NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 KA 2618

STATE OF LOUISIANA

VS.

VIRGIL LORENZO SMITH

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JUDGMENT RENDERED: DECEMBER 28, 2006

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ON APPEAL FROM THE
TWENTY-SECOND JUDICIAL DISTRICT COURT
DOCKET NUMBER 357134, DIVISION F
PARISH OF ST. TAMMANY, STATE OF LOUISIANA

HONORABLE MARTIN E. COADY, JUDGE

****

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VIRGIL LORENZO SMITH

BEFORE: CARTER, C.J., WHIPPLE AND MCDONALD, JJ.

MCDONALD, J.

Virgil Lorenzo Smith, defendant, was charged by bill of information with two counts of public intimidation, violations of La. R.S. 14:122. The offenses occurred on September 4, 2002. Defendant pled not guilty, was tried by jury and found guilty as charged. The State instituted habitual offender proceedings seeking to have defendant's sentence on count one enhanced. Following a hearing, the trial court adjudicated defendant a second felony habitual offender, imposed a sentence of ten years at hard labor without benefit of probation or suspension of sentence on count one and sentenced defendant to five years at hard labor for his conviction on count two. The sentences on counts one and two would run concurrent to each other, but would run consecutively with another multiple offender sentence also imposed that same day. In **State v. Smith,** 2004-0799 (La. App. 1st Cir. 12/17/04), 890 So.2d 35 (unpublished), writs denied, 2005-0154 & 0448 (La. 4/29/05), 901 So.2d 1063 & 1067, defendant's convictions on counts one and two were affirmed, but his habitual offender adjudication and sentence were vacated and remanded.

The State again pursued habitual offender proceedings against defendant. Following another hearing, defendant was again adjudicated a second felony habitual offender on Count One and sentenced to ten years imprisonment at hard labor without benefit of probation or suspension of sentence, to run consecutively with another habitual offender sentence imposed that same day.[1]

[1] The other habitual offender adjudication and sentence are addressed in the companion appeal issued this same day, **State v. Smith**, 2005 2617 (La. App. 1st Cir. __/__/) (unpublished).

Defendant now appeals his habitual offender adjudication and sentence. We affirm the count one habitual offender adjudication and sentence.

FACTS

On July 6, 2005, the trial court held a habitual offender hearing in this matter and defendant's companion case. At the hearing, the State presented testimony from Sergeant Carl Fullilove, an employee of the St. Tammany Parish Sheriff's Office Crime Lab. Sergeant Fullilove was accepted by the trial court as an expert in fingerprint analysis.

Sergeant Fullilove testified that he fingerprinted defendant that morning before the hearing on a ten-print card that was identified as State Exhibit 1. Sergeant Fullilove testified that defendant's fingerprints matched those prints on State Exhibit 2, which was a certified copy of defendant's conviction for forcible rape bearing case number 270776 from the Criminal District Court of the Parish of Orleans.

Sergeant Fullilove testified that defendant's prints on State Exhibit 1 matched the prints on State Exhibit 3, which was a certified copy of a pen pack bearing an affidavit from Ella Peterson from the Office of Probation and Parole. Sergeant Fullilove also testified that defendant's prints on State Exhibit 1 matched the prints included with State Exhibit 4, which was an additional certified copy of a pen pack.

The State presented testimony from David Feldman, who was employed at Louisiana State Penitentiary. During 1995, Feldman worked in an office where he fingerprinted and photographed inmates in preparation for their upcoming release. Feldman testified that on July 20, 1995, he participated in fingerprinting and photographing defendant in preparation for his release on July 26, 1995.

Following the presentation of evidence, the trial court found defendant was the same person who pled guilty to forcible rape on July 27, 1979, docket number 270776, Criminal District Court Parish of Orleans. Defendant was sentenced to twenty-five years for that offense. The court also found that not more than ten years had elapsed since the expiration of the maximum sentence of the defendant's previous conviction and the time of commission of his felony of public intimidation. See La R.S. 15:529.1 C. Accordingly, the trial court adjudicated defendant a second felony habitual offender and sentenced defendant to ten years at hard labor without benefit of probation or suspension of sentence. The trial court imposed this sentence to run consecutively to the other habitual offender sentence imposed on that same date.

ASSIGNMENT OF ERROR NUMBER ONE

In his first assignment of error, defendant argues that the trial court erred in adjudicating defendant a second felony habitual offender because the exhibits indicating defendant had a previous felony conviction (State Exhibits 2-4) were never actually introduced into evidence.

In support of his argument, defendant points to the prosecutor's statements that he was going to "offer, introduce and file into evidence State's Exhibit No. 2"; the prosecutor's statement that he was "going to introduce State's Exhibit No. 3"; and the prosecutor's statement that he was "offering, introducing and filing into evidence State's Exhibit No. 4." Defendant argues that at no time did the trial court issue a ruling admitting these exhibits into evidence and at sentencing the prosecutor specifically asked the trial court to include in its written reasons the pen packs (State Exhibits 3 and 4) so they could be reviewed by the Court of Appeal; yet, no reference is made to these exhibits in the written reasons.

At the outset, we note that State's Exhibits 2, 3, and 4 have been included in the record on appeal and are obviously part of the record. There is a certain presumption that legal proceedings are conducted with regularity. See La. R.S. 15:432.

But more importantly, we note that despite the trial court's reticence in not plainly stating these exhibits were admitted into evidence, at no time did defense counsel object to the lack of a verbal ruling. The basis or ground for the objection must be sufficiently brought to the attention of the trial court to allow it the opportunity to make the proper and relevant ruling and cure any error. A defendant is limited on appeal to the grounds for the objection that were articulated at trial. See La. Code Crim. P. art. 841 & La. Code Evid. art. 103(A)(1); see also **State v. Young**, 99-1264, p. 9 (La. App. 1st Cir. 3/31/00), 764 So.2d 998, 1005.

In the present case, defendant objected to the introduction of State Exhibit 1, the fingerprint card of defendant taken that morning prior to the habitual offender hearing on the basis that his attorney was not present. Defendant never made an objection to the prosecutor's introduction of the remainder of the State's exhibits. Under the circumstances, to suggest that the trial court's lack of a verbal ruling admitting these exhibits into evidence precludes them from being considered part of the record, is without merit.

ASSIGNMENT OF ERROR NUMBER TWO

In his second assignment of error, defendant argues that the trial court imposed an excessive sentence. Specifically, defendant argues that his threats that constituted the public intimidation conviction did not warrant a maximum sentence of ten years at hard labor.

Both the United States and Louisiana Constitutions prohibit the imposition of excessive or cruel punishment. U.S. Const. amend. VIII; La.

Const. art. I, § 20. A sentence is constitutionally excessive, even if it is within statutory limits, if it is grossly disproportionate to the severity of the offense or is nothing more than the needless imposition of pain and suffering. If the trial judge finds that an enhanced punishment mandated by the Habitual Offender Law, La. R.S. 15:529.1, 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, the trial judge has the option and duty to reduce such sentence to one that would not be constitutionally excessive. To determine whether a penalty is excessive, we must determine whether the penalty is so grossly disproportionate to the severity of the crime as to shock our sense of justice. **State v. Hayes**, 2002-1268, p. 3 (La. App. 1st Cir. 3/5/03), 845 So.2d 542, 544, writ denied, 2004-0047 (La. 12/17/04), 888 So.2d 860.

The sentencing range for the underlying offense, public intimidation, is a fine of not more than one thousand dollars, or imprisonment, with or without hard labor, for not more than five years, or both. La. R.S. 14:122. As a second felony habitual offender, defendant's enhanced sentencing range for his conviction for public intimidation was for a term of not less than two and one-half years and not more than ten years at hard labor. La. R.S. 15:529.1(A)(1)(a).

This Court has previously recognized that defendant has an extensive criminal history. See **State v. Smith**, 2003-1341 at p. 2, (La. App. 1st Cir. 2/23/04), 868 So.2d 322, 2004-1139 (La. 10/8/04), 883 So.2d 1008. The instant convictions arose while defendant was incarcerated for an unrelated matter. Defendant's continued pattern of committing offenses indicates that he is among the worst class of offenders. Moreover, the trial judge must be

mindful that the goals of the Habitual Offender Law are to deter and punish recidivism, and the sentencing court's role is not to question the wisdom of the Legislature in requiring enhanced punishments for multiple offenders. See **State v. Smith**, 2003-0917, p. 13 (La. App. 1st Cir. 12/31/03), 868 So.2d 794, 803. Considering all of the facts in this case, we do not find that the trial court's ten-year sentence was constitutionally excessive.

Defendant also complains that the habitual offender sentences are excessive in that they run consecutively rather than concurrently. La. Code Crim. P. art. 883 provides in pertinent part:

> If the defendant is convicted of two or more offenses based on the same act or transaction, or constituting parts of a common scheme or plan, the terms of imprisonment shall be served concurrently unless the court expressly directs that some or all be served consecutively. Other sentences of imprisonment shall be served consecutively unless the court expressly directs that some or all of them be served concurrently.

The usual rule is that sentences are to run concurrently rather than consecutively when the convictions arise out of a single course of conduct, at least for a defendant with no prior criminal record, and in the absence of a showing that public safety requires otherwise. **State v. Young**, 432 So.2d 1012, 1015 (La. App. 1st Cir. 1983). In the present case, defendant's convictions that were enhanced by the habitual offender adjudications did not arise out of a single course of conduct, but were separate offenses committed on separate dates.

Defendant was sentenced to the maximum sentence possible for the offense of which he was convicted, and the order that the sentence be served consecutively to other sentence imposed the same day resulted in a very severe sentence. However, the trial court is in a better position than we are to judge the threat posed to society by this defendant. The record reflects

that the recommendation following the presentencing investigation was that the defendant receive the maximum sentence. The court did not articulate any reasons for its sentencing decision, nor were any provisions of La.C.C.P. art. 894.1 referenced. While it would have been preferable had the court done so, after review of this record, we cannot say that the sentence imposed was constitutionally excessive.

HABITUAL OFFENDER ADJUDICATION AND SENTENCE AFFIRMED.