NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 1129

STATE OF LOUISIANA

VERSUS

CECIL POUNCEY III

Judgment rendered February 11, 2011.

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Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. 439232
Honorable Peter J. Garcia, Judge

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CECIL POUNCEY III
ANGIE, LA

DEFENDANT-APPELLANT
IN PROPER PERSON

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BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

PETTIGREW, J.

The defendant, Cecil Pouncey III, was charged by bill of information with one count of possession of cocaine, a violation of La. R.S. 40:967(C). He entered a plea of not guilty and was tried before a jury. The jury found him guilty as charged, and the trial court sentenced him to five years at hard labor. The State subsequently instituted habitual offender proceedings against him.[1] The defendant stipulated he was the same person convicted in the predicate offense. Thereafter, the trial court adjudicated him a second-felony habitual offender, vacated the original sentence, and sentenced him to ten years at hard labor. On appeal, this court affirmed the conviction, but vacated the habitual offender adjudication and sentence and remanded for further proceedings. See **State v. Pouncey**, 2009-0075 (La. App. 1 Cir. 6/12/09), 11 So.3d 1244 (unpublished), writ denied, 2009-1691 (La. 5/21/10), 36 So.3d 221. Upon remand, the State placed documentation concerning the predicate offense into the record, the trial court found the predicate was adequate and sufficient to establish the habitual offender status of the defendant, and resentenced him to ten years at hard labor. The defendant now appeals, attacking the habitual offender adjudication and sentence. For the following reasons, we affirm the habitual offender adjudication and sentence.

FACTS

The facts concerning the instant offense were set forth in our original decision in this matter. See **Pouncey**, 11So.3d 1244.

HABITUAL OFFENDER ADJUDICATION

In counseled assignment of error number 1, the defendant argues the trial court erred in denying the motion to quash use of the predicate offense because the State failed to honor the plea agreement made in connection with the predicate. In his pro se brief, the defendant argues this court vacated the habitual offender adjudication and sentence, and thus, the State had no authority to "get a second bite of the apple" and

[1] The habitual offender bill of information set forth that on April 9, 2002, under Twenty-second Judicial District Court Docket #344247, the defendant pled guilty to possession of cocaine.

was guilty of prosecutorial vindictiveness by introducing documentation to support use of the predicate offense to establish habitual offender status.

We note the defendant misstates the ruling of this court in regard to his original appeal in this matter. We affirmed the conviction, vacated the habitual offender adjudication and sentence, and remanded the case for further proceedings. See **Pouncey**, 11 So.3d 1244. Thus, our original decision did not foreclose a new habitual offender hearing on remand or in any way prohibit the State from establishing the habitual offender status of the defendant at such a hearing.

As set forth by the Louisiana Supreme Court in **State v. Dorthey**, 623 So.2d 1276 (La. 1993),

> Under Louisiana's Habitual Offender law[,] a bill of information alleging that a defendant is a recidivist does not charge a new crime but merely advises the trial court of circumstances, and seeks enhanced punishment following a defendant's most recent conviction. "The enhancement of the penalty for habitual offenders convicted of a new felony only addresses itself to the sentencing powers of the trial judge after conviction and has no functional relationship to the innocence or guilt of the instant crime." Thus, a ruling at a multiple offender hearing is not "a definitive judgment" but merely "a 'finding' ancillary to the imposition of sentence."
>
> Furthermore, because the hearing is not a trial, legal principles such as res judicata, double jeopardy, the right to a jury trial and the like do not apply. Louisiana's Habitual Offender statute is simply an enhancement of punishment provision. It does not punish status and does not on its face impose cruel and unusual punishment.

Dorthey, 623 So.2d at 1278-1279 (citations omitted).

In regard to the defendant's counseled argument, we note the record indicates the argument was not presented to the trial court, and thus, was not preserved for appeal. See La. R.S. 15:529.1(D)(1)(b) (prior to amendment by 2010 La. Acts No. 911, § 1). ("Any challenge to a previous conviction ... which is not made before sentence is imposed may not thereafter be raised to attack the sentence.") **State v. Williams**, 2002-1030, p. 7 (La. 10/15/02), 830 So.2d 984, 988. ("The general rule established by [the Louisiana Supreme Court] is that issues not submitted to the trial court for decision will not be considered by the appellate court on appeal.") These assignments of error are without merit.

EXCESSIVE SENTENCE

In counseled assignment of error number 2, the defendant argues the sentence imposed on remand was excessive because he is a non-violent offender with a drug addiction, the instant offense and the predicate offense were "relatively minor," and the vast majority of persons simply possessing crack cocaine for personal use[2] get probation under La. Code Crim. P. art. 893. In his pro se brief, the defendant argues the sentence imposed was excessive under La. Const. art. I, § 20.

Article I, Section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Hurst**, 99-2868, pp. 10-11 (La. App. 1 Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962. Maximum sentences may be imposed only for the most serious offenses and the worst offenders, or when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. **State v. Miller**, 96-2040, p. 4 (La. App. 1 Cir. 11/7/97), 703 So.2d 698, 701, writ denied, 98-0039 (La. 5/15/98), 719 So.2d 459.

Any person who violates La. R.S. 40:967(C) as to any controlled dangerous substance classified in Schedule II, other than pentazocine, shall be imprisoned with or without hard labor for not more than five years and, in addition, may be sentenced to pay

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[2] We do not address the accuracy of this claim. We note, however, Covington Police Department Sergeant Stephen Culotta testified at trial that he observed Mark Muse leaning into the defendant's vehicle in an area known for high crime and narcotics activity, and that the defendant was subsequently apprehended with approximately nine rocks of crack cocaine on his person. See **Pouncey**, 11 So.3d 1244.

a fine of not more than five thousand dollars. La. R.S. 40:967(C)(2). Cocaine is a controlled dangerous substance classified in Schedule II. See La. R.S. 40:964, Schedule II, (A)(4).

Any person who, after having been convicted within this state of a felony, thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows: if the second felony is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then the sentence to imprisonment shall be for a determinate term not less than one-half the longest term and not more than twice the longest term prescribed for a first conviction. La. R.S. 15:529.1(A)(1). Upon remand, the defendant was sentenced as a second-felony habitual offender to ten years at hard labor.

The sentence imposed was not grossly disproportionate to the severity of the offense and, thus, was not unconstitutionally excessive. Additionally, the defendant poses an unusual risk to the public safety due to his past conduct of repeated criminality. In imposing sentence prior to the defendant's habitual offender adjudication, the court noted: the defendant had two prior felony convictions; any lesser sentence would deprecate the seriousness of the offense; and there was a "great likelihood" that the defendant would commit another crime if not incarcerated. The defendant was not eligible for probation under the portion of La. Code Crim. P. art. 893(A) providing "where suspension is allowed under the law" because he was a habitual offender and suspension of sentence is prohibited for habitual offenders by law. La. R.S. 15:529.1(G) (prior to amendment by 2010 La. Acts No. 69, § 1). ("Any sentence imposed under the provisions of [La. R.S. 15:529.1] shall be without benefit of probation or suspension of sentence.")

These assignments of error are without merit.

HABITUAL OFFENDER ADJUDICATION AND SENTENCE AFFIRMED.