

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA** \* **NO. 2001-KA-0267**  
**VERSUS** \* **COURT OF APPEAL**  
**ALFRED GREEN** \* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**

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APPEAL FROM  
CRIMINAL DISTRICT COURT ORLEANS PARISH  
NO. 414-751, SECTION "J"  
HONORABLE LEON CANNIZZARO, JUDGE

\* \* \* \* \*

**JUDGE MAX N. TOBIAS, JR.**

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(COURT COMPOSED OF JUDGE STEVEN R. PLOTKIN, JUDGE  
MICHAEL E. KIRBY, AND JUDGE MAX N. TOBIAS, JR.)

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**AFFIRMED**

On 2 June 2000, Alfred Green (“Green”) was charged with possession of cocaine, a violation of La. R.S. 40:967. He was arraigned on 19 June 2000 and entered a plea of not guilty. On 26 June 2000, defense counsel received a copy of the police report. Thereafter, defense counsel withdrew a previously filed motion for a preliminary hearing and all discovery motions. On 24 July 2000, following a trial by jury, Green was convicted of attempted possession of cocaine. On 24 October 2000, he was sentenced to serve thirty months at hard labor, but his sentence was suspended and he was placed on five years active probation with special conditions. Green’s motion to reconsider the sentence was denied. His motion for an appeal was granted. Subsequently and as a result of active probation monitoring, Green tested positive for cocaine. A warrant was issued for his arrest, and he was arrested on 7 November 2000. On 4 January 2001, Green’s probation was revoked and his sentence of thirty months at hard labor was made executory.

**STATEMENT OF THE FACTS:**

Karen Lewis Holmes testified that she is employed by the New Orleans Police Department Crime Lab as a criminalist. The State and defense counsel stipulated that Ms. Holmes was an expert in the identification and analysis of controlled dangerous substances. Ms. Holmes testified from a report written by William Giblin, her supervisor. Mr. Giblin had performed the tests on the glass pipe taken from Green on the night in question. The State and defense counsel stipulated that if Mr. Giblin testified that he would be qualified as an expert in the identification and analysis of controlled dangerous substances and that he would further testify that he analyzed the contents of the glass pipe and that the contents were positive for cocaine.

On cross-examination, Ms. Holmes testified that the procedure used to test crack pipes is uniform. She stated that the pipe contained a small piece of mesh in the front of the pipe where the cocaine was placed. The smoke is then inhaled through the mesh and into the pipe. She stated that what is tested is the precipitation or fall out that remains inside of the pipe. She also testified that Mr. Giblin did not state in his report that he tested a hard piece of cocaine. She explained that the residue, before it can be tested, must be rinsed out of the glass tube with methanol. Once the methanol evaporates, the powdered cocaine is left for testing.

On re-direct examination, Ms. Holmes stated that most of the time she can observe residue inside of a crack pipe. According to Mr. Giblin's analysis, the residue found inside of the glass pipe taken from Green tested positive for cocaine.

Vincent Smith testified that on the night in question, he was a New Orleans police officer assigned to the Fifth District Task Force. He testified that he was familiar with the Blue Gardenia Lounge, a bar, located in the 5300 block of North Claiborne Avenue near the intersection of Forstall Street. He stated that on 23 May 2000 he was on duty patrolling the area with his partner, Officer Brian Firstley. At approximately 9:00 (time of day not given) he and his partner observed three individuals loitering in the front of the bar. The bar owner had previously informed him and Officer Firstley that he did not want anyone loitering in front of his bar and asked them to check out anyone loitering in front of the bar. Signs were posted that read "No Loitering." Upon seeing three individuals in front of the bar, Officer Smith stated that he and Officer Firstley stopped and asked the three to approach the police car. All three complied. However, upon reaching the police car, Green fled down the street. Officer Smith gave chase. Green was subsequently apprehended in the 1600 block of Forstall Street. Officer Firstley had driven the police vehicle around the corner to assist Officer

Smith. Green was informed of his rights and taken to the police vehicle where he was handcuffed. Green told Officer Smith his name. Officer Smith requested that Officer Firstley run Green's name through the crime computer. Based on information obtained from the computer, Officer Smith again advised Green of his rights and placed him under arrest. Officer Smith searched Green incidental to that arrest. The search revealed a glass tube that was in Green's right front pants pocket. The tube contained a powder residue and wire mesh consistent with a crack pipe. Green was placed under arrest for possession of drug paraphernalia. Officer Smith stated that when he initially requested that Green come to the police car, he was going to check his name for outstanding warrants pursuant to a pedestrian stop. Green was not under arrest at that time. If the subjects had no outstanding warrants, they would have been given warnings for loitering and released.

On cross-examination, Officer Smith testified that after Officer Firstley checked Green's name in the computer, the information came back that Green had an outstanding warrant from municipal court. It was for this reason that Green was placed under arrest the first time. Subsequent to that arrest, Green was searched. After the search revealed the glass pipe, Green was placed under arrest for possession of drug paraphernalia. Officer Smith testified that he did not charge Green with possession of cocaine.

Officer Brian Firstley testified that he was employed by the New Orleans Police Department on 23 May 2000 and that he was assigned to the Task Force of the Street Crimes Unit. He stated that around 8:00 p.m. that evening he was driving the police car on patrol with his partner, Officer Vincent Smith, and was patrolling in the 5000 block of North Claiborne Avenue. Upon arriving in the area of the Blue Gardenia Lounge, they observed three individuals standing outside of the bar. He stated that the bar owner had previously told his partner and him that he did not want anyone “hanging out” in front of his bar and that if they saw anyone, to stop and check them out. He and his partner stopped to conduct a “pedestrian check” of the three individuals through the computer. He and his partner exited the police car and requested that the three individuals walk to the police car. All complied. But once they reached the police car, Green fled down the street. Officer Smith gave chase. Officer Firstley stated that he reentered the police car, turned it around and drove around the block in order to assist Officer Smith. He eventually caught up with Officer Smith who had already apprehended Green. He checked Green’s name in the computer and discovered that he was wanted on an outstanding warrant. He testified that Officer Smith conducted the search of Green’s person incidental to his arrest and that he was present at the time of the search. He did not observe Officer

Smith find anything on Green because he was checking Green's name in the computer. Officer Smith advised him that he had found "a crack pipe." He testified that he observed the crack pipe and that it contained wire mesh and a residue. At that time he did not know if the pipe contained cocaine for no determination was made at the scene as to the identity of the residue. Green was arrested for possession of drug paraphernalia.

On cross-examination, Officer Firstley testified that Green was only charged that night with possession of drug paraphernalia.

**ERRORS PATENT:**

A review for errors patent reveals none.

**ASSIGNMENT OF ERROR NUMBER 1:**

Green asserts that counsel was ineffective for not moving to suppress the evidence. He argues that no reasonable suspicion existed to justify an investigatory stop of Green to conduct a "name check". He asserts that because counsel failed to move to suppress the seizure of the crack pipe, he was precluded from raising the issue at trial and on appeal, thus rendering counsel's representation of him ineffective. Green further argues that the officers' testimony at trial failed to establish articulable facts forming the basis of any reasonable suspicion of illegal activity to justify the initial stop. Therefore, counsel was ineffective for failing to object to the introduction of

the crack pipe at trial.

Generally, the issue of ineffective assistance of counsel is addressed by an application for post conviction relief filed in the trial court where a full evidentiary hearing on the issue can be conducted. State v. Prudholm, 446 So. 2d 729 (La. 1984); State v. Johnson, 622 So. 2d 845 (La. App. 4 Cir. 1993). However, when the record on appeal contains enough evidence upon which to base a ruling on the issue, the appellate court will make a determination in the interest of judicial economy. State v. Seiss, 428 So. 2d 444 (La. 1983); State v. Johnson, *supra*.

A defendant must show that counsel's performance was deficient and that this deficiency prejudiced him. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, (1984). *See also* State v. Bell, 543 So. 2d 965 (La. App. 4 Cir. 1989). "Such performance is ineffective when it can be shown that counsel made errors so serious that he was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Bell, *Id.* at 969. Counsel's deficient performance will have prejudiced a defendant if it can be shown that counsel's errors were so serious as to deprive a defendant of a fair trial, one whose result is reliable. Strickland, *supra*; Bell, *supra*; State v. Crowley, 475 So. 2d 783 (La. App. 4 Cir. 1985). The defendant has the burden of showing "that there is a reasonable probability that, but for counsel's unprofessional



errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, supra at 2068.

In the instant case, the defense argues that the officers did not have reasonable suspicion of criminal activity to make a legal initial stop of Green and his companions, and, therefore, the subsequent arrest of Green on the outstanding arrest warrant and the search incident to that arrest that resulted in the seizure of the crack pipe was also illegal.

In State v. Sneed, 95-2326, p. 3 (La. App. 4 Cir. 9/11/96), 680 So. 2d 1237, 1238, 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. 4 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; State v.

Williams, 95-1971 (La. App. 4 Cir. 11/16/95), 665 So. 2d 112.

In State v. Hill, 97-2551 (La. 11/6/98), 725 So. 2d 1282, the defendant was charged with possession of cocaine. The district court granted the defendant's motion to suppress the evidence. This court denied relief. State v. Hill, 97-1012 (La. App. 4 Cir. 9/17/97), 700 So. 2d 551. The Supreme Court granted certiorari and reversed this court finding that the attenuation doctrine applied to the search of the defendant incident to his arrest on outstanding arrest warrants which dissipated any taint from the suspicionless investigatory stop. In addition, the Court found that no flagrant misconduct occurred during the stop and frisk of the defendant that would prevent application of the attenuation doctrine. The officers were on patrol in an area about which they had received a general tip of narcotics activity. However, they had no description of anyone engaging in this activity. As the officers reached a corner, they saw the defendant and another man either standing or sitting in front of an abandoned building. The men began walking away as the officers approached. The State argued these circumstances were sufficient for a finding of reasonable suspicion to stop the men. This court held that the officers had nothing to indicate either the defendant or his companion, neither of whom the officers apparently knew, were engaged in any criminal activity. Given the circumstances of the case,

the officers did not have reasonable suspicion to stop the defendant and his companion. The officers only learned of the outstanding warrants after detaining and frisking the defendant. This court concluded that because the detention was not lawful, the resultant discovery of the warrants and the arrest pursuant to them was also unlawful. Because the arrest was not lawful, the seizure of the crack pipe incident to the arrest was also not lawful. Therefore, the trial court did not err by suppressing the crack pipe.

In reversing this court in Hill, the Supreme Court held that the attenuation doctrine is an exception to the exclusionary rule, which requires the exclusion of evidence gained through impermissible official conduct. The attenuation doctrine was defined in Nardone v. United States, 308 U.S. 338, 60 S. Ct. 266 (1939) as the connection between the unlawful police conduct and the challenged evidence wherein the connection has become so attenuated as to dissipate the taint and permits the introduction of evidence which bears only a very indirect relation to the illegal search. Hill, 725 So. 2d at 1284. The Court further reasoned:

In Brown v. Illinois, 422 U.S. 590, 603, 95 S.Ct. 2254, 2261, 45 L.Ed.2d 416, 427 (1975), the United States Supreme Court enunciated the multifactor test presently used to consider whether evidence impermissibly seized should be suppressed. The primary considerations under Brown are: (1) the temporal proximity of the illegality and the acquisition of the evidence to which instant objection is made; (2) the presence

of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. [Citations omitted.] Additionally, in considering whether the evidence should be suppressed, Brown requires us to weigh each consideration in light of the policies behind the Fourth Amendment.

Applying the Brown factors to the case before us, we note that the record from the suppression hearing provides little detail upon which to rest an analysis of the first of the Brown considerations, i.e., the temporal proximity of the Terry stop to the ultimate discovery of the crack pipe. However, it is clear that the initial Terry stop and frisk unearthed no evidence. It was only after the officers acquired the defendant's identification, discovered the outstanding arrest warrants, and arrested him that they conducted the second search which produced the evidence. Because nothing in the record indicates that any significant time lapse occurred between the initial stop and the subsequent search incident to the arrest, we will assume any time lapse was negligible. It appears that this fact weighs against finding attenuation. Yet, the Brown Court stated that "no single fact is dispositive" in determining whether or not evidence should be suppressed. [Citations omitted.] "[T]he time span between the police misconduct and the [search] is not dispositive on the question of taint." [Citations omitted.] Thus, we must weigh this factor against the others dictated in Brown.

We now turn to the second factor from Brown, the existence of intervening circumstances which is particularly significant in this case. After the stop and frisk, the computer check returned two outstanding arrest warrants for Timmie Hill. Under the Louisiana Code of Criminal Procedure, this information provided the officers with probable cause to arrest the defendant. La.C.Cr. P.

art. 213. This probable cause provided by the outstanding arrest warrants constituted an intervening circumstance under Brown which dissipates the taint of an initial impermissible encounter.

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Because we find an intervening circumstance under Brown, we need not decide whether the fourth circuit was correct in holding that the officers lacked reasonable suspicion for the initial Terry stop and frisk of the defendant because, assuming arguendo that the NOPD officers did conduct an impermissible Terry stop, no evidence was recovered during that search; rather, the evidence was not seized until after the officers discovered the two outstanding arrest warrants, arrested the defendant, and conducted a lawful search incident to his arrest on the outstanding warrants. The officers' [sic] did not arrest and search the defendant due to exploitation of the initial Terry stop or due to any evidence gained through the exploitation of the initial stop. Instead, the officers lawfully arrested the defendant pursuant to the outstanding arrest warrants under La.C.Cr. P. art. 213. The interim discovery of the existence of the two outstanding arrest warrants provided the sole basis for the defendant's arrest and constituted an intervening circumstance under the third consideration of Brown.

Subsequent to such a lawful arrest, a search incident thereto is authorized in order to ensure officer safety and to protect against destruction of evidence. [Citations omitted.] Because the second search was conducted upon the lawful arrest of the defendant, based upon the discovery of outstanding arrest warrants, the disputed evidence was seized in a lawful search incident to arrest.

Undoubtedly, had the officers not learned the defendant's name due to the initial stop, they would not have discovered the outstanding arrest warrants. However, this information is the only link between the initial Terry stop and the ultimate discovery of the disputed evidence. To rely on this causal link in making a decision to suppress evidence would be directly contrary to the dictates of the United States Supreme Court because a per se "but for" causation test has been specifically rejected as a basis for a decision to suppress evidence. [Citations omitted.] Rather, properly focusing on the dictates of Brown, we find that the police officers' discovery of the outstanding warrants was a significant intervening event. The defendant's arrest was based upon probable cause not derived from the initial stop and frisk. Therefore, the search incident thereto that uncovered the crack pipe was permissible. Because we find that the crack pipe was discovered in a lawful search incident to the defendant's lawful arrest based on probable cause, we conclude that the disputed evidence was obtained through "some other means sufficiently distinguishable, thereby purging the evidence of the primary taint." [Citation omitted.] We find that the discovery of the outstanding arrest warrants for the defendant constituted an intervening circumstance under Brown, which sufficiently attenuated the initial Terry stop from the ultimate seizure of the disputed crack pipe.

Continuing with the Brown analysis, we must view the above considerations in the light of the flagrancy of the police misconduct. [Citations omitted.] To this end, we note that the testimony of officers Elsensohn and McCabe at the suppression hearing did not reveal a "quality of purposefulness" in their conduct, which consisted of performing a Terry stop and frisk on an unknown individual whom they observed standing

about on a street corner; nor is there any indication that the officers' conduct was "calculated to cause surprise, fright, or confusion." [Citation omitted.] Thus, even if the Terry stop exceeded the officers' authority, the police conduct was not particularly egregious and did not amount to a flagrant abuse of police power. To the contrary, under the particular facts of this case, we... find that, once the officers knew of the outstanding arrest warrants, they would have been derelict in their duty not to arrest the defendant. The officers' conduct in this case does not rise to the level of flagrant misconduct within the meaning of the jurisprudence, yet the gravity of the government's interest in apprehending wanted individuals is overpowering. Because the exclusionary rule is designed to prevent the use of evidence tainted by flagrant police misconduct in order to deter law enforcement practices violative of the Fourth Amendment, we find that considering the circumstances of this case, suppression of the disputed evidence would not serve the policies behind the exclusionary rule, nor contravene the protections provided by the Fourth Amendment.

Hill, 97-2551, pp. 3-8, 725 So. 2d at 1284-1287.

Applying the reasoning in Hill to the instant case, it can be concluded that if counsel had filed a motion to suppress the evidence that the motion would have been denied. The officers' discovery of the outstanding arrest warrant was a significant intervening event which sufficiently attenuated the initial investigatory stop from the ultimate seizure of the disputed crack pipe. In addition, there is no indication that the officers' conduct was calculated to cause surprise, fright, or confusion so as to amount to a flagrant abuse of

police power.

Green can show no prejudice through counsel's failure to urge a motion to suppress the evidence.

This assignment of error has no merit.

**CONCLUSION:**

For the foregoing reason, the conviction and sentence are affirmed.

**AFFIRMED**