NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

VERSUS

WAYNE EDWARDS

NO. 02-KA-371

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 01-1513, DIVISION "J"
HONORABLE STEPHEN J. WINDHORST, JUDGE

SEPTEMBER 30, 2002

THOMAS F. DALEY
JUDGE

Panel composed of Judges Edward A. Dufresne, Jr.,
James L. Cannella, and Thomas F. Daley

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AFFIRMED AND REMANDED WITH INSTRUCTIONS

Defendant Wayne Edwards appeals his conviction of possession of cocaine, a violation of LSA-R.S. 40:967C. Defendant pled guilty under the provisions of State v. Crosby, 338 So.2d 584 (La. 1976), reserving the right to appeal the trial court's denial of his Motion to Suppress Evidence.

On March 23, 2001, the Jefferson Parish District Attorney filed a Bill of Information charging defendant with possession of cocaine, a violation of LSA-R.S. 40:967C. John Cotton was charged as a co-defendant.[1] Defendant was arraigned on May 4, 2001, and pled not guilty.

Defendant filed a Motion to Suppress Evidence. The court took up the matter on July 10, 2001, and the State submitted on the police report, State's Exhibit 1. The court denied the motion. Jury selection began that day, but was discontinued when defendant voiced his intention to plead guilty. The trial judge apprised defendant of

[1]This appeal concerns only Wayne Edwards.

his constitutional rights pursuant to Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274. Defendant indicated that he understood his rights, and that he wished to waive them. Defendant withdrew his plea of not guilty, and entered a plea of guilty as charged. Defendant reserved his right under the provisions of State v. Crosby, supra, to appeal the trial court's denial of his Motion to Suppress.

On July 23, 2001, the trial court sentenced defendant to serve two and one-half years at hard labor, with a recommendation that defendant be assigned to the Impact Program. On that day, defendant filed a Notice of Intention to Appeal, which the trial court granted.

The State filed a habitual offender Bill of Information on September 27, 2001, alleging defendant to be a second felony offender. On October 18, 2001, the trial court advised defendant of his right to remain silent and his right to a hearing on the habitual offender bill. Defendant waived those rights, and admitted to the allegations in the bill. The trial court vacated defendant's original sentence, and imposed an enhanced sentence of two and one-half years at hard labor, without benefit of probation or suspension of sentence.[2] Defendant orally reasserted his Motion for Appeal, and the court granted the motion.

FACTS

The facts underlying the instant offense were adduced at the hearing on defendant's Motion to Suppress Evidence. The State submitted the matter on the information contained in the incident report prepared by Deputy John Doyle of the Jefferson Parish Sheriff's Office.

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[2]The court's commitment is contained in the record, but defendant did not designate the transcript of the habitual offender proceedings. Defendant does not raise any issues relating to those proceedings.

According to Doyle's report, he and Deputy Harold Bourgeois were on patrol on March 3, 2001 when they stopped at the parking lot at 6613 Westbank Expressway in Marrero. There is a store at the front of the parking lot, adjacent to the street. There is also a motel at the back of the parking lot, which was known to the officers as a meeting place for drug traffickers. A third officer, Deputy Beavers, drove into the parking lot from the east. Doyle and Bourgeois entered from the west.

Doyle spotted defendant and John Cotton standing between two parked cars, a black Nissan Maxima and a green Ford Mustang. The driver's side door on the Mustang was open. Defendant saw Deputy Beavers, and using the open door as cover, he removed an item from his waistband. Defendant then dropped the object on the floorboard of the Mustang.

Deputy Beavers exited his vehicle and approached defendant. Defendant and his companion grew visibly nervous, according to Doyle's report. Doyle and Bourgeois saw defendant abruptly shove an unknown object into his right front pocket. Doyle looked into the open door of the Mustang and saw a 9mm handgun on the driver's side floorboard. Doyle told Bourgeois about the gun. Bourgeois and Doyle then observed a clear plastic bag protruding from the right front pocket of defendant's pants. Defendant attempted to conceal the object. Doyle and Bourgeois seized the bag, and saw that it contained an off-white powder residue. Inside the bag was a second plastic bag containing an off-white powder. The officers believed the substance to be cocaine. The officers also seized the gun.

The officers discovered that defendant's companion, John Cotton, was wanted on traffic warrants. They placed him under arrest. A search of Cotton, incident to his arrest, revealed a clear plastic bag in his right front pocket, which contained an off-white powder. The officers believed that substance to be cocaine.

Both subjects were advised of their Miranda[3] rights. The officers interviewed defendant and Cotton, and learned the Ford Mustang belonged to Wayne Edwards. The officers turned over the powder substance to a narcotics agent, who field tested it. The result was positive for cocaine. Crime scene technician Duffourc took possession of the seized firearm.

ASSIGNMENT OF ERROR NUMBER ONE

Defendant argues the trial court erred in denying his Motion to Suppress the Evidence. Specifically, defendant asserts that his behavior was not sufficient justification for an investigatory stop, an arrest, or the warrantless search and seizure conducted by the officers.

The Fourth Amendment to the United States Constitution and Article I, § V of the Louisiana Constitution prohibit unreasonable searches and seizures.[4] However, the right of law enforcement officers to stop and interrogate one reasonably suspected of criminal behavior is recognized by State and federal jurisprudence. Terry v. Ohio.[5] The Terry standard is codified in LSA-C.Cr.P. art. 215.1, which allows a police officer "to stop a person in a public place whom he reasonably suspects is committing, has committed, or is about to commit an offense" and to demand that the person identify himself and explain his actions.

Reasonable suspicion for an investigatory stop is something less than probable cause, and must be determined under the facts of each case by whether the officer had

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[3] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[4] State v. Ponder, 607 So.2d 857, 859 (La. 1992); State v. Belton, 441 So.2d 1195, 1198 (La. 1983), cert. denied, 466 U.S. 953, 104 S.Ct. 2158, 80 L.Ed.2d 543 (1984).

[5] 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); State v. Belton, supra; State v. Williams, 98-1006 (La. App. 5 Cir. 3/30/99), 735 So.2d 62, writ denied, 99-1077 (La. 9/24/99), 747 So.2d 1118.

sufficient knowledge of facts and circumstances to justify an infringement on the individual's right to be free from governmental interference.[6] An unparticularized hunch is insufficient to establish reasonable grounds for an investigatory stop.[7] Absent reasonable suspicion, an investigatory stop is illegal, and the evidence seized as a result is suppressible.

The determination of reasonable grounds for an investigatory stop, or probable cause for arrest, does not rest on the officer's subjective beliefs or attitudes, but turns on a completely objective evaluation of all the circumstances known to the officer at the time of his challenged action.[8] In considering those circumstances, a reviewing court should give deference to the inferences and deductions of a trained police officer "that might well elude an untrained person."[9] An officer's experience, his knowledge of recent criminal patterns and his knowledge of an area's frequent incidence of crime, are factors that may support reasonable suspicion for an investigatory stop.[10]

Even absent reasonable suspicion, a police officer has the same right as any citizen to approach an individual and ask questions. Police officers do not "seize" a person within the meaning of the Fourth Amendment by merely identifying themselves, and without taking any additional measures to assert their authority.[11]

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[6]State v. Duckett, 99-314, p. 5 (La. App. 5 Cir. 7/27/99), 740 So.2d 227, 230.

[7]State v. Camese, 00-1479, p. 5 (La. App. 5 Cir. 4/11/01), 786 So.2d 763, 766.

[8]State v. Kalie, 96-2650, pp. 1-2 (La. 9/19/97), 699 So.2d 879, 880, per curiam; State v. Butler, 01-KA-0907, p. 8 (La. App. 5 Cir. 2/13/02), 812 So.2d120, 124.

[9]State v. Huntley, 97-0965, p. 2 (La. 3/13/98), 708 So.2d 1048, 1049 (quoting United States v. Cortez, 449 U.S. 411, 418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981)).

[10]State v. Flagg, 01-65 (La. App. 5 Cir. 7/30/01), 792 So.2d 133; State v. Martin, 99-123 (La. App. 5 Cir. 6/1/99), 738 So.2d 98.

[11]See, State v. Jackson, 00-3083 (La. 3/15/02), ___ So.2d ___; State v. Watson, 99-1448, p. 11 (La. App. 5 Cir. 8/23/00), 774 So.2d 232, 239, writ denied, 00-2968 (La. 9/28/01), 798 So.2d 106.

The facts as stated in the police report support reasonable suspicion for an investigatory stop. Deputy Doyle indicated that the incident occurred at approximately 2216 hours (10:16 p.m.), in a parking lot that was known to him as a meeting place for drug traffickers. Defendant and Cotton were loitering next to two parked cars. The report indicates that Deputy Beavers was driving a marked police unit. When defendant spotted Beavers's car, he ducked behind the door of his own car, pulled an unknown object from his waistband, and dropped it on the driver's side floorboard. Doyle and his partner, Deputy Bourgeois, believed the object was a firearm. When Beavers exited his car, defendant and his companion grew visibly nervous. Doyle and Bourgeois saw defendant shove something into his right front pocket. This Court has found that presence in a high crime area, accompanied by nervousness, startled behavior, flight, or suspicious actions upon the approach of officers, is sufficient to justify an investigatory stop.[12]

Defendant attempts to analogize the facts in the instant case with those in State v. Hill, 01-1372 (La. App. 5 Cir. 5/15/02), __ So.2d __, in which this Court found that the defendant's very lack of suspicious actions, in avoiding moving or looking at the officer as he passed in his marked police car, were not sufficient to support reasonable suspicion for an investigatory stop. The facts in the instant case are, however, distinguishable, in that defendant and his companion, unlike the defendant in Hill, moved to conceal items, and otherwise exhibited suspicious behavior when they spotted the officers.

Although the officers were entitled to approach and/or stop defendant, Article 215.1 authorized them only to search defendant's outer clothing for weapons.[13] There

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[12]State v. Duckett, 99-314 at p. 7, 740 So.2d at 230.

[13]An officer who lawfully pats down a suspect's outer clothing pursuant to Article 215.1 and feels an object whose contour and mass makes its identity immediately apparent may seize the object.

is nothing in the report to indicate that the officers conducted a pat-down for weapons. For the officers to go beyond the parameters of Article 215.1 would have required probable cause. The seizure of the cocaine from defendant's pants pocket was legal only if it was found during a search pursuant to a warrantless arrest based on probable cause, or if it was seized pursuant to the "plain view" exception to the warrant requirement. The State argues that the circumstances supported probable cause to seize the plastic bag. Deputy Doyle's report indicates that, aside from the instant cocaine offense, the police charged defendant with illegal carrying of weapons and possession of a firearm while in possession of a controlled dangerous substance. Both charges fall under the provisions of LSA-R.S. 14:95. According to the police report, Deputies Doyle and Bourgeois, after retrieving a gun from defendant's car, then spotted a clear plastic bag protruding from the right front pants pocket of defendant's blue jeans. Doyle's report goes on to state:

> Officer Bourgeois and I found these observations, along with Edwards abrupt attempt to conceal the object to be consistent with the concealing of illegal contraband. Officer Bourgeois and I knowing that street level narcotics are usually packaged in clear plastic bags, retrieved the bag. In retrieving the bag Officer Bourgeois and I observed the bag to contain an off white powder residue, and to contain another bag which contained an off white substance. Officer Bourgeois and I found these observations to be consistent with cocaine.

It was at that point that the officers placed defendant in handcuffs.

A lawful arrest is based on probable cause. State v. Joseph.[14] "Probable cause to arrest exists when the facts and circumstances within the officer's knowledge are sufficient to justify a man of ordinary caution in believing the person to be arrested has committed a crime."[15] Doyle states in his report that he found defendant's behavior

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See, Minnesota v. Dickerson, 508 U.S. 366, 375, 113 S.Ct. 2130, 2136-2137, 124 L.Ed.2d 334 (1993).

[14]99-1234 (La. App. 5 Cir. 3/22/00), 759 So.2d 136.

[15]Joseph, 99-1234 at p. 5, 759 So.2d at 139.

in throwing an unknown object through the open car door to be consistent with that of a subject illegally carrying a firearm.

Also, in his report, Deputy Doyle submits that combined with defendant's attempt to conceal a plastic bag in his pocket, and the officers' knowledge of the packaging of cocaine, made it immediately apparent to the officers that defendant possessed contraband.

The question of whether an object is "immediately apparent" as contraband is sometimes a difficult one. In Texas v. Brown, supra, the United States Supreme Court held that the seizure of an opaque, tied-off balloon observed by an officer during a traffic stop was justified under the plain view exception. When the defendant in that case was stopped, he removed the object from his pocket and placed it beside his leg on the seat of the vehicle he was driving. The officer could see into the vehicle's glove compartment as the defendant retrieved his registration, and observed plastic vials, a quantity of loose white powder, and an open package of party balloons. Based on the officer's knowledge that "balloons tied in the manner of the one possessed by Brown were frequently used to carry narcotics," plus the officer's observation of the contents of the glove compartment, the Court concluded that "[t]he fact that [the police officer] could not see through the opaque fabric of the balloon is all but irrelevant: the distinctive character of the balloon itself spoke volumes as to its contents—particularly to the trained eye of the officer." State v. Brown.[16]

In State v. James[17], the Louisiana Supreme Court addressed the issue of certain packaging as contraband:

> In Arkansas v. Sanders, 442 U.S. 753, 764, n. 13, 99 S.Ct. 2586, 2593, 61 L.Ed.2d 235 (1979), rev'd on other grounds, California v.

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[16]460 U.S. at 743, 103 S.Ct. at 1543-1544.

[17]99-3304, p. 1 (La. 12/8/00), 795 So.2d 1146, 1147 (per curiam).

> Acevedo, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991), the Supreme Court observed that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment . . . some containers . . . by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance." Containers of such distinctive character have included the tied-off balloon filled with heroin spotted by the police in plain view in Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983), the silver duct-taped "kilo brick" observed by the officers in United States v. Prandy-Binett, 995 F.2d 1069 (D.C. Cir. 1993), and the glassine bag filled with marijuana within the "plain feel" of the police in United States v. Proctor, 148 F.3d 39 (1st Cir. 1998).

In James, the issue was whether a film canister fell into the above-described category. The supreme court concluded that "film canisters are not so peculiarly associated with drug trafficking that the plain feel or plain view of their outer surfaces is the functional equivalent of the plain view or feel of their contents. . . ."[18] See also, State v. Barney[19], in which this Court recognized that a matchbox is not in and of itself contraband.[20]

In contrast, the court in State v. Perrot[21] held that a cellophane bag containing marijuana was lawfully seized from a defendant's pocket under the plain view exception. In that case, a police officer noticed a clear cellophane bag protruding from the defendant's pocket during an investigatory stop. The officer believed that it was of the type commonly used to wrap marijuana, and he stated that approximately an inch and one-half to two inches of the bag was visible. The court reasoned that the officer had probable cause to seize the bag because, based on the officer's "personal

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[18]State v. James, 99-3304 at p. 6, 795 So.2d at 1149.

[19]97-777, pp. 8-9 (La. App. 5 Cir. 2/15/98), 708 So.2d 1205, 1209.

[20]Both James and Barney are "plain feel" cases. They can nevertheless be analogized to the instant case, because the "plain feel" exception to the warrant requirement follows the same reasoning as does the "plain view" exception. See, Minnesota v. Dickerson, 508 U.S. at 376-377, 113 S.Ct. at 2130.

[21]600 So.2d 805 (La. App. 3 Cir. 1992).

experience," there was probable cause to believe the cellophane bag contained contraband.

In State v. Mayberry[22], the court found that officers properly seized drugs from a lawfully stopped individual, where the man quickly raised his shirt without the officers frisking him after officers asked if the individual was carrying a weapon, officers immediately saw a plastic bag protruding from the man's navel, and officers knew that plastic bags often contain cocaine and that drug dealers sometimes store drugs in their navels. As in the instant case, the officers did not see the contraband until after they had seized the bag.

In denying the defendant's Motion to Suppress in the instant case, the trial judge commented:

> I'm going to deny the motion according to what the police officer[s] say here. They say see [sic] him stuff it into his pocket and it is partially visible and it is an item in an area–It's an item in which narcotics or other controlled dangerous substance or [sic] often packaged. It is done in an area or it occurs in an area which they–I'll say testified–but the report describes as a high trafficking area, narcotics and drug trafficking area. And they describe what is certainly by any account suspicious behavior of both defendants and in particular Mr. Edwards. And, accordingly, for those reasons and all the reasons in the report I'm going to suppress–I mean I'm going to deny the Motion to Suppress.

The facts in this case are similar to those in State v. Perrot, supra and State v. Mayberry, supra and opposed to State v. James, supra and State v. Berry, supra. Therefore, we conclude that the seizure of the cocaine from defendant's pocket was lawful.

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[22]00-1037 (La. App. 4 Cir. 5/9/01), 791 So.2d 725.

ERRORS PATENT DISCUSSION

The record was reviewed for errors patent.[23] The following matter is presented for review:

The transcript of defendant's original sentencing shows that the trial court did not properly instruct defendant regarding the time limitations for applying for post-conviction relief. LSA-C.Cr.P. art. 930.8 provides that applications for post-conviction relief must be filed no more than two years after the judgment of conviction and sentence has become final. However, the trial court simply told defendant, "you have two years to file for post conviction relief. . . ." The minute entry reflects that the court properly "informed the Defendant he/she has five (5) days from today's date to appeal this conviction, and two (2) years after judgment of conviction and sentence has become final to seek post-conviction relief."

Generally, where the transcript conflicts with the minute entry, the transcript prevails.[24] Where the trial court fails to properly comply with the provisions of Article 930.8, this Court ordinarily remands the case to the trial court with an order that the defendant be notified in writing of the proper prescriptive period.[25]

The Court remands this matter to the trial court and orders the trial court to inform defendant of the prescriptive period for post-conviction relief in writing.

AFFIRMED AND REMANDED WITH INSTRUCTIONS

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[23]LSA-C.Cr.P. art. 920; State v. Oliveaux, 312 So.2d 337 (La. 1975); State v. Weiland, 556 So.2d 175 (La. App. 5 Cir. 1990).

[24]State v. Lynch, 441 So.2d 732, 734 (La. 1983).

[25]See, State v. Stelly, 98-578, p. 6 (La. App. 5 Cir. 12/16/98), 725 So.2d 562, 564.

Court of Appeal

FIFTH CIRCUIT
STATE OF LOUISIANA

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