NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 KA 1223

STATE OF LOUISIANA

VERSUS

DAVID SOSA, JR.

Judgment Rendered: December 21, 2007

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Case No. 392182

The Honorable Martin E. Coady, Judge Presiding

* * * * * * * *

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* * * * * * * *

BEFORE: GAIDRY, McDONALD, AND McCLENDON, JJ.

GAIDRY, J.

The defendant, David Sosa, Jr., was charged by bill of information with possession of twenty-eight grams or more, but less than two hundred grams, of cocaine, or of a mixture containing cocaine, a violation of La. R.S. 40:967(F)(1)(a). Defendant pleaded not guilty. He filed motions to suppress the evidence seized and his confession, which were denied after hearing. Following a jury trial, defendant was found guilty as charged. Defendant was sentenced to twenty-five (25) years at hard labor, the first five years of the sentence without benefit of parole. The trial court also imposed a $50,000.00 fine, which was suspended. The state subsequently filed a "multiple offender" bill of information and, following a hearing, the defendant was adjudicated a second felony habitual offender. Defendant's prior twenty-five year sentence was vacated, and he was resentenced to thirty-five (35) years at hard labor without benefit of probation or suspension of sentence, the first five years of the sentence without benefit of parole. Defendant now appeals. For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence.

FACTS

On January 11, 2005, at about 7:00 a.m., Louisiana State Trooper Donald Pierce made a traffic stop of defendant for following a tractor-trailer or "eighteen-wheeler" too closely on Interstate Highway 12 in St. Tammany Parish. After speaking with defendant, Trooper Pierce determined that he was driving a rental vehicle and that the rental agreement had expired two days earlier. Upon further questioning, Trooper Pierce noticed inconsistencies in defendant's explanation of where he was coming from and his claimed destination. Trooper Pierce asked defendant if he could search the vehicle. Defendant agreed and signed a "consent to search" form.

Three other state troopers arrived shortly thereafter to assist Trooper Pierce with the search of the vehicle. Trooper Chad Guidry searched under the hood and found in the front engine compartment a bag of a mixture of compressed powder that contained cocaine. The total weight of the cocaine mixture was 125.44 grams.

After his arrest, defendant was taken to State Police Troop L headquarters and interviewed by Trooper Keith Briggs. Defendant was informed of his rights under *Miranda*, signed a "statement of rights" form, and agreed to answer any questions. Defendant advised Trooper Briggs that the cocaine belonged to him and that he had obtained it in Houston.

ASSIGNMENTS OF ERROR

Defendant has designated the following six assignments of error on the part of the trial court:

> 1. Whether the court erred in allowing the seized contraband into evidence, when it was obtained as a result of a warrantless vehicle search that exceeded the scope of consent given, and therefore [constituted] a violation of defendant's Fourth Amendment right against illegal searches and seizures.
>
> 2. Whether the court erred in admitting the contraband as evidence, where it was seized and obtained as a result of a pre-textual [*sic*] stop for which there was no probable cause, based upon the racial profiling of defendant, a Mexican American.
>
> 3. Whether the court erred in admitting the contraband as evidence when said evidence was seized and obtained as a result of defendant's illegal continued detention.
>
> 4. Whether the evidence which was seized as a result of a warrantless search which extended to the dismantling of the vehicle and therefore [*sic*] should not have been allowed into evidence.
>
> 5. Whether the District Court erred in allowing into evidence the inculpatory statements made by defendant which were obtained by duress and after defendant's request for counsel.

6. Whether the District Court erred in sentencing defendant as a multiple offender.[1]

FIRST ASSIGNMENT OF ERROR

In his first assignment of error, defendant argues the trial court erred in denying his motion to suppress the evidence seized. Specifically, defendant contends that the search of his vehicle by the officers exceeded the scope of the consent given.[2]

Trial courts are vested with great discretion when ruling on a motion to suppress.[3] Consequently, the ruling of a trial judge on a motion to suppress will not be disturbed absent an abuse of that discretion. *State v. Long*, 03-2592, p. 5 (La. 9/9/04), 884 So.2d 1176, 1179, *cert. denied*, 544 U.S. 977, 125 S.Ct. 1860, 161 L.Ed.2d 728 (2005).

Defendant contends the search went beyond a "*Terry*-type" protective search of the passenger compartment where a weapon could be hidden, and should not have included "dismantling with screwdrivers the door panels and including the engine compartments that had been securely sealed." Initially, we note that the reference to a "*Terry*-type" protective search is

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[1] In his brief under the "Assignments of Error" heading, defendant lists six assignments of error. However, in the "Law and Argument" portion of his brief, defendant briefs only four assignments of error. For the most part, the six listed assignments of error are addressed in the argument of defendant's brief. For example, it appears that the first and fourth listed assignments of error have been consolidated into a single assignment of error under the first briefed assignment of error, and the second and third listed assignments of error seem to have been consolidated into a single assignment of error under the second briefed assignment of error. There are portions of the six listed assignments of error, however, that are not briefed, *e.g.*, the racial profiling issue in the second listed assignment of error and the duress issue in the fifth listed assignment of error. Defendant provides no law or substantive argument regarding these issues. Accordingly, these particular issues, and any other issues mentioned in any of the six listed assignments of error that have not been briefed, are considered abandoned. *See* Uniform Rules of Louisiana Courts of Appeal, Rule 2-12.4.

[2] Defendant does not contest the validity of his consent to search.

[3] In determining whether the ruling on defendant's motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may consider all pertinent evidence given at the trial of the case. ***State v. Chopin***, 372 So.2d 1222, 1223 n. 2 (La. 1979).

misplaced. The "consent to search" form signed by the defendant provides that defendant voluntarily authorized Trooper Pierce to search his vehicle and its contents that were owned or controlled by the defendant, and to remove any items the Louisiana Office of State Police deemed pertinent to their investigation. Nothing in that consent form, nor anything in Trooper Pierce's testimony, suggests that the search would be limited to the passenger compartment or that the troopers would search for weapons only.

During the actual search, the quarter panels in the doors behind the seat were removed with a screwdriver. According to Trooper Pierce, there are natural compartments in vehicles where contraband can be hidden. Trooper Pierce observed evidence of tampering with the quarter panels, a suspicious circumstance since the vehicle was a new rental vehicle. The cocaine was found under the hood. According to Trooper Guidry, who testified at the hearing on the motion to suppress, there was a void or open space in the engine compartment where the air-conditioning blower unit adjoins the firewall. A black plastic shroud covered that void. According to Trooper Guidry, he was able to raise the piece of plastic about an inch and saw the cocaine in that space. Thus, despite defendant's assertion, there were no securely sealed engine compartments that were unsealed or required dismantling in order to discover the hidden cocaine.

We find further that defendant's consent to search his vehicle was not qualified in any way. The scope of a search is generally defined by its expressed object. In this case, defendant granted Trooper Pierce permission to search his vehicle, and did not place any explicit limitation on the scope of the search. *See Florida v. Jimeno*, 500 U.S. 248, 251-52, 111 S.Ct. 1801, 1804, 114 L.Ed.2d 297 (1991). At the motion to suppress hearing, defendant testified that he tried to stop the troopers from dismantling the vehicle.

According to defendant, he advised Trooper Chris Anderson that the consent form did not state that they would dismantle his vehicle, and that they were not supposed to do so. Trooper Anderson supposedly responded that they could do so in Louisiana.[4] However, our review of the videotape of the stop reveals no instance where defendant spoke to Trooper Anderson about the "dismantling" of the vehicle. Furthermore, testimony adduced at the motion to suppress hearing established that at no time did the defendant revoke or attempt to revoke his consent to the search of the vehicle. At the motion to suppress hearing, Trooper Pierce testified as follows:

> Q. At any time, did Mr. Sosa tell you, I want you to stop searching my car?
>
> A. No, he did not.
>
> Q. At any time, did Mr. Sosa tell you, I want a lawyer?
>
> A. No.
>
> Q. At any time, did any other State Trooper or any other law enforcement person tell you that Mr. Sosa had requested a lawyer or that he had asked that the search be stopped?
>
> A. No, he did not.
>
> Q. Are you aware of any such request by Mr. Sosa?
>
> A. No, I'm not.

At the motion to suppress hearing, Trooper Anderson, who stood next to defendant while other troopers searched the vehicle, testified as follows:

> Q. And during the periods of time that you were present, at any time did the defendant indicate to you that he wished to revoke his consent to search the vehicle?
>
> A. No, he did not.
>
> Q. At any time during the time that you were present, did the defendant indicate to anybody else that you overheard that he wished to revoke his consent to search the vehicle?

[4] Defendant's traffic stop was recorded by the mounted video camera in Trooper Pierce's patrol unit, and the videotape of the stop was introduced into evidence at the motion to suppress hearing and the trial.

A. No, he did not.

. . .

Q. Have you reviewed a VHS tape or DVD of the VHS tape of the stop and seen yourself present standing by with the defendant?

A. Yes, I have.

Q. And at any time, did you overhear anything such as that, that took place during the recorded portion of the stop?

A. No, I did not.

When reviewing a trial court's ruling on a motion to suppress based on findings of fact, great weight is placed on the trial court's determination because the court had the opportunity to observe the witnesses and weigh the relative credibility of their testimony. Appellate courts will not set a credibility determination aside unless it is clearly contrary to the record evidence. *State v. Peterson*, 03-1806, p. 9 (La. App. 1st Cir. 12/31/03), 868 So.2d 786, 792, *writ denied*, 2004-0317 (La. 9/3/04), 882 So.2d 606.

In denying the motion to suppress, the trial court found that there was a "consensual search" and that the drugs were found in a "natural void" in the vehicle. The trial court's conclusions are supported by the record. Defendant neither revoked his consent to the search nor limited the scope of his consent. Further, we find the removal of a few quarter panels that had already been tampered with, and the lifting of a black plastic covering over an open space in the engine compartment did not constitute a "dismantling" of the vehicle, despite defendant's characterization of the activity as such. The search did not exceed the scope of consent given. *See State v. Elias*, 509 So.2d 86 (La. App. 1st Cir.), *writ denied*, 512 So.2d 464 (La. 1987) (search not limited to the passenger compartment or to a search only for weapons).

We find no abuse of discretion in the trial court's denial of this portion of defendant's motion to suppress. The first assignment of error is without merit.

SECOND ASSIGNMENT OF ERROR

In his second assignment of error, defendant argues that his traffic stop was pretextual and that his continued detention was illegal. Specifically, defendant contends that based upon Trooper Pierce's subjective intent to detain him "for an unrelated and insupportable reason," the stop was unconstitutional, and that once he produced proof that he was entitled to operate the vehicle he was driving, he should have been allowed to proceed on his way without further delay for additional questioning.

The fourth amendment to the federal constitution and Article 1, § 5 of the Louisiana Constitution protect people against unreasonable searches and seizures. However, the right of law enforcement officers to stop and interrogate one reasonably suspected of criminal conduct is recognized by La. C.Cr.P. art. 215.1, as well as by both state and federal jurisprudence. Reasonable cause for an investigatory detention is something less than probable cause and must be determined under the facts of each case by whether the officer had sufficient knowledge of facts and circumstances to justify an infringement on the individual's right to be free from governmental interference. The right to make an investigatory stop and question the particular individual detained must be based upon reasonable cause to believe that he has been, is, or is about to be engaged in criminal conduct. *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).

Trooper Pierce testified at the motion to suppress hearing and the trial that he pulled defendant over because he was following too closely (about

fifteen feet) to an "eighteen-wheeler" tanker truck.[5] Based on defendant's failure to follow the forward vehicle in a reasonable and prudent manner, Trooper Pierce had probable cause to believe a traffic violation had occurred. Accordingly, Trooper Pierce had an objectively reasonable basis for stopping defendant's vehicle. *See* La. C.Cr.P. art. 215.1; La. R.S. 32:81; and *State v. Shapiro*, 98-1949 (La. App. 4th Cir. 12/29/99), 751 So.2d 337.

Trooper Pierce had a legitimate reason to stop defendant, and defendant's speculation as to Trooper Pierce's real motives for stopping him is irrelevant. The United States Supreme Court in *Whren v. U.S.*, 517 U.S. 806, 812-13, 116 S.Ct. 1769, 1774, 135 L.Ed.2d 89 (1996), addressed the issue of the subjective intent of law enforcement officers when making a stop or arrest:

> Not only have we never held, outside the context of inventory search or administrative inspection . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary. In *United States v. Villamonte-Marquez*, 462 U.S. 579, 584, n. 3, 103 S.Ct. 2573, 2577, n. 3, 77 L.Ed.2d 22 (1983), we . . . flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification. In *United States v. Robinson,* 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), we held that a traffic-violation arrest (of the sort here) would not be rendered invalid by the fact that it was "a mere pretext for a narcotics search," *id.,* at 221, n. 1, 94 S.Ct., at 470, n. 1[.] . . . And in *Scott v. United States*, 436 U.S. 128, 138, 98 S.Ct. 1717, 1723, 56 L.Ed.2d 168 (1978), . . . we said that "[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional." We described *Robinson* as having established that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." 436 U.S., at 136, 138, 98 S.Ct., at 1723. . . . Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.

[5] Defendant was issued a citation for following too closely.

When Trooper Pierce stopped defendant and questioned him about where he was coming from and going to, defendant stated that he was coming from Texas and going to Florida. Defendant explained that he had taken his mother home to Texas for the holidays. After further discussion, Trooper Pierce realized that defendant's story about taking his mother home was a fabrication. Defendant claimed that he spent a week with his mother in Texas, yet he had the rental car for only two days. Defendant later changed his story and said that his mother was with him for the holidays in Florida. Trooper Pierce discovered that the rental agreement's term of lease had been expired for two days. When Trooper Pierce asked him who had rented the vehicle, defendant replied that it was his friend Casey's girlfriend, but stated he did not know her name. Trooper Pierce also discovered that defendant had prior arrests, including possession of marijuana and aggravated assault with a deadly weapon. Trooper Pierce testified that during this questioning, defendant became nervous, fidgety, and hesitant with his answers. At this point, Trooper Pierce obtained written consent from defendant to search the vehicle.

Given the lawfulness of the initial stop, the reasonableness of the escalating encounter between defendant and Trooper Pierce hinged on whether the actions undertaken by Trooper Pierce following the stop were reasonably responsive to the circumstances justifying the stop in the first place, as augmented by information gleaned by Trooper Pierce during the stop. Defendant's deceptive responses, nervous demeanor, and prior criminal record led to a shift in Trooper Pierce's focus that was neither unusual nor impermissible. Trooper Pierce obtained both verbal and written consent from the defendant to search the vehicle and, within moments, three troopers conducted the search while defendant stood next to Trooper Pierce's

patrol unit. The time between defendant's consent to search and the discovery of the cocaine in the vehicle was less than seventeen minutes. The entire span of time - from the moment the defendant was pulled over until the cocaine was found - was about thirty-seven minutes. The troopers diligently pursued their investigation, and the relatively brief duration of the traffic stop and consensual search was reasonable under the Fourth Amendment. *See State v. Miller*, 2000-1657, pp. 2-5 (La. 10/26/01), 798 So.2d 947, 949-51 (per curiam). Accordingly, we find no merit to the defendant's argument that he was unlawfully detained.

Regarding the search of the vehicle, defendant contends that probable cause was not present until the drugs were discovered. However, Trooper Pierce did not need probable cause to search the vehicle. As previously noted, defendant gave Trooper Pierce both verbal and written consent to search the vehicle. A search conducted pursuant to consent is one of the specifically established exceptions to the requirements of both a warrant and probable cause. The validity of such consent is dependent upon it having been given voluntarily, free of duress or coercion either express or implied. *See State v. Montgomery*, 432 So.2d 340, 343 (La. App. 1st Cir. 1983). Nothing in the record indicates that defendant's consent was forced or coerced. Accordingly, defendant's voluntary consent rendered the search and seizure of the cocaine constitutionally valid. *Id.*

We find no abuse of discretion in the trial court's denial of this portion of defendant's motion to suppress. His second assignment of error is without merit.

THIRD ASSIGNMENT OF ERROR

In his third assignment of error, defendant argues that his statement to Trooper Briggs that the cocaine was his should have been suppressed.

Specifically, defendant contends that his refusal to give a written statement was tantamount to a request for counsel.

Under *Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966), if a suspect indicates "in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." The request for counsel need not be formal or direct, or for a particular attorney, but is sufficiently conveyed by even an unsuccessful attempt to reach a lawyer, or an inquiry whether the police could recommend a lawyer. Indeed, courts must give a broad rather than a narrow interpretation to a suspect's request for counsel. *State v. Abadie*, 612 So.2d 1, 5 (La.), *cert. denied*, 510 U.S. 816, 114 S.Ct. 66, 126 L.Ed.2d 35 (1993).

Trooper Briggs testified at both the motion to suppress hearing and the trial. According to Trooper Briggs, during his custodial interview, defendant at no time asked for an attorney. The defendant was read his *Miranda* rights and signed a statement of rights form. When Trooper Briggs asked the defendant if he would prepare a written statement, defendant informed him that he would not make any written statements, but that he would answer any of Trooper Briggs's questions. Trooper Briggs then questioned defendant about the cocaine. Defendant stated that the cocaine was his, he paid $2,100.00 for it in Houston, took it to his mother's house, packaged it in clear plastic, and placed it under the plastic cover by the windshield wipers of his rental vehicle.

In offering to answer any questions asked of him, and then orally confessing to Trooper Briggs that the cocaine was his, it is clear that defendant was not requesting counsel by simply refusing to give a written statement. While the refusal appeared to be based upon nothing more than

defendant's desire to not have his inculpatory statements memorialized in writing, we find that such refusal, for whatever reason and under the broadest of interpretations, was in no way suggestive of a wish to consult with an attorney before speaking. This assignment of error also lacks merit.

FOURTH ASSIGNMENT OF ERROR

In his fourth assignment of error, defendant argues that the trial court erred in adjudicating him a second felony habitual offender. Specifically, he contends that his previous conviction of possession of marijuana in Texas would constitute a misdemeanor in Louisiana and, as such, could not be used as a predicate offense to enhance his sentence.

For a conviction from another state to serve as a predicate felony for purposes of the Louisiana Habitual Offender Law, the conviction must be of "a crime which, if committed in this state would be a felony." *See* La. R.S. 15:529.1(A)(1). If the other state's offense of which the defendant was convicted does not necessarily include conduct considered a felony under Louisiana law, that conviction cannot be used to enhance a subsequent felony under the habitual offender statute. The habitual offender statute requires Louisiana courts to determine the analogous Louisiana crime according to the nature of the act involved in the crime of the other state or jurisdiction, not the penalty provided for the offense in the other state or jurisdiction. *State v. Hennis*, 98-0665, pp. 4-5 (La. App. 1st Cir. 2/19/99), 734 So.2d 21, 24, *writ denied*, 99-0783 (La. 7/2/99), 747 So.2d 16.

The predicate offense used to enhance defendant's sentence and introduced into evidence at the habitual offender hearing was a conviction on October 26, 1993,[6] in Kleberg County, Texas for second degree felony unlawful possession of marijuana on April 29, 1993, under docket number

[6] Defendant pleaded guilty to the charge and was sentenced to two years imprisonment. The sentence was suspended, and defendant was placed on probation for two years.

93-CRF-248. Under the applicable Texas statute, second degree felony unlawful possession of marijuana is the knowing and intentional possession of marijuana in an amount of fifty pounds or less but more than five pounds. Punishment for a second degree felony under the Texas Penal Code is confinement in prison for any term of not more than twenty years or less than two years, and the court may assess a fine not to exceed $10,000.00.

According to the Border Patrol offense report, defendant was arrested by U.S. Border Patrol agents after being found in possession of approximately twenty pounds of marijuana. The marijuana was found inside the drive shaft of the truck defendant was driving.

We find that, under Louisiana law, such a crime would be easily classified as possession of marijuana with intent to distribute, which is a felony. *See* La. R.S. 40:966(A)(1) and 40:966(B)(3). In his brief, defendant states, "Under Louisiana law, simple possession of marijuana in an amount less than sixty pounds is a misdemeanor." This assertion is erroneous. The law does not prohibit a factfinder from inferring possession with intent to distribute when the quantity of marijuana is less than sixty pounds. The intent to distribute can be inferred from the circumstances. Nothing in the facts of the defendant's Texas arrest and conviction suggests that the defendant possessed the marijuana for personal use. Quite to the contrary, the transportation of twenty pounds of marijuana hidden in the drive shaft of the vehicle clearly suggests possession with intent to distribute. *See State v. Trahan*, 425 So.2d 1222, 1225-27 (La. 1983); *State v. Johnson*, 00-1528, pp. 4-7 (La. App. 4th Cir. 2/14/01), 780 So.2d 1140, 1143-45, *writ denied*, 2001-0916 (La. 2/1/02), 807 So.2d 854; *State v. Rose*, 607 So.2d 974, 978-79 (La. App. 4th Cir. 1992), *writ denied*, 612 So.2d 97 (La. 1993); *State v. Winzer*, 545 So.2d 1259, 1265 (La. App. 2nd Cir. 1989). Accordingly, the trial court

did not err in concluding that the predicate offense, if committed in Louisiana, would be a felony in Louisiana.

The fourth assignment of error is without merit.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.