STATE OF LOUISIANA	*	**NO. 2001-K-0107**
VERSUS	*	**COURT OF APPEAL**
BRENDA GAYTON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

*** * * * * * ***

ON WRIT OF CERTIORARI DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 417-521, SECTION "D"
HONORABLE FRANK A. MARULLO, JUDGE
* * * * * *
JUDGE MICHAEL E. KIRBY
* * * * * *

(Court composed of Judge Michael E. Kirby, Judge Terri F. Love, Judge David S. Gorbaty)

HARRY F. CONNICK, DISTRICT ATTORNEY
LOUIS L. LUSCO, II, ASSISTANT DISTRICT ATTORNEY
SALLY LONGMIRE, LAW CLERK
NEW ORLEANS, LOUISIANA 70119
COUNSEL FOR RELATOR

STATEMENT OF THE CASE

On October 19, 2000 the State filed a bill of information charging the defendant with possession of crack cocaine, a violation of La. R.S. 40:967 (C)(2). On October 26, 2000 the defendant pleaded not guilty. On November 20, 2000 after a hearing on the motions, the trial court found no probable cause and granted the motion to suppress the evidence. The State objected and noticed its intent to file for writs. The trial court set the return date on January 19, 2001. The State filed its application on January 17, 2001.

We first note that the return date of January 17, 2001 greatly exceeded the thirty-day period allowed by Uniform Rules-Courts of Appeal Rule 4-3, as amended on October 2, 2000, which provides:

> The judge who has been given notice of intention as provided by Rule 4-2 shall immediately set a reasonable return date within which the application shall be filed in the appellate court. Unless the judge orders the ruling to be reduced to writing, the return date shall not exceed 30 days from the date of the ruling at issue. When the judge orders the ruling to be reduced to writing, the return date shall not exceed 30 days from the date the ruling is signed. In all cases, the judge shall set an explicit return date; an appellate court will not infer a return date from the record.
>
> Upon proper showing, the trial court or the appellate court may extend the time for filing the application upon the filing of a motion for extension of return date by the applicant, filed within the original or an extended return date period. An application not filed in the appellate

> court within the time so fixed or extended shall not be considered, in the absence of a showing that the delay in filing was not due to the applicant's fault. The application for writs shall contain documentation of the return date and any extensions thereof; any application that does not contain this documentation may not be considered by the appellate court.

The October 2, 2000 amendment to Rule 4-3 emphasizes the maximum thirty-day period; however, it is clear that the return date of January 19, 2001 greatly exceeded the time period allowed under the rule. We consider the merits of this application because we find the State should not be penalized for following the district court's order.

STATEMENT OF THE FACTS

At the November 20, 2000 hearing Officer Bryant Louis testified that he and his partner were on routine patrol. The officers entered the intersection of Clio and Clara Streets when they observed the defendant and a male subject standing on the sidewalk. Once the male subject noticed the officers, "he placed a bottle on the ground and immediately started to stumble away." Officer Louis stated that at that point he and his partner decided to conduct an investigatory stop. The officers told the defendant and the male subject to place their hands on the marked police unit. Once

the officers began speaking to the two subjects, the two officers "immediately detected … the scent of alcohol." At that point Officer Louis conducted a safety pat down. The officers engaged the two subjects in conversation and noticed the subjects' slurred speech and blood shot eyes. Officer Louis said that the two subjects were arrested for public intoxication. Officer Louis retrieved the bottle, which the male subject had placed on the ground. It was a Mad Dog 20-20 bottle with about one-fourth of the contents remaining in the bottle. The officer emptied the bottle and then threw the bottle away. The defendant became irate and "started going off on us, cussing us out." The officers placed her in the rear of the police car. Officer Louis searched the male subject and found no weapons or contraband. The male subject was placed in the police car. Officer Louis and his partner transported the two subjects to Central Lockup. Officer Louis, who was the passenger, exited the car and turned to open the door for the male subject, Johnson, who was seated behind the passenger's seat. Officer Louis observed a white object in the defendant's left hand and alerted his partner. Officer Louis said: "She was exiting, [sic] she discarded the object to the seat." Officer Louis' partner retrieved the object, which contained ten individually wrapped pieces of crack cocaine.

On cross-examination Officer Louis conceded that he saw the male,

Johnson, put the bottle onto the ground. He said that there were two abandoned lots on both sides of the subjects' location. He did not see the defendant with an open container. The officer stated that he decided to conduct a stop when Johnson put down the bottle. Once the officers exited the police unit and approached the defendant, they could smell alcohol. To the trial court's question asking whether Officer Louis saw the defendant violating any law prior to stopping the two subjects, the officer answered: "Because of the location and the intoxicated state of the subject and what he was observed doing, that scope expanded to include Miss Gayton [the defendant]. Because the subject [sic], the area is also known for Prostitution [sic]. So because of the area and location and all that we expanded to [sic] scope of the investigation because of that fact." The officer conceded that he did not see the defendant drink from the bottle or hold it in her hand. He admitted that she did not solicit the officers or anyone else for prostitution. The officer conceded that the defendant was doing nothing illegal.

The State asked to give a brief argument; however, the trial court stated that it had made up its mind. The court suppressed the evidence and found no probable cause.

DISCUSSION

The State argues that the trial court erred by finding no probable cause for the defendant's arrest and by suppressing the cocaine. The State contends that the defendant was standing with a man in an area known for criminal activity, specifically prostitution, on a sidewalk in front of abandoned lots; the male subject with the defendant put down a bottle when he saw the police. The State claims that the officers decided to stop the two subjects "due to the suspicious actions of Johnson and because of the location of Gayton and Johnson." Once out of the police car, the officers could smell alcohol on the defendant. The State argues in its application: "[D]ue to the reputation of the area, the suspiciousness of where Gayton [defendant] was standing, and the suspiciousness of Johnson's actions, and the smell of alcohol on the defendant, the officers reasonably suspected that criminal activity was taking place thus justifying the investigatory stop." The State contends that the officers had reasonable cause to stop the two subjects, and the cocaine was properly seized.

Police officers may stop a person whom they "reasonably believe is committing, has committed, or is about to commit an offense." La.C.Cr.P. art. 215.1; Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968).

> In making a brief investigatory stop on less than probable cause to arrest, the police "' must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" *State v.Kalie*, 96-2650, p. 3 (La. 9/19/97), 699

> So.2d 879, 881 (quoting *United States v. Cortez*, 449 U.S. 411, 417, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981)). The police must therefore "articulate something more than " 'inchoate and unparticularized suspicion or "hunch." ' "*United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L. Ed. 1 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L.Ed.2d 889 (1968)). This level of suspicion, however, need not rise to the probable cause required for a lawful arrest. The police need have only "'some minimal level of objective justification. . . .' " *Sokolow*, 490 U.S. 1, 7, 109 U.S. at 1585 (quoting *INS v. Delgado*, 466 U.S. 210, 217, 104 S.Ct. 1758, 1763, 80 L.Ed.2d 247 (1984)). A reviewing court must take into account the "totality of the circumstances –the whole picture," giving deference to the inferences and deductions of a trained officer that might well elude an untrained person. *Cortez*, 499 U.S. at 418, 101 S.Ct. at 695. The court must also weigh the circumstances known to the police ' not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.' *Id."*

State v. Wilson, 99-2334 p. 4 (La. App. 4 Cir. 3/15/00), 758 So. 2d 356, quoting State v. Huntley, 97-0965 p. 3 (La. 3/13/98), 708 So. 2d 1048, 1049.

Reasonable suspicion for an investigatory stop is something less than probable cause. It must be determined under the facts of each case whether the officer had sufficient articulable knowledge of particular facts and circumstances to justify an infringement upon an individual's right to be free from governmental interference. State v. Oliver, 99-1585 (La. App. 4 Cir. 9/22/99), 752 So.2d 911. The totality of the circumstances must be

considered in determining whether reasonable suspicion exists. State v. Belton, 441 So. 2d 1195 (La. 1983), *cert. denied* Belton v. Louisiana, 466 U.S. 953, 104 S.Ct. 2158 (1984); State v. Anderson, 96-0810 (La. App. 4 Cir. 5/21/97), 696 So. 2d 105. An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be engaged in criminal activity, or there must be reasonable grounds to believe that the person is wanted for past criminal conduct. State v. Moreno, 619 So. 2d 62 (La. 1993). The reviewing court must look to the facts and circumstances of each individual case to determine whether an officer had sufficient facts to justify an infringement of the suspect's rights. State v. Russell, 98-2773 (La. App. 4 Cir. 5/10/00), 764 So. 2d 93; State v. Robertson, 97-2960 (La. 10/20/98), 721 So. 2d 1268. See also State v. Hughes, 99-2554 pp. 3-4 (La. App. 4 Cir. 5/31/00), 765 So. 2d 423.

The trial court is vested with great discretion when ruling on a motion to suppress. State v. Scull, 93-2360 (La. App. 4 Cir. 6/30/94), 639 So.2d 1239, writ denied, 94-2058 (La. 11/11/94), 644 So.2d 391.

The State cites State v. Harris, 99-1434 (La. App. 4 Cir. 9/8/99), 744 So.2d 160, a case which is distinguishable. In Harris the officers, who were patrolling an area known for narcotics violations and residence burglaries, observed the defendant walk out from an area near a church and into the

street, even though there was a sidewalk adjacent to the street. As Harris began walking down the middle of the street, the officers noticed that he appeared to be weaving. The officers stopped Harris and began questioning him. He appeared to be disoriented and to have problems understanding the officers. Upon conducting a pat down search, one officer neared Harris' ankle and observed a crack pipe sticking out from one of his shoes. The officers arrested Harris for possession of drug paraphernalia and issued citations to him for walking in the street when a sidewalk is provided (a municipal violation), public intoxication, and giving a false address. Id. Unlike Harris, the defendant here was not walking in the street when there was a sidewalk; she was standing on the sidewalk. This defendant was not weaving, and there was no testimony that she was totally disoriented or unable to understand the officers. No contraband was found during a justified pat-down search of this defendant.

The State also cites State v. Ricard, 94-0975 (La. App. 4 Cir. 7/14/94), 640 So.2d 880, another clearly distinguishable case. In Ricard the police officers were patrolling near an area known for its high drug and prostitution activity. As the officers were pulling into a convenience store parking lot, they observed the defendant arguing with four females. When the officers stopped and exited their vehicle, the defendant saw the officers. He

stumbled to the back of the vehicle as if he had been drinking or was intoxicated and disregarded the officers' request for him to stop. As the defendant attempted to put his clenched right hand into his coat pocket, the officers, who believed that he might be reaching for a gun, grabbed the defendant, opened his hand, found him to be in possession of a metal tube with a white residue inside, and arrested him for possession of cocaine. Unlike the facts in Ricard, in this case no argument was occurring; four women and one man were not present; this defendant did not stumble; and she did not ignore an officer's request to stop.

In State v. Droulia, 96-1428 (La. App. 4 Cir. 4/2/97, 692 So.2d 1330, writ denied, 97-1163 (La. 10/17/97), 701 So.2d 1332, this Court was faced with an arrest for public drunkenness, which resulted in a possession of cocaine charge based on evidence found during a search the defendant. The State conceded that there was no city ordinance prohibiting public intoxication. In that case concerned citizens told the police officers that the defendant was walking and weaving in and out of traffic. When the officers investigated, they noticed a strong odor of alcohol and observed him to be incoherent and unable to communicate. The officers felt that Droulia was highly intoxicated, and they were concerned that Droulia presented a danger to himself and to passing motorists. This Court upheld the stop and search

in that case because the defendant's actions had violated La. R.S. 14:103 A (3), disturbing the peace, which can be defined as appearing in an intoxicated condition in such manner as would foreseeably disturb or alarm the public. Id.

State v. Smiley, 99-0065 (La. App. 4 Cir. 3/3/99), 729 So.2d 743, writ denied, 99-0914 (La. 5/14/99), 743 So.2d 651, is highly relevant. In Smiley this Court affirmed the trial court's decision finding no probable cause and suppressing the evidence (cocaine) when a defendant was arrested for public intoxication. The facts were as follows:

> In the early morning hours of 9 September 1998, two police officers were standing at the corner of St. Ann and Bourbon Streets when an unknown man approached them and reported that a man in a nearby truck had just tried to sell him drugs. As the officers were looking at the truck, they noticed the defendant and two other people leave the truck and stagger into a nearby bar. The unknown man identified Smiley as the man who tried to sell him drugs. The officers called for backup, and within five minutes four officers entered the bar and eventually located Smiley. Smiley agreed to accompany the officers outside. The officers noticed Smiley was having difficulty making his way out of the bar, staggering and weaving. One officer also got close to Smiley as he exited the bar and smelled alcohol on Smiley's breath. When they reached the sidewalk, the officer placed Smiley under arrest for public intoxication, purportedly to keep him from driving away in the truck. Smiley's companions must have also exited the bar because the officers conducted a pat down search of all three for the officers' safety.

> The officer testified that as one officer was pulling items out of Smiley's pants pocket, a bag of what was later found to be cocaine came out of his pocket. Id., at pp. 1-2, at 744.

This Court concluded that the officer had reasonable cause to stop the defendant based on the fact that a citizen had identified him as the man who had tried to sell him drugs. The officer testified that he arrested the defendant for public intoxication to prevent him from driving away in his truck. The officer said that he arrested the defendant for public intoxication. This Court discussed the fact that mere "public intoxication" was not prohibited by municipal ordinances or state statutes:

> It is unclear under exactly what provision the defendant was arrested at that point. The only statute which could possibly apply would be LSA-R.S. 14:103, the disturbing the peace statute. Subpart A provides in part: "Disturbing the peace is the doing of any of the following in such a manner as would foreseeably disturb or alarm the public: ... (3) Appearing in an intoxicated condition." Here, there was nothing in the officer's testimony, which should have led him to believe that the defendant's staggering would disturb or alarm the public. A more analogous provision could be §54-405 of the New Orleans Municipal Code, which provides: "It is unlawful for any person to appear in a public place manifestly under the influence of alcohol, narcotics or other drugs, not therapeutically administered, to the degree that he may endanger himself or other persons or property." However, again there was nothing in the officer's testimony which indicated the defendant's actions at the time he was leaving the bar would endanger the public. The officer

> testified he arrested the defendant to keep him from entering his truck and driving while intoxicated. However, the officers did not know that the defendant would be leaving anytime soon or that if he were leaving that he would be driving his truck, given the fact that he had two companions with him who could possibly drive, and the officer gave no indication of their condition. Therefore, at the time the officers placed the defendant under arrest, there was no probable cause to arrest him. Thus, the subsequent search, which produced the cocaine, could not be validated as a search incident to his arrest. (Citations omitted)

Id., at pp. 4-5, at 746.

Although the State attempts to buttress the officer's reasonable cause to stop by noting the reputation of the area (known for prostitution) and the location of the defendant and her male companion (on a sidewalk between empty lots), the State makes it clear in its statement of the facts that Officer Louis's stop was based on the crime of public intoxication: "The officers decided to conduct an investigatory stop of Johnson and Gayton under public intoxication." Officer Louis testified that he arrested the defendant for public intoxication, but he did not provide the statute or municipal ordinance allegedly violated.

As noted in State v. Smiley, 729 So.2d at 743, there is no statute or city ordinance prohibiting mere public intoxication. La. R.S. 14:103, the disturbing the peace statute, provides in pertinent part: "Disturbing the

peace is the doing of any of the following in such a manner as would foreseeably disturb or alarm the public: ... (3) Appearing in an intoxicated condition." In its application the State notes that the officer arrested the two subjects rather than issuing summons to insure their safety. Therefore, it would appear that an ordinance was involved. The only relevant municipal ordinance, Section 54-405 of the New Orleans Municipal Code (Public Drunkenness, Drug Incapacitation), provides: "It is unlawful for any person to appear in a public place manifestly under the influence of alcohol, narcotics or other drugs, not therapeutically administered, to the degree that he may endanger himself or other persons or property."

There was nothing in Officer Louis' testimony to show that the defendant was holding a bottle or drinking any alcoholic beverages. The officer did not see the defendant stumble; he did not see the defendant act in an intoxicated manner, which would foreseeably disturb or alarm the public. There was nothing in Officer Louis' testimony to indicate that the actions of the defendant would endanger herself or the public or property. From the testimony at the hearing, it appears that Officer Louis decided to stop the defendant and Johnson based on the fact that Johnson put down the bottle when he saw the police and started to stumble away. Only after the officers exited their car did they smell alcohol on the defendant. Officer Louis

conducted a safety pat down. Then he engaged the defendant and Johnson in conversation and observed the defendant's bloodshot eyes and slurred speech. The conversation and the officer's observations of the defendant's eyes and speech apparently occurred after she had been stopped. Regardless, the fact that the defendant smelled of alcohol and had bloodshot eyes and slurred speech did not support her arrest under M.C.S. § 54-405 or La. R.S. 14:103 because the defendant's conduct did not show that she was in a public place manifestly under the influence of alcohol to the degree that she endangered herself or the public or property or that her intoxicated manner would foreseeably disturb or alarm the public.

We conclude that Officer Louis and his partner did not have reasonable cause to stop the defendant on a charge under La. R.S. 14:103 or M.C.S. § 54-405, the only prohibitions relating to intoxication, when the officers had the defendant place her hands on the police car. When the officers arrested her for public intoxication, there was no probable cause to believe that the defendant was violating La. R.S. 14:103 or M.C.S. § 54-405. The trial court properly found no probable cause for the defendant's arrest for public intoxication. Because the officers did not have reasonable cause to stop the defendant, the trial court properly suppressed the cocaine, which was seized as a result of the illegal detention and arrest (fruit of the

poisonous tree under Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963)). It would be most difficult to conclude that the trial court abused its discretion when it suppressed the cocaine seized from the back seat of the police vehicle.

WRIT GRANTED; RELIEF DENIED.