STATE OF LOUISIANA	*	**NO. 2000-KA-0767**
VERSUS	*	**COURT OF APPEAL**
TONY SMITH	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 401-595, SECTION "A"
Honorable Charles L. Elloie, Judge

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Judge Steven R. Plotkin
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(Court composed of Chief Judge William H. Byrnes, III, Judge Steven R. Plotkin, and Judge Max N. Tobias, Jr.)

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AFFIRMED

STATEMENT OF THE CASE:

On September 17, 1998, defendant Tony Smith was charged by bill of information with possession of cocaine with intent to distribute. On November 23, 1998, the trial court found probable cause and denied defendant's motion to suppress evidence. At trial on July 29, 1999, a jury found defendant guilty of simple possession of cocaine. On December 1, 1999, a defense motion for new trial was denied. After waiver of the delay, the trial judge sentenced defendant to serve three years at hard labor, to run concurrently with any other sentence he may be serving. The State advised the court of its intention to file a multiple bill. Trial counsel filed objections to the multiple bill. Despite several settings, the multiple bill has not been tried to date.

STATEMENT OF THE FACTS:

At approximately 10:25 p.m. on September 15, 1998, Officer Joey Williams and Detective Roy Phillips investigated a tip from an untested confidential informant. The informant advised the officers that there was a subject dealing crack cocaine to pedestrians in the 6000 block of Chef

Menteur Highway, an area known to them for a high incidence of illegal drug activity. The informant advised the officers that he knew that the subject was dealing crack from personal observation. The informant further advised that the subject was a black male wearing a beige shirt with dark thin stripes, dark colored jeans and a black baseball cap. The informant also advised that the subject was from California and was staying locally at the Monte Carlo Hotel.

The officers observed defendant, who fit the description, at the given location. They further observed that defendant was interacting with a known prostitute and drug user in front of the Rest Inn Motel. Defendant was holding a tan plastic bag in one hand and had his other hand in the bag. The officers made a U-turn in their unmarked black Crown Victoria. When defendant noticed the officers, he placed a clear plastic bag inside the larger tan bag. Defendant and the other subject then separated abruptly and walked away in opposite directions.

Believing that they had interrupted a narcotics transaction, the officers stopped both subjects. Defendant told the officers that he was from California and was staying at the Monte Carlo Hotel. Officer Williams then searched the tan bag, suspecting that it contained cocaine. Inside the bag he found a beer can, a bar of soap, and a clear plastic bag that contained sixteen

individually wrapped pieces of crack cocaine.

The appellant struggled for control of the cocaine as Officer Williams tried to arrest him, but he was eventually subdued. From the search incident to the arrest, the officers recovered $524.00 in currency, a credit card and a cellular phone. The other subject was released because the officers found no connection between her and the contraband.

Allen Sison, the supervisor of the crime lab, testified from the report of Criminalist William Giblin that the evidence identified with the case by item number tested positive for cocaine. He further testified that Giblin was unavailable to testify because he was recovering from surgery, and that the crime lab report was a normal business record.

ERRORS PATENT:

A review of the record indicates no errors patent.

ASSIGNMENT OF ERROR:

In his sole assignment of error, defendant argues that the officers lacked probable cause to justify the search of his bag.

At a hearing on 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). A trial judge's decision to deny a motion to suppress will be afforded great weight and will not be set aside unless to do so is

clearly mandated by a preponderance of the evidence. State v. Lee, 545 So. 2d 1163, 1167 (La. App. 4 Cir. 1989). In reviewing a denial of a motion to suppress, an appellate court is not limited to the evidence adduced at a suppression hearing, but may consider all pertinent evidence adduced at trial. State v. Barra, 572 So. 2d 1187, 1189 (La. App. 4 Cir. 1990), writ denied, 575 So. 2d 822 (La. 1991). Evidence derived from an unreasonable stop will be excluded from trial. State v. Benjamin, 97-3065, p. 3 (La. 12/1/98), 722 So. 2d 988, 989; State v. Tyler, 98-1667, p. 4 (La. App. 4 Cir. 11/24/99), 749 So. 2d 767, 770.

In State v. Johnson, this court stated:

> La. C.Cr.P. art. 215.1 allows a police officer to stop a person in a public place whom "he reasonably suspects is committing, has committed, or is about to commit an offense and may demand of him his name, address, and an explanation of his actions." While flight, nervousness or startled behavior at the sight of a police officer is not in and of itself enough to constitute reasonable cause to make an investigatory stop, these facts may be highly suspicious and lead to a finding of reasonable cause to detain the individual. State v. Belton, 441 So.2d 1195 (La. 1983), cert. den. Belton v. Louisiana, 466 U.S. 953, 104 S.Ct. 2158, 80 L.Ed.2d 543 (1984). Reasonable cause for an investigatory stop is something less than probable cause for arrest and must be determined under the facts of each case. The issue is whether the officers had sufficient knowledge of facts and circumstances to justify an infringement on the individual's right to be free from government interference. The right to make an investigatory stop must be based upon reasonable cause to believe that the suspect has been, is, or is about to be engaged in criminal activity. State v. Ossey, 446 So.2d 280 (La. 1984), cert. den. Ossey v. Louisiana, 469 U.S. 916, 105 S.Ct. 293, 83 L.Ed.2d 228 (1984); State v. Belton;

> State v. Andrishok. The detaining officer must have knowledge of specific, articulable facts which reasonably warrant the stop. State v. Lee, 462 So.2d 249 (La. App. 4th Cir. 1984). The totality of the circumstances must be considered in determining whether reasonable cause exists. State v. Belton; U.S. v. Cortez, 449 U.S. 411, 101 S. Ct. 690, 66 L.Ed.2d 621 (1981).

State v. Johnson, 94-1170, pp. 5-6 (La. App. 4 Cir. 8/23/95), 660 So. 2d 942, 947.

In Florida v. J.L., 529 U.S. 266, 120 S.Ct. 1375 (2000), police received an anonymous tip that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. Officers arrived at the specified bus stop and observed three black males, one of whom, the defendant, was wearing a plaid shirt. The officers did not observe a firearm, nor did they witness the men engage in any illegal or threatening conduct. One officer frisked the defendant, whereupon the officer seized a gun from the defendant's pocket. The United States Supreme Court, concluding that the officers did not have reasonable suspicion to stop the defendant, stated:

> In the instant case, the officers' suspicion that J.L. was carrying a weapon arose not from any observations of their own but solely from a call made from an unknown location by an unknown caller. Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, see Adams v. Williams, 407 U.S. 143, 146-47 (1972), an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity" Alabama v. White, 496 U.S. at 329

Id. at 270, 120 S.Ct. at 1378.

Here, unlike the anonymous telephone tip in Florida v. J.L., the tip in this case came from a known but untested confidential informant. The comment by the untested confidential informant was sufficient to provide the arresting officers with an objective reasonable belief that either the defendant was committing, had committed, or was about to commit a crime.

In State v. Smiley, 99-0065 (La. App. 4 Cir. 3/3/99), 729 So. 2d 743, two police officers on Bourbon Street were approached by an "unknown" citizen, who reported that an individual in a nearby truck had just tried to sell him drugs. As the officers observed the truck, three individuals exited the truck and went into a nearby bar. The unknown citizen identified one of them as the individual who had tried to sell him drugs. This Court held that under those facts, police had reasonable suspicion to detain the individual to investigate the citizen's complaint. Even though the complaint came from an "unknown" citizen, the circumstances surrounding the giving of the information indicated a certain degree of trustworthiness.

In the case at bar, the officers received a tip from an untested confidential source giving a detailed description of an individual dealing crack cocaine in the 6000 block of Chef Menteur Highway. The area was well known to the officers for narcotics activity and the officers had made prior drug arrests at that location. Two officers observed a suspected drug

transaction between the defendant and a known prostitute, who the officers knew was a drug user. Given the reputation of the location including prior narcotics arrests, the tip concerning drug activity at that location, and the officers' observations of the suspected drug sale, the trial court did not abuse its discretion in finding it was more probable than not that the defendant was involved in drug sales. Upon seeing the officers, defendant immediately put a clear plastic bag that appeared to contain contraband into a tan bag during what appeared to be a drug deal.

Officer Joseph Williams testified at the motion hearing that:

> Mr. Smith's attire, presence, and interaction with a known crack user corroborated the source's information; therefore, we believed that the bag that he concealed contained crack cocaine. Based on that belief, we believed that probable cause existed to conduct a stop.

At trial, Officer Williams stated:

> As we were approaching from the rear they were interacting, conversing and as we were passing we observed Mr. Smith reaching into a tan plastic bag. We made a U-turn just in front of them and as we approached head on, both of them noticed our presence and Mr. Smith concealed a clear plastic bag into the tan plastic bag. At that time based on our information and observations and our knowledge of Lisa Jackson [the prostitute,] we believed that Mr. Smith was attempting to conduct a drug transaction with Miss Jackson and we elected to make a stop.

In State v. James, 99-3304 (La. 12/08/00), 2000 WL 1821204, the Louisiana Supreme Court found that the police exceeded the scope of a valid

Terry investigatory stop when the officer removed a film canister from the defendant's pocket and began manipulating it to determine its contents. The police received a complaint from a convenience store in Slidell that a described individual was selling narcotics in the parking lot. The deputy indicated that he was already familiar with the store from the numerous narcotics arrests he had made in the parking lot. When the deputy arrived at the store, he saw the defendant who fit the description given by the store's owner. The deputy approached and asked the defendant what he was doing in the parking lot. The defendant answered that he was allowing his old dog to take a break under the tree at the back side of the building. The Court held that the deputy had sufficient reasonable suspicion for an investigative safety pat-down of the defendant, but his subsequent search of the canister found in the defendant's pocket was illegal.

The Louisiana Supreme Court stated:

> In Arkansas v. Sanders, 442 U.S. 753, 764, n.13, 99 S.Ct. 2586, 2593, 61 L.Ed2d 235 (1979), rev'd on other grounds sub nom. California v. Acevado, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed2d 619 (1991), the Supreme Court observed that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment …. Some containers …. by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance." Containers of such distinctive character have included the tied-off balloon filled with heroin spotted by the police in plain view in Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983), the silver, duct-taped 'kilo brick' observed by the

> officers in United States v. Prandy-Binett, 995 F.2d 1069 (D.C. Cir. 1993), and the glassine bag filled with marijuana within the "plain feel" of the police in United States v. Procter, 148 F.3d 39 (1st Cir 1998).

Id. 2000 WL 1821204 at p. 1.

In James, the Louisiana Supreme Court also noted that in Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535, the United States Supreme Court concluded that:

> [t]he fact that [the officer] could not see through the opaque fabric of the balloon is all but irrelevant; the distinctive character of the balloon itself spoke volumes as to its contents--particularly to the trained eye of the officer." Brown, 460 U.S. at 743, 103 S.Ct. at 1543-44. Concurring in the result, 460 U.S. at 751, 103 S.Ct. at 1548, Justice Marshall elaborated on the significance of the balloon's "distinctive character:"
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> > [T]he balloon could be one of those rare single-purpose containers which 'by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance.' [quoting Sanders J.] Whereas a suitcase or a paper bag may contain an almost infinite variety of items, a balloon of this kind might be used only to transport drugs. Viewing it where he did could have given the officer a degree of certainty that is equivalent to the plain view of the heroin itself.

Id. 2000 WL 182120 at pp. 2-3.

In James, the officers did not observe what they believed was a drug transaction as the officers observed in the present case. The Louisiana Supreme Court held in James that film canisters are not so peculiarly

associated with drug trafficking that the plain feel or view of their surfaces is the functional equivalent of the plain view or feel of their contents. The Court noted that under certain circumstances, a search incidental to and contemporaneous with an arrest based on probable cause may precede a formal arrest to preserve evidence of a crime. Citing State v. Melton, 412 So. 2d 1065, 1068 (La. 1982), the Court stated:

> [I]n Melton, the police observed criminal conduct when the defendant placed a plastic bag filled with white capsules in one of his boots as the officers approached …. [t]he officers had thereby gained first-hand knowledge that the defendant was committing a crime and had probable cause to arrest him before they retrieved the challenged evidence.

Id. 2000 WL 1821204 at p. 4.

The very nature of the clear plastic bag cannot support any reasonable expectation of privacy because its contents can be inferred from its outward appearance under the circumstances of a drug transaction observed by the police. The clear plastic bag is a container that is universally used to carry drugs. The bag had a distinctive character under the circumstances of a drug deal.

In State v. Shelton, 96-2322 (La. App. 4 Cir. 10/30/96), 682 So. 2d 338, the police observed the defendant and another individual conduct hand transactions in an area known for frequent drug activity and observed the defendant place a clear plastic bag in his front shirt pocket when he sighted

the officer. The police had probable cause to make a warrantless arrest.

Shelton is the controlling guideline and precedent for the present case. In Shelton, this Court stated:

> The police officer testified that he with three other police officers went to the 2600 block of Congress Street on an unrelated matter on April 12 at 11:15 A.M. When they arrived there in an unmarked car, they observed two individuals conducting hand transactions which they believed to be drugs because this was known by the police to be a location frequently known to have drug activities. One of the subjects, the defendant, was in possession of a clear plastic bag that he placed in his front shirt pocket upon sighting the officers. The officers were just twenty-five feet from the defendant when they made these observations. They exited the vehicle and approached the defendant and the other individual. . . . [W]hen he approached the men, [the officer] believed that he had witnessed a felony. . . . [The officer] removed the packet from defendant's shirt which proved to contain thirty-one small yellow plastic bags containing white powder which he believed to be cocaine.
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> * * *
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> Since the officer believed he witnessed the crime of selling narcotics, he was authorized to arrest the defendant without a warrant. C.Cr.P. art. 213. A search of the defendant's person pursuant to the arrest is lawful without a warrant. Defendant argues that the officers had no probable cause to arrest the defendant, but this argument ignores the fact that the officers witnessed what they believed to be a drug transaction, a crime being committed in their presence.
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> . . . [I]t would be ridiculous to suppress this evidence where the officers[,] having witnessed the defendant selling drugs and placing his supply of drugs in his pocket[,] immediately arrest him and take the drugs out of his pocket.

Id. 682 So. 2d at 339.

In the instant case, the officers had more information than the officers

had in Shelton. Here, the officers had a tip from a known untested confidential informant that supported their belief that a drug transaction took place where the tipster gave a detailed description of an individual selling drugs at a particular place. Because the officers knew that the known prostitute was a known drug user, the officers had even more support for their belief that she and defendant were engaging in a drug transaction in an area known for drug trafficking. Based on the officers' observations that supported the tip, the officers saw what they believed was a drug transaction, and saw what they believed to be a clear plastic bag of contraband hastily being placed in the larger opaque bag by defendant when he saw the police. The officers had reasonable cause to believe that defendant was dealing drugs out of the clear plastic bag, and the officers had reasonable cause for an arrest. The arrest was legal, and the cocaine was validly seized when discovered during a valid search pursuant to the legal arrest.

Accordingly, there is no merit to this assignment of error.

CONCLUSION:

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

AFFIRMED