STATE OF LOUISIANA	*	**NO. 2002-K-0547**
VERSUS	*	**COURT OF APPEAL**
ZEB AND ROSS JONES	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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ON APPLICATION FOR WRITS DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 425-471, SECTION "L"
HONORABLE TERRY ALARCON, JUDGE
* * * * * *
JUDGE MICHAEL E. KIRBY
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(Court composed of Judge Miriam G. Waltzer, Judge Patricia Rivet Murray, Judge Michael E. Kirby)

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STATEMENT OF THE CASE

On October 16, 2001 the State filed a bill of information charging Zeb Jones with possession of crack cocaine, a violation of La. R.S. 40:967(C)(2), and possession of heroin, a violation of La. R.S. 40:966(C)(1). Ross Jones was charged with possession of heroin. On November 15, 2001 both defendants pleaded not guilty. On December 11, 2001 a motions hearing was held. The trial court found probable cause and denied the motion to suppress the evidence. The defendants objected and noticed their intent to file for writs. On January 9, 2002 the defendants filed a motion to reconsider the motion to suppress. On March 4, 2002 the trial court issued its judgment denying the defense motion to reconsider and once again denying the motion to suppress the evidence. On March 18, 2002 the trial court granted the defendants a stay order pending the decision by this Court.

STATEMENT OF THE FACTS

At the December 11, 2001 hearing Lt. Dwayne Scheuermann testified that on October 1, 2001 he was assigned to the traffic division. He and other traffic officers had been assigned as part of a larger group of officers assisting in an investigation of a local barroom in the 800 block of North Claiborne Avenue where large crowds gathered outside on Sunday nights. There was a history of violence and a number of law violations. The traffic officers were instructed to block off certain streets to prevent the flow of

traffic. The officers were told that "if they noted any particular violations they were to take enforcement actions," At about 1:00 a.m. or 1:30 a.m. two motorcycle officers, Bobby O'Brien and Jackie Coates, observed the defendants in a Chevrolet, and they were not wearing seatbelts. The officers issued citations to the defendants for that statutory violation. Ross Jones provided the officers with the name Othello Hamilton. Lt. Scheuermann stated that he was on foot supervising his officers. He saw the motorcycle officers pull over the defendants' vehicle on the downtown river corner of St. Ann and Claiborne Avenues. He walked toward that location. As he was alongside the stopped vehicle, the officers asked Ross Jones to exit the car; Zeb Jones was still seated inside. Lt. Scheuermann said: "But as I drew closer to the vehicle I smelled what I detected and what I knew from experience to be an odor of marijuana burning. It was apparent that it was coming from the vehicle."

Lt. Scheuermann testified that he immediately walked to the driver's side and asked Zeb Jones to exit the vehicle. He then decided to conduct a pat-down check for the officers' safety. He listed several factors in making that decision: the time of night, the reputation of the area, which he knew from being assigned to patrol the area in the past; the history of drug abuse and drug dealing; and the size of the crowd and the violence associated with

those crowds in that area. He patted down Zeb Jones and felt in the area of the defendant's upper buttocks an object, which the officer knew from seventeen years of experience, to be packets of heroin. He explained that heroin is packaged in small pieces of tinfoil that is folded over several times to form pointy edges. The officer stated: "I immediately recognized without manipulation to be packets of heroin." Wearing gloves, Lt. Scheuermann removed the objects from "between his [the defendant's] buttocks towards [sic] the top." There were nine foil packets containing a white powder substance consistent with what the officer knew to be heroin. There were also several white rock-like objects, which he believed to be crack cocaine.

Zeb Jones was then arrested, advised of his rights, and secured. Lt. Scheuermann then patted down Ross Jones and found the same type of object in about the same place. The officer retrieved nine foils of what he believed to be heroin. When the officers searched Zeb Jones, they also found $1,405.00 in cash.

On cross-examination Lt. Scheuermann clarified that the traffic officers had not set up roadblocks. Their job was to block certain streets that fed traffic into the area where the other officers were on foot conducting their investigation. The traffic officers' concern was for the safety of the investigating officers on foot. He had instructed his officers to enforce any

violations they observed, but it was not a roadblock. The officer agreed that the traffic officers were obstructing the flow of traffic at certain streets. He clarified that he was not sure whether one bar or more than one bar was being targeted. He was not involved in planning; he put "several bars" in the report for that reason. The Vice Division officers, who set up the investigation, would know whether they went inside one bar or several bars. Lt. Scheuermann noted that by statute police officers have the right to regulate the flow of traffic, and no roadblock had been set up that night. He said that there was a formal plan as to the intersections where traffic was to be diverted, but not as to stopping certain vehicles (the second or the fifth vehicle). As the officers observed violations, they issued citations. The Vice Division along with the First District conducted the investigation. He did not know either of the defendants before that night.

Lt. Scheuermann acknowledged that he saw no suspicious actions by the two defendants; however, he smelled burning marijuana as he approached their vehicle. Although no marijuana was recovered from the car, the officer explained that often suspects are able to destroy the marijuana after spotting police officers. Lt. Scheuermann stated: "[I]t was obvious that they were trying to cover up the fact that they had obviously been consuming it because they attempted to mask it with a perfume type of

spray or something because you could smell it mixed in with that." He did not recall whether the can of perfume spray was found; it would not have been seized because it was not illegal. When the officer was asked about the possibility that the smell of marijuana was emanating from the hundreds of people in the area, he replied that the smell was stronger and stronger as he approached the car, and he "could smell it within the vehicle."

Lt. Scheuermann acknowledged that he saw no bulges on the defendants, but then noted that no one can see his gun when he is carrying it on his person off-duty. He stated that it was readily apparent to him that the object was contraband. The officer stated that he always checks "towards [sic] the top ["the crevice of a person's buttocks"], feeling towards [sic] the top because it is a place where weapons can be concealed." Lt. Scheuermann was not sure whether the motorcycle officers had already asked for a driver's license. When defense counsel pointed to the fact that the statute, which allows an officer to pull over a vehicle for a seatbelt violation, prohibits an officer from searching the driver based upon that violation, the court interjected that the officer never testified that he patted down the defendants because of that violation.

Zeb Jones testified that he was not smoking marijuana. He was smoking a "black and mild," a cigar. He claimed that he had the car only

four days and had not smoked marijuana inside it because he was on probation and had to take urine tests. Jones said that he and his brother were just sitting in the car when the officers approached. His brother had the car keys because he had been drinking. He was not pulled over at all. He gave the officers his driver's license, they ran it, and then they returned it to him. Then they asked his brother for his license, but he did not have it. The officer who knocked on his window and asked for his license was not the "one who stopped us—" Lt. Scheuermann, who was carrying a 12 gauge shotgun, took the defendants from the car and started patting them down. Jones said that the object was "lower in my cheeks like right by my buttocks." He showed the court where the object had been placed. Defense counsel noted that it was the lower part of the defendant's buttocks just below the anus.

On cross-examination Zeb Jones stated that he had been drinking at a second line earlier on the day of his arrest. He was parked five to ten minutes before the police officers showed up in the area. Defense counsel stipulated that cigars and cigar wrappings are commonly used to roll blunts. Jones admitted that his prior conviction involved marijuana.

Tamika Lewis testified that she was sitting on Zeb Jones' car that night with Ross Jones. She saw officers moving up behind them. She told

Ross that they should leave. She walked across the street. When Lewis turned around, the officers had the two Ross brothers leaning against their car. On cross-examination Lewis said that she had been sitting on the car with Ross Jones for about "two hours to a [sic] hour." Zeb Jones was not there. He appeared walking "from around the corner. I don't know where he came from." No one was inside the car. On redirect examination Lewis said that she had been at the club. She denied that they were smoking marijuana. On recross-examination Lewis admitted that she had been drinking. She did not see the officers take the drugs from the defendants. She said that she had no convictions.

DISCUSSION:

The defendants argue that the trial court erred when it allowed hearsay at the motion to suppress hearing. They contend that there was no justification for the pat-down searches under La. C.Cr.P. art. 215.1, that there was no probable cause for their arrests, and the evidence seized pursuant to the illegal searches should be suppressed. In their motion to reconsider ruling on the motion to suppress, the defendants argued that there was no search warrant in this case, and the searches and seizures did not fall under any of the exceptions involving lawful arrests, the "plain view"

doctrine, exigent circumstances, consents, or “close pursuits”.

Hearsay is permitted at a motion to suppress hearing. State v. Washington, 99-1111, p. 8 (La. App. 4 Cir. 3/21/01), 788 So.2d 477, 487, fn. 1; State v. James, 99-0423, p. 11 (La. App. 4 Cir. 2/16/00), 755 So.2d 995, 1002, writ denied, 2000-0872 (La. 3/9/01), 786 So.2d 112 (La. 3/9/01). See also U.S. v. Matlock, 415 U.S. 164, 94 S.Ct. 988 (1974); State v. Smith, 392 So.2d 454 (La.1980). That defense argument lacks merit.

La. R.S. 32:295.1 provides in pertinent part:

> A. (1) Each driver of a passenger car, van, or truck having a gross weight of ten thousand pounds or less, commonly referred to as a pickup truck, in this state shall have a safety belt properly fastened about his or her body at all times when the vehicle is in forward motion. …
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> B. Except as otherwise provided by law, each front seat occupant of a passenger car, van, or truck having a gross weight of ten thousand pounds or less, commonly referred to as a pickup truck, in this state shall have a safety belt properly fastened about his or her body at all times when the vehicle is in forward motion, if a belt for his seating space has been provided by the manufacturer. …
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> * * *
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> F. Probable cause for violation of this Section shall be based solely upon a law enforcement officer's clear and unobstructed view of a person not restrained as required by this

> Section. A law enforcement officer may not search or inspect a motor vehicle, its contents, the driver, or a passenger solely because of a violation of this Section.

According to Lt. Scheuermann's testimony, two motorcycle officers pulled over the defendants' vehicle because the defendants, who were seated in the front seats, were not wearing seatbelts. In its judgment the trial court noted that under La. R.S. 32:41(A)(1)(8) municipalities are empowered to regulate the flow of traffic, and the stop was justified because of a violation of La. R.S. 32:295.1, the seatbelt law.

In State v. Benoit, 2001-2712 (La. 5/14/02), 2000 WL 984304 the Louisiana Supreme Court held that La. R.S. 32:295.1(F) does not prohibit an officer from investigating signs of intoxication independent from the seat belt violation because the officer had been only a passive observer until the defendant displayed signs of intoxication. Once the defendant displayed signs of intoxication, the officer had justification for a search and investigation independent of the seat belt violation. We conclude the same rationale applies to the situation where an officer smells the odor of burning marijuana during a seat belt violation stop. The language of La. R.S. 32:295.1(F) does not prohibit a subsequent search and inspection because the subsequent search and inspection is not solely because of the seat belt stop.

La. C.Cr.P. art. 215.1(B) provides in pertinent part: "When a law enforcement officer has stopped a person for questioning pursuant to this Article and reasonably suspects that he is in danger, he may frisk the outer clothing of such person for a dangerous weapon." At the hearing defense counsel continually argued that Lt. Scheuermann had no reason to suspect that he and the other officers were in danger because the defendants had been pulled over for a seatbelt violation. However, the trial court noted that Lt. Scheuermann justified the pat-down because of a number of factors, including the fact that he smelled burning marijuana as he approached the vehicle and inside of the car. He also pointed to the time of night, the reputation of the area and the large crowd of people. In discussing La. C.Cr.P. art. 215.1(B), this Court has stated:

> However, in many instances, suspicion of drug dealing itself is an articulable fact that may support a frisk pursuant to La. C.Cr.P. art. 215(B). State v. Fortier, 99-0244 (La.App. 4 Cir. 1/26/00), 756 So.2d 455("We can take notice that drug traffickers and users have a violent lifestyle, which is exhibited by the criminal element who are generally armed due to the nature of their illicit business. Therefore, a police officer should be permitted to frisk a suspect following an investigatory stop [based on reasonable suspicion] relating to drug activities."), 99-0244 at p. 7, 756 So.2d at 460, quoting State v. Curtis, 96-1408, pp. 9-10 (La.App. 4 Cir. 10/2/96), 681 So.2d 1287, 1292. See also State v. Williams, 98-3059 (La.App. 4 Cir. 3/3/99), 729 So.2d 142 (officer's testimony that he frisked a defendant suspected of

> drug activity to look for weapons for his own safety was sufficient to validate a frisk pursuant to La. C.Cr.P. art. 215(B)).

(Footnote omitted) State v. Jones, 99-0861, p. 14 (La. App. 4 Cir. 6/21/00), 769 So.2d 28, 38-39, writ denied, 2000-2183 (La. 9/28/01), 797 So.2d 685. In its judgment the trial court notes that the smell of marijuana has been held to be probable cause for arrest as well as reasonable suspicion for an investigatory stop.

In State v. Wyatt, 99-2221, p. 2 (La. App. 4 Cir. 9/27/00), 775 So.2d 481, 483, the court found that the officer validly stopped the vehicle because the windows were tinted so that it was impossible to see inside the car. When the defendant opened the car door, the officer smelled marijuana and saw the defendant making a "stuffing motion" to the floorboard. The officer ordered the defendant out of the car and handcuffed him; the officer returned to the car and saw a cigar containing green vegetable matter and arrested the defendant for possession of marijuana. Id. This Court stated:

> In State v. Coleman, 412 So.2d 532, 535, n. 4 (La.1982), the Louisiana Supreme Court recognized that detecting marijuana by means of smell does not constitute a search. Thus, there is no reasonable expectation of privacy from lawfully positioned officers with inquisitive nostrils.
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> In Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948), the United States Supreme Court suggested that the distinctive odor of a substance, perceived by an individual

> qualified to know the odor, might well be evidence of a persuasive character in determining probable cause for a search.

State v. Wyatt, pp. 2-3, 775 So.2d at 483, quoting State v. Garcia, 519 So.2d at 793-94.

In light of the factors set out by the officer, including the smell of marijuana emanating from the stopped vehicle, the trial court properly concluded that the officer was justified in patting down the two defendants.

In State v. Francois, 2000-1039, pp. 7-8 (La. App. 4 Cir. 1/10/01), 778 So.2d 673, 678-79, quoting State v. Denis, 96-0956 pp. 8-9, (La. App. 4 Cir. 3/19/97), 691 So.2d 1295, 1300, this Court discussed the jurisprudence relating to the "plain feel" exception:

> [E]vidence discovered during a lawful investigatory frisk may be seized under the "plain feel" exception to the warrant requirement, as explained in Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). However, just as the "plain view" doctrine requires that an object's incriminating character be immediately obvious when seen, the "plain feel" doctrine requires the tactile discovery of "an object whose contour or mass makes its identity immediately apparent." Dickerson at 375, 113 S.Ct. at 2137, 124 L.Ed.2d at 346. Thus, in State v. Parker, 622 So.2d 791 (La.App. 4th Cir.), writ denied, 627 So.2d 660 (1993), the seizure of a matchbox containing cocaine detected during a pat-down search was found not to fall within the "plain feel" exception because there was no evidence that a matchbox's shape was identifiable as contraband. In contrast, in State v. Stevens, 95-

> 501 (La.App. 5th Cir. 3/26/96), 672 So.2d 986, the seizure of drugs in a matchbox detected during a lawful pat-down was upheld because the officer testified that her prior experience indicated that most street-level crack dealers carried their drugs in a matchbox. Similarly, where testimony establishes that an object detected during a pat-down was immediately identifiable as a "crack pipe," suppression of the cocaine residue contained within the pipe is not required. State v. Lavigne, 95-0204 at p. 9, 675 So.2d at 778; State v. Livings, 95-251 pp. 5-6 (La.App. 3d Cir.11/15/95), 664 So.2d 729, 733, writ denied, 95-2906 (La.2/28/96), 668 So.2d 367.

In Francois Officer Scheuermann testified that he discovered the contraband during a frisk: "[A]s I patted the general area of his buttocks, I felt an object, which I immediately recognized without manipulating it to be a small packet of crack cocaine." Id. There this Court concluded that the seizure fell under the "plain feel" exception. Id.

Generally, 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. See also State v. Briley, 2001-0143 (La. App. 4 Cir. 10/3/01), 798 So.2d 1191.

The trial court properly denied the defendants' motion to suppress the evidence.

For the foregoing reasons we grant the writ and deny relief.

WRIT GRANTED; RELIEF DENIED.