NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 KA 0941

STATE OF LOUISIANA

VERSUS

MICHAEL E. MITCHELL

Judgment Rendered: DEC 21 2018

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APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ST. TAMMANY
STATE OF LOUISIANA
DOCKET NUMBER 587050 "I"

HONORABLE REGINALD T. BADEAUX, III, JUDGE

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BEFORE: McDONALD, CRAIN, and HOLDRIDGE, JJ.

McDONALD, J.

Defendant, Michael Mitchell, was charged by bill of information with armed robbery, a violation of La. R.S. 14:64. He pled not guilty. Defendant filed a motion to suppress, which the trial court denied after a hearing. Following a trial by jury, defendant was found guilty of the lesser included offense of first degree robbery, a violation of La. R.S. 14:64.1. Defendant filed unsuccessful motions for new trial and post-verdict judgment of acquittal. After defendant waived sentencing delays, the trial court imposed a term of three years imprisonment at hard labor, to be served without the benefit of probation, parole, or suspension of sentence. The defendant now timely appeals raising one assignment of error. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

The following facts were adduced at the motion to suppress hearing. On the afternoon of February 24, 2017, the St. Tammany Sheriff's Office ("STSO") was notified via a 911 call of a robbery that had occurred at a Dollar General on Highway 59 in Mandeville. Detective Timothy Crabtree, Deputy Brooks McGeever, and others from the STSO responded. After speaking with an on-scene witness and viewing store security camera footage, Det. Crabtree and Dep. McGeever developed a description of a suspect vehicle: an older model gray or gold sedan with aftermarket hubcaps, with its windows down. The witness, the store manager who had been out in the parking lot during the robbery, told Det. Crabtree that she observed the suspect enter a vehicle, leave the parking lot, and pull onto Highway 59 behind a Mandeville Police Department patrol car and a red SUV. Following review of the Dollar General store video, a description of the perpetrator was obtained, namely that the suspect was white, six-feet tall, of slender build, and wearing a black hooded sweatshirt, sunglasses, blue pants with a white stripe, and a dark blue hat with white and yellow letters or graphics. The

suspect was also described by the cashier as holding the black handle of an unknown object secreted in his sweatshirt. Det. Crabtree recovered surveillance video from a nearby business, "Larry Lloyd's Construction Company," in which an older gold-gray sedan with aftermarket hubcaps, its windows down, and a "miscolored hood" was observed travelling from the direction of the Dollar General within a short time of the suspect's departure from the store. A short distance away from the Dollar General, the vehicle was observed in the video driving a few cars behind a Mandeville Police unit and directly behind a red SUV. The information, including a photograph of the suspect and the suspect's vehicle, was disseminated on social media.[1]

On March 1, 2017, Sergeant Warren Keller of the STSO observed a vehicle matching the prior description and the social media photos in a Walgreens parking lot. Sgt. Keller also observed a white male get into the car who resembled the man in the photograph posted online. After Sgt. Keller waited for backup to arrive, he and STSO Deputy Dustin Stephens approached the vehicle. Upon walking up to the car, Dep. Stephens immediately said "gun," and the deputies ordered defendant from the vehicle. Sgt. Keller testified that after defendant was arrested, no one touched the vehicle until Det. Crabtree arrived.

Upon his arrival, Det. Crabtree also saw through an open window the firearm in plain view on the front passenger seat partially covered by some clothing. He photographed it as he found it. In the pile on top of the gun was a black hooded sweatshirt, sunglasses, a bandana, and a dark colored hat with white and yellow graphics. After moving the clothing to get a better photograph of the firearm, Det. Crabtree retrieved the gun to secure it, and discovered it was a BB gun. Because it was only a BB gun, he left it in defendant's vehicle. Det. Crabtree

[1] As a result, in addition to a STSO sergeant later locating the vehicle, defendant's stepfather notified the STSO he recognized the vehicle from the video and "had no doubt" that it was defendant.

then completed arrangements to have the car towed to the crime lab for further examination after a search warrant had been obtained.

After defendant was arrested, he was brought back to the sheriff's office where he was interviewed. After waiving his **Miranda**[2] rights, defendant gave a recorded statement.

Defendant testified at the suppression hearing. In his testimony, defendant admitted to robbing the Dollar General, but denied using a weapon.[3] He also said that he was reading a book while in the Walgreens parking lot, and that he had placed the book down on the passenger seat when the deputies approached and ordered him out of the car. Defendant explained they searched him and removed objects from his pockets that they placed on the driver's seat and on top of his car. Defendant said he observed plain clothes deputies other than Det. Crabtree searching his car while he was in the back of the police SUV. Defendant claimed all he had on the front passenger seat were "a bunch of bills and some donuts," and that the photographs admitted into evidence by the State at the hearing did not reflect how he left the vehicle. Defendant asserted the hat and the BB gun were on the floorboard, the bandana was between the seat and the center console, and that other items were misplaced from where he had left them.

The trial court acknowledged photos taken from the Dollar General video, not admitted into evidence, contained a vehicle bearing a strong resemblance to the vehicle found in the Walgreens parking lot. In its reasoning denying the motion to suppress, the court noted the strong similarities in the vehicle described and observed in the initial investigation and that of the vehicle in which defendant was

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

[3] Defendant also stipulated at trial to being the person who committed the robbery.

found outside Walgreens. The trial court also stated the deputies had the right to conduct an inventory search.

ASSIGNMENT OF ERROR: MOTION TO SUPPRESS

In his sole assignment of error, defendant argues the trial court erred in denying the motion to suppress evidence seized from defendant's vehicle. Defendant appears to concede the vehicle contained evidence relevant to the investigation, and that the sheriff's department made a legitimate connection between the vehicle seen leaving the Dollar General and the one defendant was found inside in the Walgreens parking lot. In fact, at trial defendant stipulated that he was the individual who committed the robbery. The crux of defendant's argument is that there were no exigent circumstances that would relieve the STSO from the warrant requirement in order for them to search defendant's vehicle. Following from that, defendant contends there were no other exceptions to the exclusionary rule, such as attenuation or inevitable discovery. The State argues in brief the trial court did not err in denying the motion to suppress where sufficient evidence was admitted to establish probable cause since defendant and his vehicle were connected to the scene of the robbery a few days before. In the alternative, the State argues the evidence would have been inevitably discovered due to the search warrant Det. Crabtree later obtained.

Trial courts are vested with great discretion when ruling on a motion to suppress. **State v. Long**, 2003-2592 (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). When a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, i.e., unless such ruling is not supported by the evidence. See **State v. Green**, 94-0887 (La. 5/22/95), 655 So.2d 272, 280-81. However, a trial court's legal findings are subject to a *de novo* standard of review. **State v. Hunt**, 2009-1589 (La. 12/1/09),

25 So.3d 746, 751. When reviewing a trial court's ruling on a motion to suppress, the entire record may be considered. **State v. Martin**, 595 So.2d 592, 596 (La. 1992).

The Fourth Amendment to the United States Constitution and article I, § 5, of the Louisiana Constitution protect people against unreasonable searches and seizures. A defendant adversely affected may move to suppress any evidence from use at the trial on the merits on the ground that it was unconstitutionally obtained. La. Code Crim. P. art. 703(A). Subject only to a few well-established exceptions, a search or seizure conducted without a warrant issued upon probable cause is constitutionally prohibited. **State v. Johnson**, 98-0264 (La. App. 1st Cir. 12/28/98), 728 So.2d 885, 886. Once a defendant makes an initial showing that a warrantless search or seizure occurred, the burden of proof shifts to the State to affirmatively show it was justified under one of the narrow exceptions to the rule requiring a search warrant. La. Code Crim. P. art. 703(D); **Id.** Evidence derived from an unreasonable stop, i.e., seizure, will be excluded from trial. **State v. Benjamin**, 97-3065 (La. 12/1/98), 722 So.2d 988, 989.

Under the automobile exception, police may search a vehicle without obtaining a search warrant if the car is readily mobile and probable cause exists to believe it contains contraband or evidence of criminal activity. See **Pennsylvania v. Labron**, 518 U.S. 938, 940, 116 S.Ct. 2485, 2487, 135 L.Ed.2d 1031 (1996) (per curiam); **United States v. Ross**, 456 U.S. 798, 809, 102 S.Ct. 2157, 2164-65, 72 L.Ed.2d 572 (1982). In such cases, no special exigency is required beyond a showing of the mobility of the automobile. **Maryland v. Dyson**, 527 U.S. 465, 466, 119 S.Ct. 2013, 2014, 144 L.Ed.2d 442 (1999) (per curiam); **State v. Brumfield**, 2017-0080 (La. App. 1st Cir. 9/21/17), 232 So.3d 42, 49-50 (police may search vehicle without obtaining a search warrant if the car is readily mobile and probable cause exists to believe it contains contraband or evidence of criminal

activity). Further, it has been held in applying the automobile exception that there is no constitutional distinction between seizing and holding a vehicle before presenting the probable cause issue to a magistrate and immediately searching the vehicle without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment and the Louisiana Constitution.[4] **State v. Tatum**, 466 So.2d 29, 31 (La. 1985) (police officers who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it, may conduct a warrantless search of the vehicle as thorough as a magistrate could authorize); **State v. Gordon**, 93-1923 (La. App. 1st Cir. 11/10/94), 646 So.2d 1005, 1010. Moreover, if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle. **Ross**, 456 U.S. at 825, 102 S.Ct. at 2173.

In the instant case, defendant's vehicle was readily movable, notwithstanding defendant's claims that there were no exigent circumstances justifying a warrantless entry. Defendant provides no support for his contention that because the vehicle was legally parked in a business parking lot, there was no need to enter the car without a warrant.

Additionally, in **Arizona v. Gant**, 556 U.S. 332, 351, 129 S.Ct. 1710, 1723, 173 L.Ed.2d 485 (2009), the Supreme Court held that police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. (Emphasis added.) The fact that the defendant in the present case was stopped because he and his vehicle matched the published description of those involved in an armed robbery means law enforcement could search the vehicle for evidence related to the armed robbery. This is exactly what was done here.

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[4] Here, a search warrant was obtained anyway.

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). The deputies seized defendant and the vehicle in question in order to investigate and to gather information of a crime that had already occurred. Such an investigatory seizure is not in violation of the Fourth Amendment as the seizure was based on reasonable suspicion that the vehicle was used in the commission of the underlying offense. See La. Code Crim. P. art. 215.1; **State v. Dobard**, 2001-2629 (La. 6/21/02), 824 So.2d 1127, 1129-30.

Moreover, if police are lawfully in a position from which they view an object that has an incriminating nature which is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant. **Horton v. California**, 496 U.S. 128, 136-37, 110 S.Ct. 2301, 2308, 110 L.Ed.2d 112 (1990). A seizure is reasonable under the "plain view" doctrine if the officer has probable cause to believe the item seized was associated with criminal activity. **State v. Bush**, 2012-0720 (La. 6/1/12), 90 So.3d 395, 396 (per curiam). Here, the deputies had a lawful right to approach defendant's vehicle parked in a parking lot, and when they did so one deputy saw in plain view what reasonably appeared to be the handle of a firearm. Additionally, Detective Crabtree had a duty to the public to remove the suspected firearm from a place where it would be accessible to any passer-by. See **State v. Brisban**, 2000-3437 (La. 2/26/02), 809 So.2d 923, 927-28; **State v. Brumfield**, 2005-2500 (La. App. 1st Cir. 9/20/06), 944 So.2d 588, 597, writ denied, 2007-0213 (La. 9/28/07), 964 So.2d 353.

Though there was some conflicting testimony at the suppression hearing regarding what was on the passenger seat at the time Det. Crabtree took the photographs entered into evidence, the trial court was best placed to make the

credibility determination between Det. Crabtree and defendant. **State v. Zeno**, 2014-0325 (La. App. 1st Cir. 9/19/14), 155 So.3d 4, 18, writ denied, 2014-2167 (La. 5/22/15), 170 So.3d 983 (when trial court denies motion to suppress, factual and credibility determinations should not be reversed in absence of clear abuse of trial court discretion, *i.e.*, unless such ruling is not supported by the evidence); **State v. Murphy**, 2014-0437 (La. App. 5th Cir. 10/15/14), 181 So.3d 1, 8 (trial court's determination as to the credibility of witnesses on motion to suppress to be accorded great weight on appeal unless unsupported by the evidence). Moreover, the trial court heard testimony and observed both the still photographs from the "Larry Lloyd" surveillance video in addition to photographs of defendant's car and concluded there was sufficient probable cause generated by the similarities to justify the STSO's belief there may be evidence related to the robbery inside.[5] Testimony adduced at the hearing revealed that the dark hat with white and yellow lettering and the black sweatshirt the perpetrator was wearing in the Dollar General video matched those found in defendant's vehicle. The trial court did not err or abuse its discretion in denying the motion to suppress. Accordingly, the assignment of error is without merit. Because there was lawful reason for the STSO to search the defendant's vehicle without a warrant, we decline to address the State's alternative argument of inevitable discovery of the evidence.

CONVICTION AND SENTENCE AFFIRMED.

[5] These still photos are marked by defendant for identification at the motion to suppress, but were not entered into evidence. The "Larry Lloyd" video was admitted into evidence at trial.