

Judgment rendered April 10, 2013
Application for rehearing may be filed
within the delay allowed by Art. 922,
La. C.Cr.P.

No. 47,996-KA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

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STATE OF LOUISIANA

Appellee

versus

WENDELL TURNER

Appellant

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Appealed from the
Twenty-Sixth Judicial District Court for the
Parish of Webster, Louisiana
Trial Court No. 85090

Honorable John Robinson, Judge

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DOUGLAS LEE HARVILLE
Louisiana Appellate Project

Counsel for
Appellant

J. SCHUYLER MARVIN
District Attorney

Counsel for
Appellee

JOHN M. LAWRENCE
MARCUS PATILLO
C. SHERBURNE SENTELL III
Assistant District Attorneys

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Before BROWN, STEWART and CARAWAY, JJ.

NOT DESIGNATED FOR PUBLICATION.
Rule 2-16.3, Uniform Rules, Courts of Appeal.

CARAWAY, J.

Wendell Turner pled guilty to driving while intoxicated, third offense in violation of La. R.S. 14:98 and was subsequently sentenced to three years at hard labor with credit for time served. Turner appeals his sentence as constitutionally excessive. For the following reasons, we affirm.

Facts

On December 17, 2011, an officer with the Sibley Police Department pulled Turner's vehicle over for erratic driving. Subsequent chemical tests showed that Turner's blood alcohol registered .190 g%.

Turner was charged with driving while intoxicated, third offense and on April 9, 2012, he pled guilty to the charged offense.¹ Two months later he was sentenced.

Prior to sentencing Turner, the trial court noted his extensive criminal history beginning in 2001 in the state of West Virginia. The court noted that Turner had numerous arrests for assaultive-type behavior, including domestic battery and battery on a police officer, but considered that not all of the charges had been prosecuted. The court observed that Turner's criminal activity had been "steady." His history included a conviction for domestic battery, third offense in 2004 for which he received a probated sentence. The court noted that Turner had his first DWI conviction in 2005 and a felony conviction in West Virginia in 2007. Later, Turner was convicted of felony-grade larceny in 2008 and received a one-year jail

¹Turner was also charged with driving under suspension. As part of his plea agreement, Turner pled guilty to the offense of driving without a valid driver's license in exchange for dismissal of a driving under suspension charge. For the offense, he received a concurrent 30-day sentence. No complaint about this sentence has been made on appeal.

term.² In 2011, Turner received his second DWI conviction after he moved to Louisiana and was arrested for felony domestic abuse battery which was dismissed. The trial judge also considered a letter that Turner wrote to the court as well as his mother's illness.

The court proceeded to sentence Turner for the DWI offense and imposed a sentence of three years at hard labor with credit for time served and a recommendation that he receive treatment.

A timely motion to reconsider sentence requesting only that a portion of Turner's sentence be probated was denied. Thereafter, Turner filed a *pro se* motion to reconsider sentence which was denied as untimely. This appeal ensued.

Discussion

On appeal, Turner argues that he is 46 years old and his mother is mentally handicapped and very ill. Under these facts, he contends that his sentence fails to punish him in a reasonable manner for his non-violent crime. Turner argues that his sentence is excessive, a violation of his constitutional rights and nothing more than a needless imposition of pain and suffering.

La. R.S. 14:98 provides, in pertinent part, as follows:

D. (1)(a) On a conviction of a third offense, notwithstanding any other provision of law to the contrary and regardless of whether the offense occurred before or after an earlier conviction, the offender shall be imprisoned with or without hard labor for not less than one year nor more than five years and shall be fined two thousand dollars. One year of the sentence of imprisonment shall be imposed without benefit of probation, parole, or suspension of sentence. The court, in

²The defendant was originally arrested for robbery, kidnaping, and possession of a stolen vehicle.

its discretion, may suspend all or any part of the remainder of the sentence of imprisonment. If any portion of the sentence is suspended, the offender shall be placed on supervised probation with the Department of Public Safety and Corrections, division of probation and parole, for a period of time equal to the remainder of the sentence of imprisonment, which probation shall commence on the day after the offender's release from custody.

When a defendant's motion for reconsideration urges merely that the sentence is excessive, he is relegated only to a claim of constitutional excessiveness. *State v. Mims*, 619 So. 2d 1059 (La. 1993); *State v. Nelams*, 45,817 (La. App. 2d Cir. 11/3/10), 55 So. 3d 30. Constitutional review turns upon whether the sentence is illegal, grossly disproportionate to the severity of the offense or shocking to the sense of justice. *State v. Lobato*, 603 So. 2d 739 (La. 1992). A trial court has broad discretion in sentencing offenders. Absent a showing of manifest abuse of that discretion, an appellate court may not set aside a sentence as excessive. *State v. Kidd*, 45,638 (La. App. 2d Cir. 11/3/10), 55 So. 3d 90.

Considering that the original motion for reconsideration of sentence involved the excessiveness of Turner's sentence and that Turner's *pro se* motion to reconsider sentence was untimely, we limit our review to a claim of constitutional excessiveness.

Given Turner's criminal history and the facts of the case, the imposed sentence is constitutional. Turner is a repeat offender who has not availed himself of prior opportunities for rehabilitation. His criminal record has spanned an 11-year period and he has failed to take advantage of prior leniency afforded him in sentencing. Turner's actions continue to demonstrate a consistent disregard for the safety of others and the law.

Given the trial court's broad discretion and Turner,'s criminal history, the imposition of a three-year, midrange sentence is not grossly disproportionate or excessive in this case.

This assignment is without merit.

Decree

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

AFFIRMED.