NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-0124**
VERSUS	*	**COURT OF APPEAL**
SAMUEL T. HILLS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 386-214, SECTION "H"
Honorable Camille Buras, Judge

* * * * * *

Judge Dennis R. Bagneris, Sr.

* * * * * *

(Court composed of Chief Judge William H. Byrnes, III, Judge Charles R. Jones, and Judge Dennis R. Bagneris, Sr.)

BYRNES, C. J., DISSENTS WITH REASONS

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CONVICTION AND SENTENCE REVERSED

STATEMENT OF THE CASE

Defendant Samuel T. Hills ("the defendant") was charged by bill of information on November 14, 1996, with possession with intent to distribute cocaine, a violation of La. R.S. 40:967(A). The trial court denied the defendant's motions to suppress on June 18, 1997. The defendant was found guilty of possession of cocaine on November 17, 1997. The trial court denied the defendant's motion for a new trial on November 25, 1997. On December 29, 1997, the trial court denied the defendant's second motion for a new trial. On January 29, 1998, the defendant was adjudicated a fourth-felony habitual offender. On March 13, 1998, the trial court sentenced the defendant to twenty years at hard labor, without the benefit of parole, probation or suspension of sentence, with credit for time served. On June 21, this court granted the defendant's writ application, ordering the trial court to grant the defendant an out-of-time appeal.

FACTS

New Orleans Police Officer Bryan Lampard ("Officer Lampard") testified that he had been involved in close to one thousand narcotics arrests or investigations. On June 8, 1996, he was participating in surveillance in the 2100 block of LaSalle Street, investigating narcotics activity. Sergeant Gaudet ("Sgt. Gaudet") notified Officer Lampard and his partner, Officer Jake Schnapp ("Officer Schnapp"), that he had witnessed two narcotics transactions, and they arrested two persons in connection therewith. The officers continued their investigation, focusing on the defendant's apartment at 2301 Jackson Avenue, Apartment B, which was at the corner of Jackson Avenue and LaSalle Streets. The defendant kept coming out of a back door of his second-floor apartment to look at the officers. Officer Lampard said that it appeared that the defendant, his girlfriend and two young males were trying to leave the apartment. Officer Lampard and Sgt. Gaudet walked up the stairs and encountered the defendant and the female on a landing. Officer Schnapp remained downstairs. The officers advised the defendant that he was under investigation for a possible narcotics violation. The defendant spoke with Officer Schnapp, while Officer Lampard checked the residence for other occupants, for safety reasons and to prevent the destruction of any contraband inside. The female, an infant, and the two young males were placed in the kitchen area. Sgt. Gaudet prepared an

application for a search warrant and subsequently obtained a search warrant for the defendant's apartment. The officers used the aid of a narcotics-detecting canine to search the apartment. The canine detected eight-thousand five-hundred dollars in one hundred dollar bills behind stereo equipment, two small bags of powder cocaine and one small bag of marijuana in an ice bucket on top of the refrigerator. Officer Lampard said the focus of the investigation was not the defendant, but James Scott ("Scott"). Scott was one of the two persons arrested on the same day that the defendant was arrested. He was arrested on the other side of a chain link fence, next to the defendant's apartment. Officer Lampard said that the defendant was not involved in either of the two drug transactions witnessed by Sgt. Gaudet. Officer Lampard admitted that when Scott was arrested, he said that he did not want to go to jail, and he offered to give police some information. Officer Lampard said on redirect examination that the defendant became a target of the investigation only after Scott spoke up. Officer Lampard identified a piece of mail addressed to the defendant at 2301 Jackson Avenue.

New Orleans Police Officer Jake Schnapp testified that he and Officer Lampard arrested two individuals based on information received from Sgt. Gaudet. One of the arrested individuals, James Scott, gestured upward,

telling Officer Lampard and Sgt. Gaudet that he had obtained the narcotics he was selling from the upstairs rear apartment at 2301 Jackson Avenue. Two young black males exited the apartment and entered a black Nissan Sentra. Subsequently, the defendant and a female exited, and Sgt. Gaudet and Officer Lampard detained them. The defendant subsequently informed Officer Schnapp that he did not wish his family to go to jail, and he directed the officer to a wooden table underneath the outside stairway. He told Officer Schnapp to lift up a sofa cushion on the table, underneath which was a plastic bag containing twenty-five smaller plastic bags of powder cocaine.

New Orleans Police Criminalist Officer William Giblin, qualified by the court as an expert in the identification of controlled dangerous substances, identified most of the white powder recovered as cocaine. One bag of white powder tested negative for cocaine.

New Orleans Police Officer Christopher Harris, of the Asset Forfeiture Division, testified that the defendant informed him that neither he nor anyone else who lived in his apartment owned the eight thousand five hundred dollars found therein. The defendant refused to sign a form reflecting that the money had been seized from him.

Valisha Bean ("Ms. Bean") testified that she resided at 2301 Jackson Avenue with her four children, ages twenty, sixteen, thirteen and twelve.

She had been living there sixteen years, including June 1996. She admitted that the defendant, her “guy-friend” and the father of her daughter, was living there at that time. Ms. Bean testified that on the day in question, her children alerted her to the presence of police downstairs, where they had taken “Dinky” into custody. The defendant peeped out of the door. Police came upstairs as she was about to leave with her daughter, and they informed her that the house was under investigation for drug activity. They told her to have a seat, and they then brought her two youngest sons upstairs and handcuffed them. An officer told the defendant that he was going to take everyone to jail. Ms. Bean testified that the police never asked her if there were any drugs in the house. At some point, the police took the defendant outside, leaving her and the children inside. She did not hear the defendant, while he was inside, tell police about any drugs outside. Ms. Bean testified that the eight thousand five hundred dollars in one hundred-dollar bills found in the apartment belonged to her and defendant. She accounted for the money by stating that she worked three jobs and frequented the casino. She further indicated that some of it was her income tax money. She said she would not lie on behalf of defendant; did not allow drugs in her apartment; and did not know of any drugs being stored outside her apartment. Ms. Bean further testified that people used her yard as a

pathway, and that they would simply jump over her fence.

Ms. Bean stated that she worked at Wal-Mart, in the pharmacy department; at Tulane Computer Store; at University Hospital; and at the New Orleans Public School Board. Ms. Bean further stated that the defendant worked at Mule's, and he also did some brick work. She said that approximately five thousand dollars of the money belonged to her, and the other three thousand five-hundred to defendant.

Charita Jiles ("Ms. Jiles") testified that she had a number of convictions for possession of cocaine, relating to arrests by Officers Lampard and Schnapp. She stated that she was talking to the defendant on the telephone on the day of his arrest, when he told her police had "Dinky" downstairs. She went to his apartment and saw police there. Ms. Jiles testified on cross-examination that Officer Schnapp had previously harassed her, broken her nose, and punched her in the jaw.

ERRORS PATENT

A review of the record reveals several errors patent. The record does not reflect that the defendant was arraigned, or that he entered a plea. However, "a failure to arraign the defendant or the fact that he did not plead, is waived if the defendant enters upon the trial without objecting thereto, and

it shall be considered as if he had pleaded not guilty thereto." La. C.Cr.P. art. 555.

The trial court sentenced defendant pursuant to La. R.S. 15:529.1(A)(1)(c)(i), as a fourth felony habitual offender, to twenty years at hard labor, without benefit of parole, probation or suspension of sentence. However, La. R.S. 15:529.1(G) provides that a defendant sentenced under the statute be without the benefit of only probation or suspension of sentence. Accordingly, the defendant's sentence must be amended to delete the stipulation denying him the benefit of parole.

ASSIGNMENT OF ERROR NUMBER ONE

In this assignment of error, the defendant argues that the trial court erred in denying his motion to suppress the evidence based on his assertion that the warrant was facially defective.

The defendant claims the search warrant was facially defective because it listed the address of the place to be searched as 2103 Jackson Avenue, instead of the correct address, 2301. The defendant concedes that the search warrant issued in the instant case was not made a part of the record, but he bases his argument on testimony by Sgt. Gaudet at the motion to suppress hearing. Sgt. Gaudet testified that the address on the application

for the search warrant was 2103 Jackson Avenue, Apartment B, which address he said was not the one searched, and had nothing to do with the case. The search warrant presumably was issued for the incorrect address listed in the application.

Search warrants must particularly describe the place to be searched. U.S. Const., Amend. IV; La. Const. art. 1, § 5; La. C.Cr.P. art. 162. The particularity requirement for search warrants assures that by limiting the authorization to search to the specific areas for which there is probable cause to search, the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches repugnant to the U.S. and Louisiana constitutions. State v. Sterling, 99-2598, p. 3 (La. 4/25/00), 759 So.2d 60, 62. Simply put, the object of the particularity requirement is to prevent the search of the wrong premises. State v. Jenkins, 2000-0425, p. 5 (La.App. 4 Cir. 5/24/00), 764 So.2d 137, 140. Nevertheless, as a general rule, mistakes in the use of municipal numbers do not invalidate a search warrant which otherwise describes the premises with sufficient particularity such that "the officer with the warrant" can ascertain and identify the place intended to be searched. State v. Alonzo, 95-2483, pp. 2-3 (La. 5/31/96), 675 So.2d 266, 267.

The only case cited by the defendant in support of his argument is

State v. Alonzo, 95-1291 (La.App. 4 Cir. 9/15/95), 661 So.2d 1043, wherein this Court affirmed the trial court's grant of a motion to suppress evidence seized from 660 N. Tonti Street, where the warrant had been issued for 654 N. Tonti. However, the defendant fails to acknowledge that the Louisiana Supreme Court subsequently reversed this court's decision in Alonzo, finding that the search warrant adequately described the premises to be searched, aside from the incorrect municipal number. The Supreme Court also noted that the officer who obtained the search warrant was present during the search, a fact which "offered additional assurances that only the targeted premises and not any other apartment would be searched." Id. at pp. 3-4.

The facts in the instant case show that the officers went to 2301 Jackson Avenue, Apartment B, the address of the place to be searched, and occupied it to protect any contraband therein from being destroyed. Sgt. Gaudet, one of the officers initially on the scene at the apartment to be searched, prepared the application for a warrant to search that apartment. He mistakenly listed the municipal number of the address as 2103, instead of 2301. However, he said he also went "into a little detail" when describing the building to be searched. Sgt. Gaudet obtained the search warrant, while other officers waited at the apartment for him to return. Upon Sgt. Gaudet's

return with the search warrant to 2301 Jackson Avenue, Apartment B, he and the officers who had remained at that apartment, along with a canine team, searched that apartment. George Calico, an investigator for the Orleans Parish District Attorney's Office, testified that he photographed 2103 Jackson Avenue, which was a church with no apartments in it. Considering the totality of the circumstances, it would defy reason and common sense to suggest that the policy behind the particularity requirement for search warrants was violated in this case. There was absolutely no possibility that the wrong place would be searched by police. The trial court properly denied the motion to suppress the evidence, insofar as it was based on the incorrect municipal number on the application and search warrant.

There is no merit to this assignment of error.

ASSIGNMENT OF ERROR NUMBER TWO

In this assignment of error, the defendant claims that the trial court erred in denying the motion to suppress the twenty-five bags of cocaine seized from the table underneath the stairway. The defendant claims that he only directed the officers to that after he was arrested without probable cause.

On trial of a motion to suppress, the State has the burden of proving

the admissibility of all evidence seized without a warrant. La. C.Cr.P. art. 703(D); State v. Jones, 97-2217, p. 10 (La.App. 4 Cir. 2/24/99), 731 So.2d 389, 395, writ denied, 99-1702 (La. 11/5/99), 751 So.2d 234. A trial court's ruling on a motion to suppress the evidence is entitled to great weight, because the court has the opportunity to observe the witnesses and weigh the credibility of their testimony. State v. Mims, 98-2572, p.3 (La.App. 4 Cir. 9/22/99), 752 So.2d 192, 193-194. In reviewing a trial court's ruling on a motion to suppress, an appellate court is not limited to evidence adduced at the hearing on the motion to suppress; it may also consider any pertinent evidence given at trial of the case. State v. Nogess, 98-0670, p. 11 (La.App. 4 Cir. 3/3/99), 729 So.2d 132, 137.

At the motion to suppress hearing, Sgt. Gaudet testified that on the day in question, he and other officers were investigating narcotics trafficking in the 2100 block of LaSalle Street, based on information received from a confidential informant. He and Officers Lampard and Schnapp subsequently arrested James Scott and Howard Bryant. Scott was in possession of nineteen bags of cocaine, and upon his arrest he informed police that the defendant–he gave the officers the defendant's name–had given him that cocaine "to sell." Scott described the defendant as wearing a white baseball cap, a blue and white striped shirt, and blue shorts, and he gestured up

toward the nearby apartment at 2301 Jackson Avenue, where the defendant resided. He told the officers that the defendant had drugs in the apartment. While this was going on, the defendant appeared at the door of his upstairs apartment at least three times, seemingly monitoring the police activities outside. Shortly afterward, two young males exited the apartment and got into a black Nissan Sentra, followed by a female carrying a child. The female placed the child in the car and then returned upstairs. At that time, officers believed the defendant was preparing to leave the apartment. Therefore, they elected to secure the apartment. The defendant and the female exited the apartment as Sgt. Gaudet and Officer Lampard ascended the stairs. The officers returned them inside and, as Sgt. Gaudet phrased it, "we confined them to the kitchen area"; advised them they were under investigation for narcotics violations; and secured the residence by making sure that there were no other persons present. Sgt. Gaudet confirmed that the defendant and Ms. Bean told the officers they did not want them in their apartment. The defendant was advised of his rights. He subsequently informed the officers that he did not want his family to go to jail, and he directed the officers to the twenty-five bags of cocaine. Sgt. Gaudet said the defendant was placed under arrest after that cocaine was found. Sgt. Gaudet testified on cross-examination that Scott and Bryant, the two individuals

arrested, were unknown to him prior to their arrest. However, he said that given Scott's position, he "kind of believed he was telling the truth," and when he saw the individuals leaving the apartment, it further aroused his suspicion. Sgt. Gaudet conceded that he did not notice the defendant or anyone else coming out of his apartment engaging in any criminal activity. He admitted that the defendant was not free to leave at the point he and Officer Lampard encountered him on the stairs, and they advised him he was under investigation for possible narcotics violations.

Officer Schnapp testified that after James Scott was arrested he provided officers with the defendant's name and description, and he told them where the defendant lived. Officer Schnapp said that a person fitting that description began looking out of the second-floor door, and it appeared that he and the other occupants of the apartment became concerned with the officers' presence and were preparing to leave. Officer Schnapp stated that Sgt. Gaudet and Officer Lampard, as he phrased it, "detained them" and advised them that they were under investigation for a possible narcotics violation. He said within minutes the defendant told the officers he did not want his family to go to jail, and he showed him–Officer Schnapp said he had remained downstairs–the twenty-five bags of cocaine on the table beneath the stairway. Office Schnapp stated on cross-examination that the

informant who had originally given officers information concerning drug trafficking at that corner did not mention anything about the defendant. Officer Schnapp admitted that he did not know James Scott, and he had no reason to believe that any information received from him would be truthful or untruthful. The officer said he handcuffed the two young males, who had exited the apartment and entered the Nissan Sentra, to the fence. However, he said they were not under arrest.

Officer Lampard's testimony at the motion to suppress hearing essentially tracked that of Sgt. Gaudet and Officer Schnapp. He said officers stopped the defendant and Ms. Bean based on James Scott's information, and the officers' observation that the defendant appeared to be attempting to leave the area. He conceded that James Scott was a "totally untested" source of information at the time he informed them that the defendant had given him the nineteen bags of cocaine found in his possession.

The defendant testified at the motion to suppress hearing that he only knew James Scott from seeing him around the area, and he said Scott would be lying if he said he had obtained drugs from him.

The defendant's argument on appeal is premised on the assumption that he was under arrest at the time he told officers about the cocaine on the table under the stairway. Police testified that the defendant was not placed

under arrest until after they recovered the cocaine. La. C.Cr.P. art. 201 defines arrest as the "[t]aking of a person into custody by another. To constitute an arrest there must be an actual restraint of the person. The restraint may be imposed by force or may result from the submission of the person arrested to the custody of the one arresting him." An arrest occurs when the circumstances indicate an intent to effect an extended restraint on the liberty of the accused, rather than at the precise time an officer tells an accused he is under arrest. State v. Simms, 571 So.2d 145, 148 (La. 1990); State v. Watson, 99-1448 (La.App. 4 Cir. 8/23/00), __ So. 2d __, __, 2000 WL 1486574. This Court further elaborated on "arrest" in State v. Dorsey, 99-1819 (La.App. 4 Cir. 4/19/00), 763 So.2d 21, stating:

> The distinguishing factor between an arrest and the lesser intrusive investigatory stop is that in the former, a reasonable person would not feel that he is free to leave, while in the latter, a reasonable person would feel free to leave after identifying himself and accounting for his suspicious actions; "it is the circumstances indicating intent to effect an extended restraint on the liberty of the accused" that is determinative of when an arrest occurs.

99-1819 at pp. 5-6, 763 So.2d at 24-25, quoting State v. Allen, 95-1754, p. 6 (La. 9/5/96), 682 So.2d 713, 719.

In State v. Allen, 95-1754 (La. 9/5/96), 682 So.2d 713, police were seeking the defendant for questioning in a homicide, as the defendant had been with the victim in a bar where the victim's body was found, and the

defendant supposedly owned a .380 caliber firearm, the type of gun used to kill the victim. A deputy sheriff spotted the defendant in his car later that night and stopped him. A second deputy arrived on the scene and asked the defendant if he owned a .380 caliber firearm. The defendant replied that he did, and said it was in his vehicle. The defendant was advised of his Miranda rights and consented to a search of the vehicle. The Louisiana Supreme Court held that the defendant was not under arrest at this time "as there was no restraint on his liberty and he was free to leave at anytime." 95-1754 at p. 6, 682 So.2d at 719. The court noted the following factors in reaching its decision: that the deputy stopping the defendant did not use any weapon or physical force to restrain him; that both deputies said they only wanted to ask the defendant some questions–and he complied without objection; and that the defendant was not searched, handcuffed, or placed in a police car. The court said there was no indication that the officers intended to do anything other than briefly question the defendant, and, "[m]ost importantly," there was no evidence suggesting that the defendant was not free to leave at anytime. Id. The defendant was later driven in a patrol car to a sheriff's substation for additional questioning. The court held that even then, there was no indication that the defendant had been forced to go to the substation, or that he was not free to terminate the in-station interview at any

time and leave.

In State v. Smith, 99-2129 (La.App. 4 Cir. 4/26/00), 761 So.2d 642, police stopped Smith by boxing in his pickup truck between two police cars. After Smith was stopped, the officer advised Smith that he was conducting an investigation, and that he intended to secure a search warrant for Smith's residence. Smith was advised of his Miranda rights, and the officer testified that Smith had not been free to go. Police handcuffed Smith and drove him in a police car to his residence. Smith told the officers where a key was located, and the officers entered the residence. They subsequently obtained a search warrant, searched the residence, and seized drugs, cash and guns. This Court held that under these circumstances, Smith had been arrested.

In the instant case, the officers approached the defendant and his girlfriend; informed him that he was under investigation for possible narcotics violations; took both of them back inside of his apartment; and advised the defendant of his Miranda (presumably) "rights." Meanwhile, the teenage male children of the defendant's girlfriend had been handcuffed downstairs to a fence. Police initially only *suspected* that narcotics were in the apartment. They checked the defendant's apartment for other persons, finding none. They did not search the apartment for drugs, evidencing an intent to either obtain a search warrant based on what little information they

had, or possibly obtain consent to search. Officer Schnapp said the defendant and Ms. Bean were "detained." Within minutes, the defendant volunteered the information about the cocaine downstairs on the table under the stairway. However, the officers testified that the defendant was not placed under arrest until after the cocaine was recovered. Certainly, nothing in the officers' testimony indicates that the defendant was free to leave, although there was no testimony that he was handcuffed. Even though the defendant showed police the cocaine downstairs within minutes of being confronted by officers and advised of his rights, the evidence strongly suggests that the officers intended an extended restraint on defendant's liberty–until he or Ms. Bean consented to a search of the apartment, or until a search warrant had been obtained. Therefore, it must be concluded that the defendant was under arrest at the time he gave the statement to police.

It now must be determined whether there was probable cause to arrest defendant. This Court set forth the applicable law pertaining to arrest in State v. Dorsey, 99-1819 (La.App. 4 Cir. 4/19/00), 763 So.2d 21, as follows:

> A warrantless arrest must be based on probable cause. State v. Jackson, 450 So.2d 621, 627 (La.1984); State v. Creecy, 98-1472, p. 6 (La.App. 4 Cir. 7/14/99), 742 So.2d 615, 619. Probable cause exists when the facts and circumstances, either personally known to the arresting officer or of which he has reasonably trustworthy information, are sufficient to justify a man of ordinary caution in believing that the person to be

> arrested has committed a crime. State v. Johnson, 98-2544, p. 6 (La.App. 4 Cir. 11/17/99), 748 So.2d 527, 531; State v. Bryant, 98-1115, p. 5 (La.App. 4 Cir. 8/4/99), 744 So.2d 108, 111. Probable cause is assessed by an objective standard that must withstand the "detached, neutral scrutiny of a judge." State v. Fisher, 97-1133, p. 8 (La.9/9/98), 720 So.2d 1179, 1184 (quoting State v. Flowers, 441 So.2d 707, 712 (La.1983), cert. denied, 466 U.S. 945, 104 S.Ct. 1931, 80 L.Ed.2d 476 (1984)). In determining whether probable cause existed, the court should take into account the "practical considerations of everyday life on which ... average police officers can be expected to act." Id. (quoting State v. Raheem, 464 So.2d 293, 296 (La.1985)). The determination of probable cause, although requiring something more than bare suspicion, does not require evidence sufficient to support a conviction; probable cause, as the very name implies, deals with probabilities. State v. Green, 98-1021 (La.App. 4 Cir. 12/22/99), 750 So.2d 343. The determination of probable cause, unlike the determination of guilt at trial, does not require the fine resolution of conflicting evidence that a reasonable doubt or even a preponderance standard demands. Id.

99-1819 at pp. 5-6, 763 So.2d at 24-25.

In the instant case, James Scott, who informed police that he had obtained the nineteen bags of cocaine found by police in his possession from the defendant, was an informant. Whether an informant's tip establishes probable cause to arrest must be considered under the totality of the circumstances. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). When assessing the overall reliability of a tip, and weighing the veracity and reliability of the informant and the basis of his knowledge, a deficiency as to one of those factors may be compensated for by a strong

showing as to another, or by some other indicia of reliability. Gates, 462 U.S. at 233, 103 S.Ct. at 2329. Even if there is doubt as to an informant's motives, an explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case. Gates, 462 U.S. at 234, 103 S.Ct. at 2330. There is an indicia of reliability in a tip from an informant who can be held responsible if his allegations turn out to be fabricated, i.e., a tip from a known informant. See Florida v. J.L., 529 U.S. 266, 120 S.Ct. 1375, 1378, 146 L.Ed.2d 254 (2000).

In State v. Creecy, 98-1472 (La.App. 4 Cir. 7/14/99), 742 So.2d 615, an untested confidential informant told police that a black male named Warren Creecy was selling retail quantities of marijuana from an apartment located at 1233 S. Saratoga Street. The informant said he had purchased marijuana from Creecy within the past seventy-two hours. During a period of surveillance, officers observed several pedestrians walk down the alley to Creecy's apartment, stay a short while, and then leave. Another individual walking past an officer's vehicle appeared startled at seeing him. That individual continued on, walked into Creecy's apartment, and left less than one minute later. Suddenly, a person fitting Creecy's description exited the apartment, walked out of the alley to the street, and began looking around in

all directions. Believing their surveillance had been compromised, police approached Creecy, detained him, informed him that he was under investigation for narcotics trafficking, and advised him of his rights. For the safety of all person involved, Creecy was handcuffed. Police searched him and found marijuana on his person. The trial court denied defendant's motion to suppress the evidence, and defendant pleaded guilty, reserving his right to appeal the denial of the motion to suppress. On appeal, the State conceded that defendant had been arrested. This Court found that the information from the untested informant, together with the officers' surveillance observations, were insufficient to establish probable cause to arrest, and reversed the defendant's conviction and sentence. The Court noted that the informant's physical description of the defendant, his residence, and his vehicle, which were verified by officers during their surveillance, were simply facts that could have been obtained by a casual observer. The Court also apparently found no support in the officers' observation of several pedestrians going to the defendant's apartment, each staying only a few minutes before leaving.

In State v. Smith, supra, a police officer received information from an untested confidential informant that Smith lived 2745 St. Peter Street, drove a red Ford F-150 pickup truck, and left his residence each night between

11:45 p.m. and midnight to deliver drugs to various individuals in the 2300 block of Aubrey Street. The officer was familiar with Smith from dealing with other informants, and he knew the 2300 block of Aubrey Street was rife with drug activity. The officer set up a surveillance and, at 11:40 p.m., observed Smith leave his residence, walk to the back of a red Ford F-150 pickup truck, put something in his mouth, enter the truck, and drive away. The officer followed Smith for six blocks, at which time he elected to stop him. As previously discussed, Smith was deemed under arrest after the stop. The trial court denied Smith's motion to suppress the evidence. On appeal, this Court reversed, finding that police had no probable cause to arrest Smith. Though the informant was known to police–as opposed to an anonymous informant–he was untested. The informant told the officer he had not been in Smith's residence. The Court noted that all police had done was to corroborate information as to where Smith lived, the type of vehicle he drove, and that he would leave his home between 11:45 p.m. and midnight each night. The Court also noted that Smith putting an unidentified object into his mouth before getting into his truck was not in itself a particularly suspicious act that would lead a person of ordinary caution to believe that Smith was engaged in the sale of narcotics.

In State v. Cook, 99-0091 (La.App. 4 Cir. 5/5/99), 733 So.2d 1227,

officers received information through a narcotics hotline (an anonymous tip) that drugs were being sold from an apartment. An officer testified that he observed a person exit the apartment building and later make a hand-to-hand transaction with another individual. The same officer later observed a second individual exit the apartment building and make a hand-to-hand transaction with another person. Both of the individuals who had exited the apartment were subsequently stopped by police, but no contraband was found on either of them. When officers observed the defendant exit the apartment during the thirty to forty-five minute surveillance, they decided to stop him. When he saw the officers, the defendant ran back inside of the apartment. This court held that, based on the information officers had received, and their own observations, they had probable cause to arrest at the point when the defendant turned and fled at the sight of the officers. 99-0091 at pp. 11-12, 733 So.2d at 1234.

In the instant case, the officers received information from essentially a known, but untested informant, as in Creecy and Smith. Scott's motive in telling officers that the defendant gave him the cocaine was obvious: he did not want to go to jail and sought to curry favor with police, hoping for some immediate or future concession from them or prosecutors. On first impression, it might be thought that James Scott, found in possession of

nineteen bags of cocaine, had a motive to lie. However, the other side of that coin is that James Scott could be held responsible if his allegations were found to be untrue. That said, it is important to note that James Scott gave police no specific information from which it could be concluded that Scott was privy to what the defendant had in his apartment, such as information as to how much cocaine the defendant had, or information as to where any cocaine in the apartment was located. Scott did not say when he had obtained the cocaine from the defendant. None of the police officers testified that Scott ever stated that he had been inside of the defendant's apartment. Police observed no criminal activity on the defendant's part. The only thing the officers had was James Scott's allegation that he had obtained the cocaine from Samuel Hills; that Hills had more cocaine in the apartment; and that Hills was wearing a white baseball cap, a blue and white striped shirt, and blue shorts. As in Creecy, except for the name and the allegations about the cocaine, this information could have been available to a "casual observer," someone who had perhaps recently seen the defendant enter his apartment. This is the same type of information given to and corroborated by police in Smith, but which this court found did not militate toward a finding of probable cause to arrest. Unlike in Creecy, police in the instant case did not observe individuals on separate occasions enter the

defendant's apartment and leave minutes later, which might be considered indicative of drug sales occurring in the apartment. The fact that the defendant peered out of his door at the police activity cannot realistically be considered indicative of criminal activity or consciousness of guilt. It certainly is not uncommon for law-abiding residents to watch police activities occurring near their homes or apartments. The preparation of the apartment residents to leave in the Nissan Sentra also was not indicative of guilt. This was not the familiar immediate flight-at-the-sight-of-police activity often cited as weighing heavily in favor of reasonable suspicion to make an investigatory stop. And, again, it is not simply reasonable suspicion to stop that must be justified in the instant case, but probable cause to arrest.

Considering the totality of the circumstances, we find that it cannot be said that James Scott's statement, together with the observation of actions by the defendant and members of his household, furnished police probable cause to believe that the defendant had committed a crime. Thus, the defendant's arrest prior to the time he directed police to the cocaine on the wooden table was illegal. Police learned of the cocaine only because the defendant was arrested and told officers about the cocaine because he said he did not want his family to go to jail. Thus, the cocaine was seized only as a

result of the illegal arrest, and should have been suppressed as the "fruit of the poisonous tree." Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); see also State v. Stan, 97-2195 (La.App. 4 Cir. 10/29/97), 703 So.2d 83, writ denied, 97-2852 (La. 2/18/98), 709 So.2d 762. Further, the two bags of cocaine seized from the defendant's residence were seized pursuant to a search warrant issued upon an application containing information pertaining to the defendant's arrest for the twenty-five bags from the table under the stairway. Sgt. Gaudet's testimony establishes that the only other information in the search warrant application pertaining to probable cause was the information that already has been determined insufficient to establish probable cause to arrest the defendant–the tip from James Scott and the officers' observations. Therefore, if the information about the twenty-five bags of cocaine is excised from the application, what remains cannot be considered sufficient to establish probable cause to believe that contraband was in the defendant's apartment. Accordingly, as fruit of the poisonous tree, the two bags of cocaine seized from the the defendant's residence should have been suppressed by the trial court. See State v. Creecy, 98-1472 (La.App. 4 Cir. 7/14/99), 742 So.2d 615.

This assignment of error has merit. Both the cocaine seized from the wooden table and from inside the defendant's apartment should have been

suppressed. In this case, this was all of the cocaine seized by police.

There is merit to this assignment of error.

ASSIGNMENT OF ERROR NUMBER THREE

In this assignment of error, the defendant claims the trial court erred in denying his motion for a new trial based on newly discovered evidence.

La. C.Cr.P. art. 851 provides that a new trial shall be granted on motion of defendant whenever, among other reasons:

> (3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty; ….

In order to obtain a new trial based on newly discovered evidence, the defendant must show that: (1) the new evidence was discovered after trial; (2) the failure to discover the evidence at the time of trial was not due to the defendant's lack of diligence; (3) the evidence is material to the issues at trial; and (4) the evidence is of such a nature that it would probably have changed the verdict of guilty. State v. Bright, 98-0398, p. __ (La. 4/11/00), __ So.2d __, __, 2000 WL 366295. In ruling on the motion the trial court is to ascertain whether there is new material fit for a new jury’s verdict, not weigh the evidence as though it were a jury determining guilt of innocence.

State v. Cavalier, 96-3052, p. 3 (La. 10/31/97), 701 So.2d 949, 951. Nevertheless, the court must determine whether the evidence presented at trial appears strong enough to support a conclusion that the newly discovered evidence probably would not have changed the verdict, considering all of the newly discovered evidence that would be presented at trial. Id., 96-3052 at pp. 4-5, 701 So.2d at 952. A trial court assessing the legal merits of a motion for new trial is given considerable latitude in evaluating the reliability of the evidence and its impact on the verdict. State v. Brooks, 98-0693, p. 12 (La.App. 4 Cir. 7/21/99), 758 So.2d 814, 820, writ denied, 99-2519 (La. 2/25/00), 755 So.2d 247. The trial court has much discretion in ruling on a motion for new trial. State v. Cureaux, 98-0097, p. 4 (La.App. 4 Cir. 5/26/99), 736 So.2d 318, 321. Review of the trial court's ruling is limited to determining whether the trial court abused its discretion. State v. Labran, 97-2614, p. 6 (La.App. 4 Cir. 5/26/99), 737 So.2d 903, 907, writ denied, 99-1981 (La. 1/7/00), 752 So.2d 175.

The new evidence presented by the defendant at his motion for new trial was an affidavit by James Scott, a copy of which is contained in the record. Mr. Scott acknowledged in his affidavit that he had been arrested for a narcotics violation on June 8, 1996, but he averred that the police had not asked him any questions, nor had he volunteered any information to them.

Mr. Scott said Officer Lampard's testimony that he told police he had obtained the cocaine from defendant was false. He claimed that at no time did he say anything to police about defendant.

The defense witness list contained in the record names James Scott. James Scott did not testify at trial, and defense counsel represented to the court at the hearing on the motion for new trial that James Scott did not appear for trial. Defense counsel said he did not have an address on James Scott–although one was listed on the witness list–and that someone brought Mr. Scott to his office, apparently recently, at which time he executed the affidavit. The defendant argued to the court that the credibility of the police officers who testified at trial was at issue and that Mr. Scott's affidavit therefore warranted a new trial. Newly discovered evidence affecting only a witness's credibility ordinarily will not support a motion for a new trial, because new evidence which is merely cumulative or impeaching is not usually an adequate basis for the grant of a new trial. State v. Cavalier, supra.

The defendant fails to show that the trial court abused its discretion in implicitly determining that Mr. Scott's testimony was not of such a nature that it would probably have changed the verdict of guilty.

There is no merit to this assignment of error.

PRO SE ASSIGNMENT OF ERROR

In his pro se assignment of error, the defendant attacks his adjudication as a fourth-felony habitual offender pursuant to La. R.S. 15:529.1.

In State v. Alexander, 98-1377 (La.App. 4 Cir. 2/16/00), 753 So.2d 933, this Court stated:

> LSA-R.S. 15:529.1 D(1)(b) states that the district attorney has the burden of proving beyond a reasonable doubt any issue of fact and that the presumption of regularity of judgment shall be sufficient to meet the original burden of proof. In State v. Shelton, 621 So.2d 769, 779-780 (La.1993), the Supreme Court stated:
>
>> If the defendant denies the allegations of the bill of information, the burden is on the State to prove the existence of the prior guilty pleas and that defendant was represented by counsel when they were taken. If the State meets this burden, the defendant has the burden to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. If the defendant is able to do this, then the burden of proving the constitutionality of the plea shifts to the State. The State will meet its burden of proof if it introduces a "perfect" transcript of the taking of the guilty plea, one which reflects a colloquy between judge and defendant wherein the defendant was informed of and specifically waived his right to trial by jury, his privilege against self-incrimination, and his right to confront his accusers. If the State introduces anything less than the "perfect" transcript, for example, a guilty plea form, a

> minute entry, an "imperfect" transcript, or any combination thereof, the judge then must weigh the evidence submitted by the defendant and by the State to determine whether the State has met its burden of proving that the defendant's prior guilty plea was informed and voluntary, and made with an articulated waiver of the three Boykin rights. (Footnotes omitted).

98-1377 at pp. 5-6, 753 So.2d at 937.

The defendant argues that the State failed to produce Boykin transcripts for two of his prior convictions and failed to prove that he was one and the same person previously convicted in case # 348-864. Defense counsel argued at the habitual offender hearing that the State failed to prove beyond a reasonable doubt that the defendant was the same person previously convicted of the offenses, i.e., that the State failed to prove the element of identity. The specific argument in the trial court that the evidence failed to prove identity preserves a defendant's right to review of the sufficiency of the evidence as to identity. State v. Hayden, 98-2768, p. 16 (La.App. 4 Cir. 5/17/00), 767 So.2d 732, __, 2000 WL 722193. Accordingly, the argument as to the sufficiency of the evidence as to identity for the prior conviction in case # 348-864 is preserved for review. However, defense counsel did not raise any objection regarding proof that the defendant had been adequately advised of his Boykin rights on the two prior convictions resulting from guilty pleas, or specifically object to the lack of

Boykin transcripts therefore. The failure to object at the habitual offender hearing to the failure of the State to produce Boykin transcripts precludes a defendant from raising that issue on appeal. State v. Boles, 99-0427, p. 7 (La.App. 4 Cir. 5/10/00), 763 So.2d 74, 79. Accordingly the only issue for review presented by this assignment of error is whether the State met its burden of proving the element of identity as to the prior conviction in case # 348-864.

To prove that a defendant is a habitual offender under La. R.S. 15:529.1, the State is required to establish the prior felony conviction and that the defendant is the same person convicted of that felony. State v. Anderson, 99-1407, p. 6 (La.App. 4 Cir. 1/26/00), 753 So.2d 321, 325. Proof of identity can be established through a number of ways, such as the testimony of witnesses to prior crimes, expert testimony matching the fingerprints of the accused with those in the record of the prior proceeding, or photographs contained in a duly authenticated record. State v. Isaac, 98-0182, p. 7 (La.App. 4 Cir. 11/17/99), 762 So.2d 25, 28-29. It is sufficient to match fingerprints on an arrest register to a defendant, and then match the arrest register to a bill of information and other documents evidencing conviction and sentence; this can done through a date of birth, social security number, bureau of identification number, case number, specifics and details

of the offense charged, etc. See Anderson and Isaac, supra.

New Orleans Police Officer Lawrence James was qualified at the habitual offender hearing by stipulation as an expert in fingerprint identification. He testified that he fingerprinted the defendant that morning in court. He matched those fingerprints to ones on the back of an arrest register for a Samuel T. Hills, arrested on February 2, 1991 for possession of crack cocaine. That arrest register shows that the Samuel T. Hills arrested for possession of crack cocaine on February 2, 1991 had a date of birth of 8/11/63, and an address of 2332 Josephine Street. A bill of information in case # 348-864 was introduced in evidence, charging Samuel T. Hills, 2332 Josephine Street, with possessing crack cocaine on February 2, 1991. A plea of guilty form was introduced showing that a Samuel T. Hills, date of birth, 8/11/63, pled guilty to possession of cocaine on April 26, 1993 in case # 348-864. A docket master in case # 348-864 reflects these facts. Therefore, the State proved beyond a reasonable doubt that the defendant Samuel T. Hills was one and the same person previously convicted of possession of cocaine in case # 348-864.

There is no merit to this assignment of error.

CONCLUSION

For the foregoing reasons, the defendant's conviction and sentence are hereby reversed.

CONVICTION AND SENTENCE REVERSED