NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-2354**
VERSUS	*	**COURT OF APPEAL**
ANTOINE T. MINTER	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 405-474, SECTION "F"
Honorable Dennis J. Waldron, Judge
* * * * * *
Judge Patricia Rivet Murray
* * * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge Charles R. Jones, Judge Patricia Rivet Murray)

Harry F. Connick
District Attorney of Orleans Parish
William L. Jones, III
Assistant District Attorney of Orleans Parish
619 So. White Street
New Orleans, LA 70119
COUNSEL FOR PLAINTIFF/APPELLEE

Frank G. DeSalvo
Harry J. Boyer
FRANK G. DeSALVO, A P.L.C.
201 South Galvez Street
New Orleans, LA 70119
COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

STATEMENT OF THE CASE

Antoine T. Minter was charged by bill of information filed on March 10, 1999, with a violation of La. R.S. 40:967 for possession of crack cocaine with the intent to distribute it. He pled not guilty, and his first trial ended in a mistrial, because the jury could not reach a verdict. He was tried again and found guilty of the lesser included charge of possession of cocaine. His motion for a new trial was denied and he pled guilty as a second offender to a multiple bill filed by the State. Mr. Minter was sentenced to serve seven years in the custody of the Louisiana Department of Corrections at hard labor without benefit of probation or suspension of sentence but with consideration for the intensive incarceration program under La. R.S. 15:574.4, and with credit for time served. He appeals this conviction assigning three errors: the denial of his motion to suppress evidence; the admission of hearsay testimony; and, that trial counsel was ineffective.

STATEMENT OF THE FACTS

On April 14, 1998, New Orleans Police Department officers Steven Villere, Brain Lampard, and Harry O'Neal participated in the surveillance and arrest of the defendant, Mr. Minter. Officer Lampard had received an

anonymous telephone call from a concerned citizen regarding a person the caller suspected was a drug dealer. The caller provided a description of the suspected seller, the seller's first name, and a description and the license plate number of the automobile involved in the suspected drug sales. On April 14, Officer Villere parked in the 5300 block of Constance Street in New Orleans where he maintained surveillance a short distance away from the reported scene of the drug sales. Officer Villere observed a suspect appearing to match the description given by the anonymous caller and two other men loitering across the street from a Buick Regal, which was the type of automobile described by the caller. The suspect was wearing blue pants and a bright, yellow shirt.

While Officer Villere observed the suspect, he saw a third man approach the suspect. Officer Villere saw the third man converse with the suspect briefly and then give him an unknown amount of currency, which he put in his pocket. After he put the money in his pocket, the suspect walked across the street to the Buick Regal, reached into the wheel well of the rear passenger tire, and retrieved a pink pill bottle. Officer Villere saw the suspect remove something from the pink pill bottle, place the pill bottle back under the wheel well, and cross the street to return to the third individual. The suspect gave the individual the object removed from the pink pill bottle,

which the individual then put the object in his pocket and left the scene.

The exchange observed by Officer Villere appeared to him to be a narcotics transaction. Therefore, he radioed Officer Lampard and Officer O'Neal, who were the "take down unit" for the surveillance he was conducting. Officer Villere told the take down unit what had transpired and gave them a description of the suspect's clothing, the apparent transaction, and the location of the suspected narcotics. These officers drove to the scene, where Officer O'Neal detained the suspect, advised him of the investigation, and his Miranda rights. Officer Lampard went to the wheel well of the Buick Regal and recovered the bottle of suspected narcotics, which was sitting on the top of the rear passenger side tire. He opened the bottle and found what appeared to be individually wrapped rocks of crack cocaine inside.

Officer Lampard then walked back to the suspect, formally placed him under arrest, and again informed him of his Miranda rights. In a search incident to the arrest, Officers Lampard and O'Neal seized from the suspect $31.00 in cash, a cell phone, and a set of keys with a remote control for a car alarm attached. When the button on the remote control was pushed, the lights on the Buick Regal flashed, and the car alarm was deactivated. The officers, believing there might be more drugs in the car, entered it. Although

the suspect denied owning the Buick Regal, the officers were able to verify that it was, in fact, registered to the suspect, Antoine T. Minter, the defendant.

1. At trial the parties stipulated that the rocks found in the bottle seized from the wheel well of the Buick Regal tested positive for cocaine.

DISCUSSION

Assignment of Error No. 1

In his first assignment of error, the defendant contends that the trial court erred by denying his motion to suppress the evidence against him. Specifically, he argues that the evidence against the defendant that was discovered in the investigatory stop by Officers Lampard and O'Neal must be suppressed, because it was discovered in an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States.

In Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968), the United States Supreme Court first recognized that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest". 392 U.S. at 22, 88 S.Ct. at 1880. According to Terry, such an investigatory stop is not an unlawful "seizure" and, therefore,

does not violate the Fourth Amendment's prohibition against unreasonable searches and seizures.

In Louisiana there is statutory authorization for investigatory stops on less than the probable cause required for an arrest. La. Code Crim. Proc. art. 215.1(A) reads as follows:

> 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.

In State v. Belton, 441 So.2d 1195 (1983), cert. denied, Belton v. Louisiana, 466 U.S. 953, 104 S.Ct. 2158, 80 L.Ed.2d 543 (1984), the Louisiana supreme court discussed the right of police officers to stop and interrogate a person as follows:

> The fourth amendment to the federal constitution and art. 1, §5 of the Louisiana constitution protects [sic] people against unreasonable searches and seizures. However, the right of law enforcement officers to stop and interrogate one reasonably suspected of criminal conduct is recognized by La. Code Crim. P. art. 215.1, as well as by both state and federal jurisprudence. Id. at 1198.

In State v. Dank, 99-0390 (La. App. 4 Cir. 5/24/00), 764 So.2d 148, this court explained the factors a reviewing court must consider in determining whether an investigatory stop was permissible. This court stated:

> "Reasonable suspicion" to stop is something less than the probable cause required for an arrest, and the reviewing court

> must look to the facts and circumstances of each case . . . . Evidence derived from an unreasonable stop, i.e., seizure, will be excluded from trial. In assessing the reasonableness of an investigatory stop . . . . [t]he totality of the circumstances must be considered in determining whether reasonable suspicion exists. The detaining officers must have knowledge of specific, articulable facts, which, if taken together with rational inferences from those facts, reasonably warrant the stop. In reviewing the totality of the circumstances, the officer's past experience, training and common sense may be considered . . . . Id. at 4-5 and at 155 (citations omitted).

In State v. Robertson, 97-2960 (La. 10/20/98), 721 So.2d 1268, the Louisiana supreme court indicated what is necessary for an investigatory stop to be permissible when an anonymous tip is involved. In that case, police received a telephone call from a concerned citizen on a hotline. The caller gave the first name and a description of an individual suspected of selling narcotics. The caller also gave a detailed description of the individual's automobile and the location where it would be parked when the suspect was not selling narcotics. The officers went to that location and saw the vehicle being driven away. The officers followed the vehicle until it was parked. When an individual matching the description of the suspect exited the automobile, the officers asked him his name. When he identified himself as William Robertson, they arrested him. A canine detection unit was called, and when the dog indicated that there were narcotics in the vehicle, one of the officers entered the vehicle and seized a bag of crack cocaine that was

underneath an ashtray.

The court held that the anonymous tip alone was insufficient to generate the reasonable suspicion necessary for an investigatory stop, even though the descriptive information given in the tip was corroborated by police officers. In holding that the evidence was illegally seized and should have been suppressed, the supreme court stated:

> We note that the police were not powerless to act on the non-predictive, anonymous tip they received. The officers could have set up more extensive surveillance of defendant until they observed suspicious or unusual behavior. Id. at 5 and at 1270.

In the instant case, the officers did exactly what was suggested by Robertson; they acted on the anonymous tip by conducting surveillance until they observed what appeared to be a drug transaction. The anonymous tip was only the first step in the chain of events that ultimately resulted in the stop of Mr. Minter. The tip was corroborated by Officer Viller's surveillance, during which he observed Mr. Minter engage in what appeared to be the sale of narcotics. Based on what he had observed, Officer O'Neal had reasonable suspicion to detain the appellant while Officer Lampard retrieved the pink pill bottle. When Officer Lampard opened the bottle and discovered what appeared to be crack cocaine inside, the officers had probable cause to arrest Mr. Minter. The officers then properly seized the

pink pill bottle and its contents as well as evidence from Mr. Minter's person incident to that arrest. See also State v. Julian, 2000-1238 (La. App. 4 Cir.3/14/01), 785 So.2d 872, cert. denied, 2001-1247 (La. 3/22/02), 811 So.2d 920; State v. Bryant, 98-1115 (La. App. 4 Cir. 8/4/99), 744 So.2d 108, cert. denied, 1999-2617 (La. 3/17/00), 756 So.2d 322 (anonymous tips regarding possible drug activity coupled with observations of suspicious activity held sufficient to warrant investigatory stops).

Because the stop of Mr. Minter was based on Officer Villere's having observed him engage in apparently criminal conduct, we find the defendant's reliance on Florida v. J.L., 529 U.S. 266, 120 S.Ct. 1375 (2000), to be misplaced. **Assignment of Error No. 2**

In his second assignment of error, the defendant contends that inadmissible hearsay evidence, concerning the information received in the anonymous tip, was admitted at trial resulting in reversible error. The defendant acknowledges that no objection was made to the introduction of this testimony at trial.

La. Code Evid. art. 801(C) defines hearsay as " a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted". La. Code Evid. art. 802 provides that "[h]earsay is not admissible except as

otherwise provided by this Code or other legislation".

In State v. Hearold, 603 So.2d 731 (La.1992), the Louisiana supreme court addressed the issue of the admissibility of testimony involving an informant's tip. The court stated:

> Law enforcement officers may not testify as to the contents of an informant's tip because such testimony violates the accused's constitutional right to confront and cross-examine his accusers. …
>
> Moreover, as to any exception to the hearsay rule based on an officer's testimony regarding information which immediately prompted an investigation . . . the issue of relevancy is significantly interrelated with the hearsay issue. The fact that an officer acted on information obtained from an informant may be relevant to explain his conduct, but may not be used as a passkey to bring before the jury the substance of the out-of-court information that would otherwise be barred by the hearsay rule. Id. at 737 (citations omitted).

In the instant case, most of the testimony regarding the information received in the anonymous tip was elicited by the defense counsel on cross examination, and there was no objection to it. La. Code Crim. Proc. art. 841 (A) provides in part that "[a]n irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence". The general rule regarding testimony to which no objection was raised is that "hearsay evidence not objected to constitutes substantive evidence and may be used by the trier of fact to the extent of any probative or persuasive powers that it

might have". State v. Beach, 610 So.2d 908, 916 (La. App. 1st Cir. 1992), cert. denied, 614 So.2d 1252 (La. 1993) and 94-1942 (La. 11/11/94), 644 So.2d 389.

La. Code Crim. Proc. art. 921 provides that "[a] judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused." In State v. Casey, 99-0023 (La. 1/26/00), 775 So.2d 1022, cert. denied, 531 U.S. 840, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000), the Louisiana supreme court discussed as follows the effect that improperly admitted evidence may have on a verdict:

> Erroneous admission of evidence requires reversal only where there is a reasonable possibility that the evidence might have contributed to the verdict. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 284, 17 L.Ed.2d 705 (1967); *State v. Gibson*, 391 So.2d 421 (La. 1980). The relevant inquiry is whether the reviewing court may conclude the error was harmless beyond a reasonable doubt, *Chapman*, supra, i.e. was the guilty verdict actually rendered unattributable to the error. *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). Id. at 13 and at 1033.

Even if we were to conclude that the hearsay testimony should have been excluded, admission of the testimony in the instant case would be harmless error. The testimony was not introduced by the prosecution for the purpose of proving the truth of the information given by the anonymous

caller; rather, it was first elicited by defense counsel on cross examination. The testimony presented by the prosecution regarding Officer Villere's observations during the surveillance and Officer Lampard's testimony regarding the investigatory stop and subsequent arrest provided ample evidence to support Mr. Minter's conviction.

We find that the jury's verdict was not attributable to the hearsay testimony that related the information received from the anonymous tip received by Officer Lampard. Therefore, the defendant's second assignment of error is without merit.

Assignment of Error No. 3

The defendant contends that his trial counsel was ineffective. This contention is based on the failure of his counsel to object to the admissibility of the hearsay evidence concerning the anonymous tip received by the police.

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court of the United States articulated the test for determining the effectiveness of a criminal defendant's counsel as follows:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not

> functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. Id. at 687 and at 2064.

Louisiana courts have adopted the two prong test for determining the effectiveness of counsel established in the Strickland case. See, e.g., State v. Fuller, 454 So.2d 119 (La. 1984); State v. Wilson, 2000-1736 (La. App. 4 Cir. 11/14/01), 803 So.2d 102.

We have already determined that the hearsay testimony the defendant contends was improperly admitted into evidence did not prejudice his defense, because there was ample evidence for the jury to convict him absent that testimony. Therefore, the defendant has not shown that his counsel's performance prejudiced him in any way. He has failed to satisfy one of the two prongs of the test required to be satisfied before a finding that counsel was ineffective can be made.

The defendant has failed to show that he was prejudiced by any error his counsel may have made in his case. We find that his contention that his counsel was ineffective is without merit.

CONCLUSION

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

AFFIRMED