant to La. R.S. 13:5401(b)(1)(f). This relatively new and innovative program provides eligible offenders with educational and vocational training, moral rehabilitation, basic social and life skills, and community and faith-based support systems to help facilitate their reentry into society. By virtue of his habitual offender conviction, Mr. Williams is also barred from participating in work release programs until "the last year of his term." La. R.S. 15:1111.[7] Because Mr. Williams will be parole eligible after he serves twenty-five percent of his sentence, this means that, if the Louisiana Board of Pardons & Parole decides to parole Mr. Williams earlier than one year from the time he becomes full term, Mr. Williams may never become eligible to participate in work release programs because of his habitual offender status.[8] This program serves to help offenders accumulate some kind of financial cushion to facilitate their reentry into the community. The law inanely limits the degree to which those most likely to recidivate may take advantage of this benefit. Although the Legislature established both the Workforce Development Sentencing Program and work release programs to help offenders gain meaningful and transferable job skills that may help them obtain employment upon their release, habitual offenders—

[7] La. R.S. 15:1111 governs work release programs established and administered by the Department of Corrections. This statute limits a habitual offender's work release eligibility to the "last year of his term." In contrast, La. R.S. 15:711 governs work release programs established and administered by the sheriff in each parish. This statute limits habitual offenders' work release eligibility to the "last six months of their terms." Thus, prisoners in parish custody have an even shorter window during which they may be eligible for work release participation.

[8] As a practical matter, the Board of Pardons & Parole will often hold a parole hearing six months before the offender becomes parole eligible. If the Board grants parole, it will then often set a parole release date six months after the parole hearing such that a habitual offender may at least take advantage of six months of work release.

those who are most likely to need this help—are further handicapped because the law limits their access to these important programs.[9]

As taxpaying members of an ordered society, we pay to incarcerate individuals as punishment for their crimes, and we demand that offenders turn their lives around such that they can once again join the community of contributing members. However, the collateral consequences attending a habitual offender conviction extend the time of incarceration—and, therefore, the amount of taxpayer dollars spent—but limit the tools the offender has at his disposal to successfully reenter the community upon release. While La. R.S. 15:529.1 places the discretion to multiple bill solely within the hands of the district attorney, given the high cost of incarceration, the low impact on deterrence, and the limitations it places on access to rehabilitation programs, restrained, limited, and thoughtful exercise of that discretion would seem to best promote justice, the public interest, and the offender's prospects for successful reentry.

[9] As Butler, Drahozal, and Bailey point out, "Serving time in jail may reduce legal opportunities so that the opportunity cost of future criminal activity is lower." Butler et al., *supra*, 386. This point is important and makes sense. Based on the economic model of rational choice, the degree to which an offender is likely to recidivate depends heavily on the alternatives to criminal behavior available to him such that the opportunity cost of criminal behavior is higher. Work release programs are an effective rehabilitation measure because they expand these legal alternatives. Given the damage a single felony conviction does to one's job prospects outside the prison walls, it makes no sense to limit a habitual offender's access to job programs within the prison walls which may help increase the opportunity cost of future criminal activity and to decrease his desire to recidivate.

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **JUNE 29, 2017** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU
CLERK OF COURT

16-KA-600

E-NOTIFIED
24TH JUDICIAL DISTRICT COURT (CLERK)
HONORABLE STEPHEN D. ENRIGHT, JR. (DISTRICT JUDGE)
TERRY M. BOUDREAUX (APPELLEE)
LIEU T. VO CLARK (APPELLANT)
GAIL D. SCHLOSSER (APPELLEE)

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