NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-0621**
VERSUS	*	**COURT OF APPEAL**
MICHAEL MEAD	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 406-128, SECTION "G"
Honorable Julian A. Parker, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Michael E. Kirby, and
Judge David S. Gorbaty)

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AFFIRMED

STATEMENT OF THE CASE

On April 8, 1999, the defendant, Michael Mead, was charged by bill of information with possession of cocaine with the intent to distribute, a violation of La. R.S. 40:967. He filed a motion to suppress, which was denied. On July 21, 1999, a twelve- member jury found the defendant guilty as charged. He filed a motion for new trial that the trial court denied. He was sentenced to thirty years at hard labor, and the trial court denied a motion for reconsideration of sentence. The State filed a multiple bill. On August 13, 1999, the trial court found him to be a third offender, vacated his original sentence, and resentenced him to life imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. The defendant filed an appeal with this Court.

ERRORS PATENT

A review of the record for errors patent reveals none.

FACTS

Officer Melvin Walton testified that on March 27, 1997, he was on routine patrol with his partner, Officer Terrence White, in the C.W. Peete, Magnolia Housing Project. Officer Walton testified that he and his partner saw a group of "subjects" standing in a tight circle at the corner of Sixth and Magnolia Streets. One of these subjects, later revealed to be Don Jackson, who Officer Walton knew, yelled "heads up" upon seeing the officers. The entire group then began to walk away. The officers immediately decided to stop all of the subjects, and they called Officer Akron Davis for assistance. Officer Davis drove into the courtyard. Officer White drove Officer Walton to a passageway. Officer Walton testified that when he walked into the passageway, he saw Officer Davis place two of the subjects on the car. Officer Walton also testified that he saw the defendant walking with a female. The defendant put his hand in his pocket, and his other arm around the female. Officer Walton stated, "As he got closer to me he pushed her on me and ran." Officer Walton chased him. The defendant threw something down as he ran. Officer Walton stopped the defendant. Officer Walton said that he and Davis went back to the spot where they had seen the defendant throw an object, and Officer Davis found a plastic bag containing forty

pieces of individually wrapped crack. The officers later searched the defendant and found $775.00. The defendant said that the money was an income tax refund.

On cross-examination, Officer Walton stated that he never lost sight of the defendant in the chase and that there was no one else in the driveway when he was chasing the defendant. He further stated that there was trash in the area.

Officer Davis said when he pulled up in response to the call, he saw a group of guys standing in a group, talking. As Officer Davis was getting out of his car, he saw Officer Walton run behind a group of subjects. Officer Davis testified that he got back into his car. Officer Walton radioed Officer Davis and told Officer Davis to meet him. When Officer Davis arrived, Officer Walton was walking back with the defendant. Officer Walton told him to search for the object the defendant threw down in the 2700 block of Sixth Street. Officer Davis found the bag containing the drugs within two minutes. It was located near a parked car in the middle of the street. Officer Davis testified that a nearby dumpster had trash around it, but the street was clean.

On cross-examination, he said that Officer Walton had told him that the object was white.

The defense called Quain Minor. Minor testified that she was with the defendant, and he ran when the officers approached. She said he did not push her into the officers, and that he had no drugs on him. She further testified that she had gone through the defendant's pockets earlier to get some money for food.

ASSIGNMENT OF ERROR NUMBER ONE

It has long been held that property cannot be seized legally if it was abandoned pursuant to an infringement of the person's property rights. However:

> if . . . property is abandoned without any prior unlawful intrusion into a citizen's right to be free from government interference, then such property may be lawfully seized. In such cases, there is no expectation of privacy and thus no violation of a person's custodial rights.

State v. Belton, 441 So. 2d 1195, 1199 (La. 1983), cert. den. Belton v. Louisiana, 466 U.S. 953, 104 S.Ct. 2158 (1984). See also State v. Britton, 93-1990 (La. 1/27/94), 633 So.2d 1208; State v. Tucker, 626 So.2d 707 (La. 1993), opinion reaffirmed and reinstated on rehearing, 626 So.2d 720 (La. 1993); State v. Laird, 95-1082 (La. App. 4 Cir. 5/8/96), 674 So.2d 425.

An "actual stop" occurs when an individual submits to a police show of authority or is physically contacted by the police. Tucker. An "imminent

actual stop" occurs when the police come upon an individual with such force that, regardless of the individual's attempts to flee or elude the encounter, an actual stop of the individual is virtually certain. Id. The Supreme Court listed the following factors to be considered in assessing the extent of police force employed in determining whether that force was "virtually certain" to result in an "actual stop" of the individual: (1) the proximity of the police in relation to the defendant at the outset of the encounter; (2) whether the individual has been surrounded by the police; (3) whether the police approached the individual with their weapons drawn; (4) whether the police and/or the individual are on foot or in motorized vehicles during the encounter; (5) the location and characteristics of the area where the encounter takes place; and (6) the number of police officers involved in the encounter. Id. An actual stop is imminent "when the police come upon an individual with such force that, regardless of the individual's attempts to flee or elude the encounter, an actual stop of the individual is *virtually certain*." Tucker, 626 So.2d at 712.

If a defendant abandons property as a result of an actual stop or an imminent actual stop, the officers involved must have at least reasonable suspicion to support the stop. In State v. Sneed, 95-2326, p. 3 (La. App. 4 Cir. 9/11/96), 680 So. 2d 1237, 1238, writ denied, 96-2450 (La. 3/7/97), 689

So.2d 1371, this court described the standard to support an investigatory stop:

> An individual may be stopped and questioned by police if the officer has a reasonable suspicion that the person "is committing, has committed, or is about to commit an offense." La. Code Crim. Proc. Ann. art. 215.1. While "reasonable suspicion" is something less than the probable cause needed for an arrest, it must be based upon particular articulable facts and circumstances known to the officer at the time the individual is approached. State v. Smith, 94-1502, p. 4 (La. App. 4th Cir. 1/19/95), 649 So.2d 1078, 1082. The officer's past experience, training and common sense may be considered in determining if the inferences drawn from the facts presented were reasonable. State v. Jackson, 26,138 (La.App.2 Cir. 8/17/94), 641 So.2d 1081, 1084.

See also State v. Allen, 95-1754 (La. 9/5/96), 682 So.2d 713. It must be noted that the court needs to determine if officers had reasonable suspicion for an investigatory stop **only if** it finds the officers' actions constituted an actual or an imminent actual stop.

In State v. Benjamin, 96-2781 (La. App. 4 Cir. 11/26/97), 703 So.2d 192, officers were on routine patrol when they came upon the defendant, who was walking down the street. As the officers pulled alongside the defendant, he grabbed at his waistband and began running down the street. Because the officers believed the defendant was carrying a weapon or contraband, one officer exited the police vehicle and gave chase on foot, while the other officer remained the car and attempted to cut off the

defendant's escape. A second police car joined in the chase, with one of its officers joining in the foot chase. The chase continued through back yards and over fences, and the defendant eventually abandoned a gun and continued fleeing. The officers in the cars apprehended the defendant as he was exiting an empty lot. One of the officers returned to the scene of the abandonment and retrieved the gun that had been thrown down by the defendant.

This Court reversed the trial court's denial of the defendant's motion to suppress the gun and a statement he made at his arrest. This Court found that the officers' actions constituted an imminent actual stop: "Two officers were chasing the defendant on foot and two were following in police units cutting off any escape routes that the defendant might take. The police surrounded him. In fact, the testimony was to the effect that the officers' aim was to try to cut him off, give him a short cut and make him turn so that he would have no escape possibility." Id. at p. 7, 703 So. 2d at 196. Finding that a stop was virtually certain, this Court then found that the officers did not have reasonable suspicion to stop the defendant. This Court noted that the chase was precipitated only by the defendant's actions of running and grabbing at his waistband. The Court further noted that there was no tip involving the defendant or any drug activity at that time; nor did the officers

see any weapon or suspected drug activity on the defendant's part. This court concluded:

> There was no reasonable suspicion to detain the defendant. All the while there were no articulable facts that the defendant was fleeing as a result of the commission or attempted commission of a crime. Although the defendant's running from the scene upon seeing the officers is a factor to be considered, flight without more is insufficient to justify an investigatory stop where the officers did not know what might be in the defendant's waistband. State v. Roberson, 549 So.2d 931 (La.App. 3rd Cir.1989); State v. Ellington, 96-0766 (La.App. 4 Cir. 9/4/96), 680 So.2d 174; State v. Denis, 96-0956 (La. App. 4 Cir. 3/19/97), 691 So.2d 1295, writ denied 97-1006 (La. 6/20/97), 695 So.2d 1352. Running and pulling on the waistband served as an impermissible substitute for the requisite reasonable suspicion. It is not a crime to run from the police while clutching one's waistband.

Benjamin at p. 8, 703 So.2d at 196. Because there was an imminent actual stop and because there was no reasonable suspicion to support the imminent stop, this Court suppressed the evidence abandoned by the defendant.

The Supreme Court reversed, holding that:

> Given the highly suspicious nature of flight from a police officer, the amount of additional information required in order to provide officers a reasonable suspicion that an individual is engaged in criminal behavior is greatly lessened.
>
> Here, [the officers] observed that defendant, upon seeing the marked police unit, began to run away holding his waistband as if he were supporting a weapon or contraband. These objective facts known to the officers were sufficient to raise a reasonable suspicion that defendant either was engaging or was about to engage in criminal activity, and, thus, justified a stop.

State v. Benjamin, 97-3065 (La. 12/1/98), 722 So.2d 988, 989. The Court found that since the investigatory stop was justified in that the officers had reasonable suspicion, the question of whether an "imminent stop" had occurred was moot.

In this case, Walton testified that the defendant shoved a girl, perhaps Minor, onto him and then fled. Under Benjamin, the officers had reasonable suspicion at that point, a stop was justified, and whether the stop was "imminent" is moot. The trial court did not err in denying the motion to suppress.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER TWO

The defendant argues the evidence was insufficient because Officer Walton saw the defendant throw down the drugs, but Officer Davis was the one that found them. He argues that there was trash in the area, that there were other white objects in the area, and that another individual could have discarded the drugs.

The standard of appellate review for sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the prosecution,

any rational trier of fact could have found that the State proved the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979). Either direct or circumstantial evidence may prove the essential elements of the crime. With circumstantial evidence, the rule is: "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." La. R.S. 15:438. This rule is not a separate test from the review standard established by Jackson v. Virginia. Rather, it is an evidentiary guideline, which facilitates appellate review of the sufficiency of the evidence. State v. Jacobs, 504 So.2d 817, 820 (La. 1987). Ultimately, to support a conviction, the evidence, whether direct or circumstantial, or both, must be sufficient under Jackson to satisfy any rational trier of fact that the defendant is guilty beyond a reasonable doubt. State v. Sutton, 436 So.2d 471 (La. 1983). Specific intent may be inferred from circumstances and the defendant's actions. State v. Smith, 94-2588 (La. App. 4 Cir. 3/27/96), 672 So.2d 1034.

This court reviewed the law on point in State v. Allen, 96-0138, pp. 4-5 (La. App. 4 Cir. 12/27/96), 686 So.2d 1017, as follows:

> To support a conviction for possession of narcotics, the State must prove that a defendant knowingly possessed narcotics. State v. Chambers, 563 So. 2d 579, 580 (La. App. 4th Cir. 1990). The State need not prove that the defendant was in actual possession of the narcotics found; constructive

> possession is sufficient to support conviction. See State v. Trahan, 425 So. 2d 1222, 1226 (La. 1983); see also State v. Cann, 319 So. 2d 396, 397 (La. 1975). The mere presence of a defendant in the area where the narcotics were found is insufficient to prove constructive possession. See State v. Collins, 584 So. 2d 356, 360 (La. App. 4th Cir. 1991); see also Cann, supra at 397.
>
> A person not in physical possession of narcotics may have constructive possession when the drugs are under that person's dominion and control. State v. Jackson, 557 So. 2d 1034, 1035 (La. App. 4th Cir. 1990). A person may be deemed to be in joint possession of a drug which is in the physical possession of a companion if he willfully and knowingly shares with the other the right to control it. State v. Smith, 257 La. 1109, 245 So. 2d 327, 329 (1971). Determination of whether a defendant had constructive possession depends on the circumstances of each case. See Cann, supra at 399-400. Among the factors to consider in determining whether the defendant exercised dominion and control sufficient to constitute constructive possession are whether the defendant knew that illegal drugs were present in the area, the defendant's relationship to the person in actual possession of the drugs, whether there is evidence of recent drug use, the defendant's proximity to the drugs, and any evidence that the area is frequented by drug users. See State v. Pollard, 93-1960, p. 13 (La. App. 4th Cir. 7/14/96), 640 So. 2d 882, 888.

In this case, Officer Walton told Officer Davis where to search for the abandoned object. He accompanied Officer Davis in the search. Although Officer Davis did say that there may have been other white objects in the area, the drugs were found in the middle of a clean street within two minutes. There was no testimony that others passed the spot in the short period between the defendant abandoning an object and the drugs being

found. The State successfully proved that the defendant threw down a bag containing forty pieces of crack individually wrapped. Accordingly, the State proved that the defendant possessed cocaine with the intent to distribute.

This assignment of error is without merit.

CONCLUSION

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

AFFIRMED