NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-1107**
VERSUS	*	**COURT OF APPEAL**
CURTIS SIMMONS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 371-904, SECTION "G"
Honorable Julian A. Parker, Judge
* * * * * *
Judge Terri F. Love
* * * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge Joan Bernard Armstrong, Judge Terri F. Love)

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CONVICTION AFFIRMED, SENTENCE VACATED AND REMANDED

STATEMENT OF CASE

Defendant Curtis Simmons was charged by bill of information on September 13, 1994, with possession of four hundred grams or more of cocaine, in violation of La. R.S. 40:967. Defendant pleaded not guilty at his September 28, 1994, arraignment. A twelve-person jury found defendant guilty of attempted possession of four hundred grams or more of cocaine or a related substance on July 30, 1997, following trial. On December 2, 1998, the court found him to be a quadruple offender. On October 29, 1999, defendant was sentenced as a quadruple offender to life imprisonment at hard labor, without the benefit of probation, parole or suspension of sentence. The court granted his motion for appeal the appeal was lodged with this court.

STATEMENT OF FACT

Officer Dwayne Scheurrmann, with the New Orleans Police Department and the Safe Home Task Force, testified that on August 17, 1994, he and Deputy Marshals Devin Page and Marvin Deselles were transporting a juvenile in their custody downtown to be booked when they heard a call on the police radio of a shooting in the Desire Housing Development. The officers were unable to respond to the call when it was initially broadcasted, but they went to Charity Hospital and spoke to the mother of one of the shooting victims. The victim's mother told the officers that the shooter was driving an older model blue Monte Carlo. Officer Sheurrmann then radioed the description to Captain Dabdoub, his commanding officer who was still at the crime scene. The three officers then went to the shooting crime scene to be of assistance to the officers already there. As the officers were standing at the crime scene an older model blue Monte Carlo being driven by the defendant passed by. All of the officers at the scene rushed to their vehicles in pursuit of the defendant. Also at the crime scene was WDSU Channel 6 news cameraman Bennie Marks, following up on a previous story. When Mr. Marks saw the officers pursue the defendant he followed, thinking it might be a developing story.

The officers pursuing the defendant surrounded him by placing one police vehicle in front of the defendant's car and one behind. Officer

Sheurrmann, who was driving the car behind the defendant, exited his vehicle and approached the defendant's car. Officer Sheurrmann testified that the defendant asked what was going on, and the officer told the defendant of the triple shooting in the Desire Housing development. The officer further testified that the defendant appeared nervous, but was adamant that he had not shot anyone. According to Officer Sheurrman, the defendant then stated, "I don't have no gun you can check." Officer Sheurrmann did a pat down of the defendant and began to scan the interior of the vehicle while the defendant stood with the other officers on the scene. One of the other officers asked Officer Sheurrmann for the keys to search the trunk of the defendant's vehicle. When Officer Dabdoub searched the trunk he found a white bucket, and inside the bucket was a blue shopping bag. Inside of the blue shopping bag was a brown bag. Inside the brown bag was a plastic bag that contained a white powder substance. Just before the trunk was searched cameraman Bennie Marks arrived on the scene and began to tape what was happening. Mr. Marks testified that when the trunk was opened the officer held up the plastic bag for him to see it.

Officer Sheurrmann testified that once the drugs were found in the trunk the defendant was read his rights and arrested. Deputy Marshal Marvin Deselles, Agent Richard Palmisano, and Officer Dabdoub all

testified for the state corroborating the testimony of Officer Sheurrmann.

Officer William Giblin, of the New Orleans Police Department, testified that he took four samples from the drugs found in the defendant's trunk, and all tested positive as cocaine.

Officer Timothy Seuzeneau, of the New Orleans Police Department, testified that he tested the plastic bag that contained the cocaine found in the defendant's trunk for the defendant's fingerprints. The defendant's prints were not found on the bag.

Detective Reginald Jacque, of the New Orleans Police Department, testified that the quantity of cocaine found in the defendant's trunk had a street value of about twenty to twenty-five thousand dollars.

Mrs. Eva Simmons, the defendant's mother, testified for the defense. Mrs. Simmons testified that her son had a problem with drug addiction, and he sought help for it. She further testified that in spite of the drug problem her son remained employed, and helped to support his family.

ERRORS PATENT

The record revealed no errors patent.

DISCUSSION

ASSIGNMENT OF ERROR NUMBER 1

In this assignment of error defendant complains that his right to

effective assistance of counsel was violated due to his counsel's failure to file a motion to quash the bill of information because the state failed to adhere to the two-year prescriptive period in La. C.Cr.P. art. 578. He also argues his constitutional right to a speedy trial was violated.

The defendant, in his argument, relies on the two-prong test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) articulated by the Supreme Court, which states the defendant has to show: (1) counsel's performance was deficient, and (2) he was prejudiced by the deficiency.

La. C.Cr.P.art. 578, in pertinent part, provides:

> Except as otherwise provided in this Chapter, no trial shall be commenced:
>
> (2) In other felony cases after two years from the date of institution of the prosecution.

In addition to the statutory rights, a defendant also has a constitutional right to a speedy trial, provided in the Sixth Amendment of the U.S. Constitution. The due process clause of the Fourteenth Amendment extends this fundamental right to the states. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 2184 (1972). Barker provides a four-part test for determining whether this right has been violated. A reviewing court must look at the following: the length of the delay, the reason for the delay, the defendant's assertion of his right to speedy trial, and the prejudice to the defendant. Barker, id.

Furthermore, the court noted that the length of the delay is a triggering mechanism, and unless the court finds the length of the delay to be presumptively oppressive given the circumstances of the case the other three factors need not be addressed.

In the instant case, the defendant was arrested on August 14, 1994; the bill of information was filed on September 13, 1994; the arraignment was set and took place on September 28, 1994. On December 13, 1994, the defense filed an application for bill of particulars as well as a motion for discovery and inspection, a motion to suppress, a motion for preliminary hearing, and a motion for discovery of the original police report. On December 20, 1994, the hearing on the motions was continued until March 14, 1995. On March 14, 1995 the defendant appeared unattended by counsel, and the court continued the matter for the defense until May 23, 1995. The defendant and his counsel both appeared on May 23, 1995, and the court granted the defense a continuance until August 11, 1995, on the hearing for the defense motions. The hearing for the defense motions was held on August 11, 1995. The trial was then set for November 13, 1995. On November 13, 1995, the court granted the state and the defense a continuance and the trial was reset for January 31, 1996. According to the minutes and the docket master in the record the trial court granted the defense a total of nine continuances from

January 31, 1996 to July 23, 1997, because the defense counsel was ill, the defendant appeared without counsel, and there was confusion as to who was the defense counsel of record. In the same period of time the state was granted a continuance once. The trial court for its own reasons continued the matter a total of three times during the same time period. The trial was finally held on July 30, 1997.

When one looks at the length of the delay from the time the defendant was arraigned on September 28, 1994, to the time the trial actually took place on July 30, 1997, the almost three year period appears to be presumptively oppressive. But, when one looks at the reasons for the delay, in large part due to the actions of the defendant and defense counsel, one sees that it was self-inflicted.

La.C.Cr.P. art. 580 provides:

> When a defendant files a motion to quash or other preliminary plea, the running of the periods of limitation established by Article 578 shall be suspended until the ruling of the court thereon; but in no case shall the state have less than one year after the ruling to commence the trial.

In State v. Pratt, 32,302 (La. App. 2 Cir. 9/22/99), the Second Circuit stated that the defendant's motion to suppress was a "preliminary plea" which suspended the two-year time limit for bringing the defendant to trial

after the bill of information was filed. In the instant case, as in Pratt, the defendant's motion to suppress filed on December 13, 1994, suspended the two-year prescriptive period of Article 578. And, the state had up to one year after the trial court's ruling on the motion to bring defendant to trial. The trial court denied defendant's motion to suppress on August 11, 1995. Therefore, the state had until August 1996 to bring the defendant to trial. At no time during this delay did the defendant attempt to assert his right to a speedy trial by filing a motion to that effect. The defendant has also failed to assert that the delay has prejudiced him in any way other than his denial of a speedy trial.

Though the two year prescriptive period of La. C.Cr.P. art. 578 was not adhered to, if one counts two years from the date of arraignment, the delay was imposed upon the state by the defense, and was beyond its control. Therefore, the defendant's rights to a speedy trial were not violated by the state. If defendant's rights to a speedy trial were not violated, his claim of ineffective assistance of counsel based on the defense counsel's failure to file a motion to quash for the time delay is without merit.

ASSIGNMENT OF ERROR NUMBER 2

In this assignment of error the defendant complains that his right to effective assistance of counsel was violated because defense counsel failed

to file a motion to quash the multiple bill of information because eighteen months elapsed from the time it was filed until he was actually sentenced. Defendant also complains that defense counsel erred by failing to review the record at the multiple bill hearing and allowing the state to erroneously rely upon a plea taken pursuant to now repealed La. R.S. 40:983.

This court in State v. Jason, 99-2551 (La. App. 4 Cir. 12/6/00), 779 So.2d 865, 871, citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), stated that the claim of ineffective assistance of counsel is to be assessed by the two-part test of Strickland. The defendant must show that his counsel's performance was deficient and that the deficiency prejudiced him. Counsel's performance is ineffective when it can be shown that he made errors so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the Sixth Amendment. Jason, id. Counsel's deficient performance will have prejudiced the defendant if he can show that the errors were so serious as to deprive him of a fair trial. To carry this burden, the defendant "must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Jason, id, citing Strickland, id.

La. R.S. 15:529.1 (D) provides that a defendant may be charged as a multiple offender if at any time after either conviction or sentence, it appears that a person convicted of a felony has previously been convicted of another felony. The statute does not contain a prescriptive period; but, in State v. Broussard, 416 So.2d 109 (La. 1982), the Supreme Court held that a multiple bill must be filed within a reasonable time after the State becomes aware of the defendant's prior felony record. The court stated that upon conviction, a defendant was entitled to know the full consequences of the verdict within a reasonable time, and proceedings to sentence a defendant as a habitual offender should not be unduly delayed. As stated in State v. Morris, 94-0553 (La. App. 4 Cir. 11/17/94), 645 So.2d 1295, application of the Broussard doctrine is a fact-specific inquiry, which depends upon the particular circumstances of each case.

In State v. Carter, 630 So.2d 926 (La. App. 4 Cir.1993), this court found a fifteen month delay reasonable where both the State and the defendant were granted continuances, where an investigation was undertaken to determine the validity of the defendant's claim of breach of a plea bargain agreement not to multiple bill him, and where the case was transferred to a different section of court. In State v. Jenkins, 595 So.2d 780 (La. App. 5 Cir. 1992), the Fifth Circuit found a delay of nearly two years

between filing the multiple bill and the holding of the hearing was not unreasonable because the defendant had been notified immediately of the intended filing of the multiple bill and was still incarcerated at the time of the hearing.

In the instant case, the State filed the multiple bill on August 28, 1997, less than thirty days after the defendant was found guilty at trial on July 30, 1997. The minute entries revealed that the multiple bill hearing was reset and delayed due to the trial court's inability to hear the matter due to trials in other matters. The delay was not unreasonable. Even if the defendant had been sentenced immediately after trial and conviction, the minimum sentence for attempted possession of 400 or more grams of cocaine is thirty years at hard labor. Thus, the defendant would still have been incarcerated at the time the multiple bill hearing was held. Also, the defendant in his brief fails to show how his counsel's failure to file a motion to quash the multiple bill so prejudiced him that but for the error the outcome of the proceedings would have been different.

The defendant also complains that defense counsel erred in allowing the state to rely upon a plea taken pursuant to La. R.S. 40:983 to sentence him as a multiple offender.

La. R.S. 40:983, repealed by Acts 1995, No. 1251, sect.2, provided at

the time of defendant's plea of guilty:

> Whenever any person who has not previously been convicted of any offense under this part pleads guilty to or is convicted of having violated R.S. 40:966C, 40:967C, 40:968C, 40:970C of this part, and when it appears that the best interests of the public and of the defendant will be served, the court may, without entering a judgment of guilt and with the consent of such person, defer further proceedings and place him on probation upon such reasonable terms and conditions as may be required.
>
> Upon the defendant's violation of any of the terms or conditions of his probation, the court may enter an adjudication of guilty and impose sentence upon such person.
>
> Upon the fulfillment of the terms and conditions of probation imposed in accordance with this section, the court shall discharge such person and dismiss the proceedings against him.
>
> Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for a second or subsequent convictions under R.S. 40:982.
>
> Discharge and dismissal under this section may occur only once with respect to any person.

The docket master entry and the minute entry reflect that the guilty plea was entered pursuant to La. R.S. 40:983. Defendant received a three year suspended sentence, and eighteen months of active probation with special conditions. This court set forth the substance of La. R.S. 40:983, emphasizing that a discharge and dismissal under the statute shall be without

court adjudication of guilt and shall not be deemed a conviction. State v. Christian, 618 So.2d 559 (La. App. 4 Cir. 1993). This court noted that the state agreed that a plea of guilt pursuant to La. R.S. 40:983 cannot be considered an adjudication of guilty and cannot be used as an underlying offense to enhance a sentence. Accordingly, the two-prong test of Strickland, 466 U.S. 668, 104 S.Ct. 2052 (1984), should be applied. Because defendant's February 1992 "conviction" from a guilty plea entered pursuant to La. R.S. 40:983 should not have been used as a predicate conviction for sentence enhancement under the habitual offender law, his counsel's failure to raise this issue was deficient, and such deficiency clearly prejudiced the defendant. Defendant's adjudication as a quadruple habitual felony offender should be amended to a third offender, his sentence should be vacated, and the case remanded for a new sentencing as a third offender.

ASSIGNMENT OF ERROR NUMBER 3

In this third assignment of error defendant complains that his sentence is unconstitutionally excessive, and the trial court erred by not following the sentencing guidelines of La. C.Cr.P. art. 894.1.

This assignment of error is moot with the disposition of assignment of error number two.

ASSIGNMENT OF ERROR NUMBER 4

In this assignment of error the defendant complains that the trial court erred by not granting the motion to suppress the videotape, created by a WDSU Channel 6 cameraman, and by allowing it to be viewed by the jury. Specifically, the defendant claims that the videotape used as evidence and viewed by the jury violated his due process rights and his right to a fair trial. According to the defendant, his rights were violated because the arresting officers failed to notify him that what he said was being recorded.

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 (La. App. 4 Cir. 9/22/99), 752 So.2d 192. In reviewing a trial court's ruling on a motion to suppress, an appellate court is not limited to evidence adduced at hearing on the record on the motion to suppress; it may consider any pertinent evidence given at trial of the case. State v. Nogess, 98-0670 (La. App. 4 Cir. 3/3/99), 729 So.2d 132, 137.

The defendant claims when the videotape was recorded he did not know it was being made, and that it could be used against him. La C.Cr.P. art. 841 provides in part that an irregularity or error cannot be availed of after the verdict unless it was objected to at the time of the occurrence. On appeal the defendant raises the issue and claims that the videotape was made

without his knowledge. However, in the transcript of the motion hearing held on June 20, 1997, defense counsel does not raise the issue or object to the fact that the video was made but, counsel had an issue with the authenticity of the video. Defense counsel really raised an issue of chain of custody with his concerns of whether the tape in the State's possession was in fact the same tape recorded on the day of the defendant's arrest, and whether the tape had been edited or altered in any way. In State v. Alexander, 621 So.2d 861, 863, (La. App. 5 Cir. 1993), the court held that the law does not require that the evidence as to custody eliminate all possibility that the object has been altered. For admission, it suffices if the foundation laid establishes that it is more probable than not that the object is the one connected with the case. In addition, Bennie Marks, the WDSU Channel 6 cameraman, testified at both the motion hearing and trial as to the authenticity of the tape recorded by him on the day of the defendant's arrest. Therefore, because defense counsel failed to object to the creation of the videotape at the motion hearing, and failed to raise any new objections to the tape at trial the issue cannot now be raised on appeal.

WDSU cameraman Bennie Marks testified at trial that he arrived on the scene after the officers stopped the defendant, and that when he arrived the trunk of defendant's car was being searched. Mr. Marks further testified

that he then retrieved his camera equipment from his trunk and began recording. Officer Dwayne Sheurrmann testified at trial that the defendant was stopped, informed of the reason for the stop, and that the defendant voluntarily agreed that his vehicle could be searched. Once the drugs were found in the trunk, Officer Sheurrmann testified that he read the defendant his rights; the defendant articulated that he understood his rights; and the cameraman videotaped the defendant being read his rights. Mr. Marks did not capture the statements made by the defendant prior to his trunk being searched, and he was not on the scene prior to the defendant being read his rights and arrested for possession of the drugs found in the vehicle. Because the videotape was made as the defendant was being made aware of his rights it did not capture the statements made by the defendant prior to the drugs being found. The defendant does not claim the statements he made prior to being formally arrested were made under force. The trial court's decision to allow the video into evidence was not a violation of defendant's rights. Therefore, this assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 5

In this assignment of error the defendant claims his Fourth Amendment rights against unreasonable search, seizure and invasion of privacy were violated by the police officers that stopped him.

Warrantless searches and seizures fail to meet constitutional requisites unless they fall within one of the narrow exceptions to the warrant requirement. State v. Edwards, 97-1797 (La.7/2/99), 750 So.2d 893.

La.C.Cr.P.art. 215.1 (A) provides:

> A law enforcement officer may 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.

"Reasonable suspicion" to stop is something less than probable cause required for an arrest, and the reviewing court must look to the facts and circumstances of each case to determine whether the detaining officer had sufficient facts within his knowledge to justify an infringement of the suspect's rights. State v. Littles, 98-2517 (La. App. 4 Cir. 9/15/99), 742 So.2d 735, 737. In assessing the reasonableness of an investigatory stop, the court must balance the need for the stop against the invasion of privacy that it entails. State v. Harris, 99-1434 (La. App. 4 Cir. 9/8/99), 744 So.2d 160, 162. The totality of the circumstances must be considered in determining whether reasonable suspicion exists. State v. Oliver, 99-1585 (La. App. 4 Cir 9/22/99), 752 So.2d 911. The detaining officers must have knowledge of specific, articulable facts, which if taken together with rational inferences from those facts, reasonably warrant the stop. State v. Dennis, 98-1016 (La.

App. 4 Cir. 9/22/99), 753 So.2d 296. In reviewing the totality of the circumstances, the officer's past experience, training and common sense may be considered in determining if his inferences from the facts at hand were reasonable. State v. Cook, 99-0091 (La. App. 4 Cir. 5/5/99), 733 So.2d 1227, 1231. Deference should be given to the experience of the officers who were present at the time of the incident. State v. Ratliff, 98-0094 (La. App. 4 Cir. 5/19/99), 737 So.2d 252, 254.

The evidence clearly establishes that at the time the defendant was stopped by the police, the officers had at the very least, reasonable suspicion to stop the defendant. The officers were told by the mother of a twelve year old shooting victim that the shooter was driving an older model blue Monte Carlo. The defendant was in the vicinity of the shooting and driving a vehicle that fit the description of the car described by the victim's mother. The facts seem to be specific and articulable when taken together with rational inferences warranted the stop of the defendant. Upon being stopped and detained, the defendant then voluntarily allowed the officers to search his vehicle to show that he did not have a weapon, and was not involved in the shooting. When the state relies upon consent to justify a warrantless search, it also must demonstrate that the consent was freely and voluntarily given without coercion. State v. Gorut, 590 So.2d 1268 (La.

App. 1 Cir. 1992). The voluntariness of defendant's consent to search is a question of fact to be determined by the trial court under the facts and circumstances surrounding each case. Gorut, id. The defendant does not claim that his consent was forced or coerced. Therefore, because the defendant voluntarily agreed to the search of his vehicle his rights were not violated. This assignment of error is without merit.

CONCLUSION

For the foregoing reasons the defendant's conviction is affirmed, however his adjudication and sentence as a quadruple habitual felony offender is vacated, and the case is remanded for a new habitual offender hearing and sentencing.