

[3] 15The Board of Parole alone may place conditions on Defendant's parole under La.R.S. 15:574.4. The trial court is not authorized to place conditions on Defendant's parole. Therefore, the condition placed on Defendant's parole is, hereby, vacated. See *State v. Craft*, 01-248 (La. App. 3 Cir. 10/3/01), 796 So.2d 907; *State v. Foshee*, 99-1423 (La.App. 3 Cir. 4/5/00), 756 So.2d 693.

DECREE

Defendant's sentence of four years is affirmed. The trial court's order of restitution as a condition of parole is, hereby, vacated.

AFFIRMED IN PART; VACATED IN PART.



2012-668 (La.App. 3 Cir. 12/5/12)

STATE of Louisiana

v.

Patrick Darnell TURNER.

No. 12-668.

Court of Appeal of Louisiana,
Third Circuit.

Dec. 5, 2012.

Background: Defendant was convicted, on plea of guilty before the Eleventh Judicial District Court, Sabine Parish, No. 68855, Stephen B. Beasley, J., of one count of intentional exposure to the AIDS virus, and was sentenced to eight years at hard labor. Defendant appealed.

Holding: The Court of Appeal, Amy, J., held that defendant's sentence was not unconstitutionally excessive.

Affirmed.

1. Sentencing and Punishment ⇌94, 98, 313

In considering a defendant's criminal history for sentencing purposes, the court may take into account not only prior convictions, but all evidence of prior criminal activity; in so doing, the court may consider evidence that would otherwise be inadmissible at trial, including records of prior arrests, hearsay evidence of suspected criminal activity, conviction records, and evidence of uncharged offenses or offenses that were nolle prossed.

2. Sentencing and Punishment ⇌97, 98

Trial court properly considered charges pending in another jurisdiction in sentencing defendant who pled guilty to one count of intentional exposure to the AIDS virus; defendant's post-conviction bail was revoked after the trial court learned that the defendant had been charged with intentional exposure to the AIDS virus in another state, and trial court expressed concern at sentencing that defendant might have committed same offense for which he was charged while out on bail. LSA-R.S. 14:43.5.

3. Assault and Battery ⇌100

Sentencing and Punishment ⇌60, 97, 1485

Sentence of eight years at hard labor, imposed upon defendant who pled guilty to one count of intentional exposure to the AIDS virus, was not unconstitutionally excessive; sentence was within statutory guidelines, defendant's sentencing exposure was substantially reduced by plea agreement, and there was evidence in record that defendant might have committed same offense for which he was charged while out on post-conviction bail. LSA-Const. Art. 1, § 20; LSA-R.S. 14:43.5.

4. Sentencing and Punishment ¶60

Where a defendant pleads guilty to an offense which inadequately describes the entire course of the defendant's conduct, a court determining sentence may consider the benefit to the defendant obtained by the plea agreement; this consideration is especially relevant in cases where the defendant's sentencing exposure is substantially reduced pursuant to the plea agreement.

Don M. Burkett, District Attorney,
Anna L. Garcie, Assistant District Attorney,
Many, LA, for Appellee, State of Louisiana.

Alex J. Washington, Washington &
Wells, Shreveport, LA, for Defendant/Appellant,
Patrick Darnell Turner.

Court composed of MARC T. AMY,
ELIZABETH A. PICKETT, and BILLY
HOWARD EZELL, Judges.

AMY, Judge.

1The defendant was initially charged with four counts of intentional exposure to the AIDS virus, a violation of La.R.S. 14:43.5. Pursuant to a plea agreement, the defendant eventually pled guilty to one count of intentional exposure to the AIDS virus. The trial court imposed a sentence

1. We observe that in *State v. Gamberella*, 633 So.2d 595, 602–03 (La.App. 1 Cir.1993), writ denied, 94–200 (La.6/24/94), 640 So.2d 1341 (footnote omitted), the first circuit discussed the legislature's use of the phrase "any acquired immunodeficiency syndrome (AIDS) virus," stating:

Defendant further notes that the phrase "acquired immunity deficiency syndrome (AIDS) virus" is a misnomer because the actual virus is the human immunodeficiency virus (HIV). AIDS is not the virus but, rather, is a clinical syndrome which is diag-

of eight years imprisonment at hard labor. The defendant appeals. For the following reasons, we affirm.

Factual and Procedural Background

The defendant, Patrick Darnell Turner, was charged with four counts of intentional exposure to the AIDS virus, a violation of La.R.S. 14:43.5.¹ The defendant subsequently pled guilty to one count of intentional exposure to the AIDS virus. At the guilty plea hearing, the State provided the factual basis for the charges, stating:

Your Honor, with regard to count one, between the months of November 8, 2010 through December 8, 2010, he was in a relationship with someone who we will identify by the initials of [L.M.];[²] that they became involved in a sexual relationship. She had unprotected sex with him. It was after that, that she learned—that she found paperwork that showed where he had been diagnosed and was positive for AIDS. And then an investigation—she contacted law enforcement and then an investigation was conducted and subsequently he was actually charged with four counts because there were at least three other individuals.

2The trial court accepted the defendant's guilty plea and, pursuant to a plea agreement, the State dismissed the other three counts of the indictment and additionally

nosed when a person, who is infected with the HIV virus, develops one of a certain list of infections. Despite the legislature's failure to correctly label the virus which causes AIDS, the language of the statute is not vague. As Dr. Brandon testified, although the medical community makes a distinction between a person being HIV positive and having AIDS, "people have called it for years the AIDS virus."

2. The victim's initials are used pursuant to La.R.S. 46:1844(W).

dismissed a new charge under docket number 69904.

The record indicates that the defendant was released on bail pending his sentencing hearing.³ However, the trial court revoked the defendant's bail after being notified that the defendant had an outstanding warrant for one count of intentional exposure to the AIDS virus from Natchitoches Parish. Thereafter, at the sentencing hearing, the defendant's mother and the victim impact coordinator testified. After hearing the testimony and considering the pre-sentence investigation, the trial court imposed a sentence of eight years at hard labor served for the sole count of intentional exposure to the AIDS virus.

The defendant appeals, asserting that his sentence is unconstitutionally excessive.

Discussion

Errors Patent

Pursuant to La.Code Crim.P. art. 920, all criminal appeals are reviewed for errors patent on the face of the record. After reviewing the record, the court finds no errors patent.

Excessive Sentence Claims

The defendant asserts that his sentence is unconstitutionally excessive. In *State v. Jacobs*, 11-363, pp. 22-23 (La.App. 3 Cir. 10/5/11), 74 So.3d 884, 898-99, *writ denied*, 11-2469 (La.3/9/12), 84 So.2d 552, a panel of this court reiterated the standard for reviewing excessive sentence claims, stating:

[Louisiana Constitution Article] I, § 20 guarantees that, "[n]o law shall subject any person to cruel or unusual punishment." To constitute an excessive sentence, the reviewing court must find the penalty so grossly disproportionate to the severity of the

crime as to shock our sense of justice or that the sentence makes no measurable contribution to acceptable penal goals and is, therefore, nothing more than a needless imposition of pain and suffering. The trial court has wide discretion in the imposition of sentence within the statutory limits and such sentence shall not be set aside as excessive absent a manifest abuse of discretion. The relevant question is whether the trial court abused its broad sentencing discretion, not whether another sentence might have been more appropriate.

State v. Barling, 00-1241, 01-1591, p. 12 (La.App. 3 Cir. 1/31/01), 779 So.2d 1035, 1042, *writ denied*, 01-838 (La.2/1/02), 808 So.2d 331 (citations omitted).

....

Even though a penalty falls within the statutory sentencing range, it may still be unconstitutionally excessive:

In deciding whether a sentence is shocking or makes no meaningful contribution to acceptable penal goals, an appellate court may consider several factors including the nature of the offense, the circumstances of the offender, the legislative purpose behind the punishment and a comparison of the sentences imposed for similar crimes. While a comparison of sentences imposed for similar crimes may provide some insight, "it is well settled that sentences must be individualized to the particular offender and to the particular offense committed." Additionally, it is within the purview of the trial court to particularize the sentence because the trial judge "remains in the best position to assess the aggravating and mitigating circumstances presented by each case."

3. One of the conditions of the defendant's bail

was that he refrain from sexual intercourse.

State v. Smith, 02–719, p. 4 (La.App. 3 Cir. 2/12/03), 846 So.2d 786, 789, *writ denied*, 03–562 (La.5/30/03), 845 So.2d 1061 (citations omitted). “[T]he trial judge need not articulate every aggravating and mitigating circumstance outlined in art. 894.1[;] the record must reflect that he adequately considered these guidelines in particularizing the sentence to the defendant.” *State v. Smith*, 433 So.2d 688, 698 (La.1983).

[1] Further, in considering the defendant’s criminal history, the trial court may take into account not only prior convictions, but all evidence of prior criminal activity. *State v. J.S.*, 10–1233 (La.App. 3 Cir. 5/11/11), 63 So.3d 1185. In so doing, the trial court may consider evidence that would otherwise be inadmissible at trial, including 1 “records of prior arrests, hearsay evidence of suspected criminal activity, conviction records, and evidence of uncharged offenses or offenses that were *nolle prossed*.” *Id.* at 1192.

Pursuant to La.R.S. 14:43.5(E)(1), “[w]hoever commits the crime of intentional exposure to [the] AIDS virus shall be fined not more than five thousand dollars, imprisoned with or without hard labor for not more than ten years, or both.” In *State v. Turner*, 05–78 (La.App. 1 Cir. 11/4/05), 927 So.2d 438, the defendant was charged with two counts of intentional exposure to the AIDS virus. The defendant subsequently pled guilty to both counts of the indictment. The trial court warned the defendant that if she failed to appear for an interview in connection with the pre-sentence investigation, she would not receive a sentence of probation. However, the defendant failed to appear for the interview and was unable to be contacted. Although the defendant in *Turner* was a first offender, the pre-sentence investigation recommended that, given her inability to comply with the trial court’s orders, that

a sentence of incarceration was appropriate. Noting that the defendant was “clearly aware” that she “probably sentenced two other people to the death sentence,” the trial court imposed a sentence of five years at hard labor on each count, to be served concurrently. *Id.* at 441. Based on the information in the record, the first circuit found that the defendant’s sentence was not unconstitutionally excessive. *Id.*

Similarly, in *Gamberella*, 633 So.2d 595, the defendant was convicted of one count of intentional exposure to the AIDS virus. The state filed a habitual offender bill, and, after determining that the defendant was a second felony offender, the trial court sentenced the defendant to ten years at hard labor. The first circuit noted that the defendant’s prior conviction was for attempted simple burglary and his probation had been revoked. The first circuit found that the defendant’s sentence was not excessive, stating:

1 [The defendant] did not inform the victim, did not inform his current girlfriend (until the time of his arrest), and did not inform his baby’s doctor. Considering defendant’s blatant disregard for the welfare of the women he was involved with sexually, the sentence chosen by the court is not grossly disproportionate to the crime or the needless imposition of pain and suffering.

Id. at 607.

Here, the trial court imposed a sentence of eight years at hard labor. At the sentencing hearing, the trial court noted that the defendant was a first felony offender, that he had a high school education, and that he had been employed since 2004. The defendant’s mother and the victim impact coordinator both testified at the hearing. Additionally, the trial court was privy to a pre-sentence investigation.

[2] The defendant specifically contends that the trial court erred in considering information regarding pending charges in other jurisdictions. In sentencing the defendant, the trial court stated:

I know these are just mere allegations but on the PSI it says that on February 3, 2011 you were arrested in Natchitoches Parish and charged with the felony offense of intentional exposure of others to the AIDS virus. And then you entered a plea of not guilty in May of 2011. And then—I don't see it in the pre-sentence investigation but I just want to say, and you may want to reschedule this, Mr. Washington, to look into it further, but it came to my attention—I didn't talk to the detective but one of the detectives called my secretary, Martha Hagelin, and said that now there is a complaint coming out of Texas regarding the same type of charge. I don't know if it's been filed or not yet but I'm saying those things—I'm not saying that—here is a part of the problem I'm having and you don't have to say anything to me if you don't want to, Mr. Turner, is that I allowed you to plead guilty and I ordered a pre-sentence investigation to be conducted and then while you were out on bail I'm concerned that you may have exposed one or more females to the AIDS virus.

We note that the trial court is permitted to consider all criminal activity, both convictions and “records of prior arrests, hearsay evidence of suspected criminal activity, conviction records, and evidence of uncharged offenses or offenses that were *nolle prossed*.” *State v. J.S.*, 63 So.3d at 1192. The record indicates that the defendant's post-conviction bail was revoked after the trial court learned that the 16defendant had been charged with intentional exposure to the AIDS virus in Natchitoches Parish. At the sentencing hearing, the trial court expressed concern

that, while out on bail, the defendant may have exposed other unsuspecting sexual partners to HIV. Accordingly, we find no merit to the defendant's argument in this regard.

[3, 4] The defendant's eight-year term of imprisonment is within the statutory guidelines. *See* La.R.S. 14:43.5(E)(1). Further, the record indicates that the defendant's sentencing exposure was significantly reduced by agreeing to the plea agreement. The record indicates that, in exchange for the defendant's guilty plea, the State agreed to dismiss the remaining three counts of intentional exposure to the AIDS virus, as well as a separate charge under a different docket number. Where the defendant pleads guilty to an offense which inadequately describes the entire course of the defendant's conduct, the trial court may consider the benefit to the defendant obtained by the plea agreement. *State v. Williams*, 02-707 (La.App. 3 Cir. 3/5/03), 839 So.2d 1095. This consideration is especially relevant in cases where the defendant's sentencing exposure is substantially reduced pursuant to the plea agreement. *Id.*

In light of the substantial benefit afforded the defendant pursuant to his plea agreement and the evidence in the record that the defendant may have committed the same offense for which he was charged in this case while out on post-conviction bail, the sentence imposed by the trial court is not grossly disproportionate to the crime or the needless imposition of pain and suffering. Accordingly, we find that the trial court did not abuse its discretion in fashioning the defendant's sentence.

This assignment of error is without merit.

17DECREE

For the foregoing reasons, the conviction and sentence of the defendant, Patrick

Darnell Turner, for intentional exposure to the AIDS virus, a violation of La.R.S. 14:43.5, is affirmed.

AFFIRMED.



2012-671 (La.App. 3 Cir. 12/5/12)

Heather TATE, et al.

v.

Robert TURNAGE, et al.

No. 12-671.

Court of Appeal of Louisiana,
Third Circuit.

Dec. 5, 2012.

Background: Plaintiff driver, who was injured in auto accident as she was attempting to make left turn, brought action against defendant driver, who hit her. After bench trial, the Twelfth Judicial District Court, Parish of Avoyelles, No. 2011-6754-A, Mark A. Jeansonne, J., found plaintiff 10% liable and defendant 90% liable, and defendant appealed.

Holding: The Court of Appeal, Gremillion, J., held that trial court did not abuse its discretion in finding defendant 90% at fault for colliding with plaintiff's vehicle as she was making left turn.

Affirmed.

1. Automobiles ⇨171(12), 242(4.3)

While a left-turning motorist generally has a heightened duty of care, a presumption of negligence against the left-turning motorist will not apply if the scope of the duty does not extend to the plaintiff.

2. Automobiles ⇨171(12)

Left-turning motorist is only required to make proper observation that the left-turn can be made safely without endangering other motorists.

3. Automobiles ⇨171(1, 9)

Once defendant driver left the gap for plaintiff driver, who was exiting fast food restaurant and who was making left turn, to enter, defendant had a duty to observe before closing the gap, and location of the damage over the right rear tire well of plaintiff's car indicated that defendant proceeded unlawfully after plaintiff had nearly completed her left turn maneuver.

4. Automobiles ⇨244(11, 60)

Trial court did not abuse its discretion in finding defendant driver 90% at fault for colliding with plaintiff driver's vehicle as she was making left turn; plaintiff had nearly cleared defendant's lane and was half-way into the turning lane when defendant hit the rear of plaintiff's car, and defendant admitted he did not look right before proceeding once the light had turned green after he purposefully left a gap for plaintiff exiting fast food restaurant.

Mark J. Neal, Neal Law Firm, Monroe, LA, for Defendant/Appellant, Robert Turnage, Southern Casualty Ins. Co.

Cory P. Roy, Law Offices of Cory P. Roy, Marksville, LA, for Plaintiffs/Appellees, Heather Tate, et al.

Court composed of SYLVIA R. COOKS, OSWALD A. DECUIR, and SHANNON J. GREMILLION, Judges.

GREMILLION, Judge.

1The defendants, Robert Turnage and Southern Casualty Insurance Company