STATE OF LOUISIANA	*	**NO. 2002-K-1575**
VERSUS	*	**COURT OF APPEAL**
MARK JOHNSON, ET AL.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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ON APPLICATION FOR WRITS DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 426-786, SECTION "G"
HONORABLE JULIAN A. PARKER, JUDGE
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JUDGE MICHAEL E. KIRBY
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(Court composed of Judge Michael E. Kirby, Judge Terri F. Love, Judge David S. Gorbaty)

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STATEMENT OF THE CASE

On December 13, 2001, the defendants Mark Johnson and Shaqueisha Jackson were both charged with one count each of possession with the intent to distribute heroin, possession with the intent to distribute marijuana, and possession with the intent to distribute cocaine, charges to which they subsequently pled not guilty. The court heard their motion to suppress the evidence on January 25, March 27, and May 31, 2002, and on July 30 the court denied the motion as to evidence seized at the scene of the arrest but granted the motion as to evidence seized from a residence not near the scene. The State now comes before this court seeking relief from this ruling. The trial court stayed all proceedings.

FACTS

The evidence in the case was seized from two locations: (1) evidence was seized from the defendants and pursuant to a search warrant from a car located in the 2300 block of Josephine, the scene of the defendants' arrest; and (2) evidence was seized pursuant to a search warrant at a residence on Crozat Street in the Iberville Housing Project. Most of the testimony taken at the three suppression hearings pertained to the evidence seized on the scene of the arrest. The court denied the motion to suppress this evidence but suppressed the evidence seized from the Crozat Street apartment.

On November 30, 2001, police officers received a tip from an untested confidential informant that a male named Mark Johnson and a female named "Shaquesha" were selling heroin, cocaine, and marijuana in the 2300 block of Josephine Street. The C.I. described the two sellers and indicated they stored the drugs in a silver Chevy Lumina, the license plate number which the C.I. supplied, which was parked in that block. The C.I. also indicated that the pair traveled to and from the scene in an aqua Nissan Altima.

At approximately 4:00 p.m. that day one officer set up a surveillance of the 2300 block of Josephine. He observed the defendants Mark Johnson and Shaqueisha Jackson standing in that block up against an aqua Altima, which was parked directly across the street from a silver Lumina. The defendants matched the descriptions given by the C.I. Approximately ten minutes later, the officer observed an unknown man walk up to the defendants, engage in a brief conversation with them, and then hand Johnson some currency. Johnson walked across the street to the Lumina, used a key to enter, leaned inside for a short time, then exited, closed and locked the door, and walked back to the unknown man, giving him a small object. The man then left. Soon thereafter, another unknown man approached the pair, engaged them in conversation, and gave Johnson some money. Johnson gave the keys to Ms. Jackson, who walked over to the Lumina, unlocked and

opened the door, leaned inside briefly, and then exited and walked back to the man, giving him an object. That man then left.

A few minutes later, a third man on a bicycle passed the officer who was conducting the surveillance and looked inside the officer's car. The man continued riding, stopped at the defendants, and spoke briefly with them, pointing to the officer's car. The man rode away, and the defendants walked to the corner and turned onto LaSalle Street, out of the officer's sight. The officer, believing the surveillance had been discovered, contacted backup units to come to the area and arrest the defendants. At that point, the defendants walked back into the block and were detained as they neared the Altima. The officers advised them of the narcotics investigation and advised them of their rights. As one of the officers passed the Lumina, Johnson denied that the Lumina belonged to him. Soon a canine arrived and "alerted" on the front passenger door and the trunk of the Lumina.

The officers obtained a warrant to search the car, and pursuant to this search they found in the middle console of the Lumina one plastic bag containing forty-eight tinfoil packets of what was later found to be heroin, another plastic bag containing one tinfoil packet of heroin, a plastic bag of what was discovered to be loose heroin, another plastic bag of what was found to be cocaine, and two plastic bags containing what was found to be

marijuana. They also seized from the car a picture of Ms. Jackson, a picture of Johnson, some paperwork in Johnson's name, and a two-month-old phone bill in Ms. Jackson's name for service at 243 Crozat Street, Apt. M. The officers arrested the defendants and again advised them of their rights. The officers searched the defendants and seized $192 from Johnson and $52 from Ms. Jackson, as well as matching sets of keys from each defendant. Johnson told them he lived on Alvar Street with his father, while Ms. Jackson stated she lived with her grandmother in the 2300 block of Josephine. Both denied any knowledge of the apartment on Crozat Street.

While on the scene, one officer received a call from a second C.I., who had been paid for information in the past, confirming that the defendants had been selling narcotics. This C.I. also indicated the defendants lived at an address in the Iberville Housing Project and that they kept more drugs there. The C.I. also indicated that Johnson had a red Chevy Tahoe at that address. The officers went to the Crozat Street address, which was in the Iberville Project, and saw the Tahoe parked on the street. The officers pushed the remote button on the keys they had seized from the defendants and discovered it belonged to the Tahoe. They ran the license plate number and found it had been rented from a company in Maryland. They also learned that the driver's license number of the person who rented

the car was Johnson's driver's license number. They tried the house keys in the door to the apartment and found they fit.

Based upon these facts, the officers obtained a warrant to search the Crozat Street apartment. Prior to obtaining the warrant, the officers entered the apartment to secure it and found lying in plain view on a table in the living room more tinfoil packets of heroin and more smaller baggies of cocaine. This information was not placed in the affidavit for the search warrant. After obtaining the warrant, the officers used a canine who "alerted" on the living room table and closet, as well as on the closets, dressers, and mattresses in two upstairs bedrooms. The officers seized: the contraband from the living room table; bags of marijuana, $1900, and a shoebox containing materials for cutting and packaging drugs from the living room closet; cocaine from the kitchen; some ammunition from inside a dryer; more ammunition and $1285 from one bedroom; and $602 from another bedroom.

At the January suppression hearing, one officer testified that some officers entered the Crozat Street apartment to secure it while other officers were attempting to obtain the search warrant. He stated that they did not know that there was anyone else in the apartment, but they feared that if someone were there, that person would learn of Ms. Jackson's arrest,

possibly from her grandmother who lived in the block where the arrests occurred, and anyone inside the apartment would then destroy any evidence inside. He also testified that the officers decided to go to that apartment because of the tip from the second C.I. that the defendants lived there and kept more drugs there, as well as the defendants' denial of any knowledge of the apartment, even in the face of the phone bill in Ms. Jackson's name from that address. He admitted that other than the second C.I.'s tip, they had no information concerning that apartment. He also admitted he did not know how the C.I. knew that drugs could be found there.

DISCUSSION:

The trial court suppressed only the evidence seized from the apartment on Crozat Street. The court suppressed this evidence because it found it was seized without a search warrant. The trial court was mistaken on this point, perhaps because the only hearing which dealt with this search occurred over six months prior to the ruling, and the judge himself indicated he was relying only upon his memory. The court made much of the fact that the officers entered the apartment to secure it and saw some drugs in plain view. Apparently, when the court made its ruling on this basis the prosecutor must have also forgotten that the officers had obtained a search

warrant for the apartment. Indeed, the only testimony on this point showed the officers did not seize the evidence when they entered the apartment to secure it, nor did they include in the application for the search warrant any information gleaned from the warrantless seizure.

The court apparently found the officers were not justified in entering the apartment without the warrant, relying upon Kirk v. Louisiana, 536 U.S. ___, 122 S.Ct. 2458 (2002). However, such reliance was misplaced. In Kirk, the officers entered the defendant's residence to arrest and search him without an arrest warrant. This court upheld the arrest and search, without making a finding of whether there were exigent circumstances to permit the entry, finding that the entry was justified because the officers had probable cause to arrest him. State v. Kirk, 2000-0190 (La. App. 4 Cir. 11/15/00), 773 So. 2d 259. Our Supreme Court denied writs. State v. Kirk, 2000-3395 (La. 11/9/01), 801 So. 2d 1063. The U.S. Supreme Court reversed and remanded, holding that *in the absence of exigent circumstances*, the officers could not enter a residence without first obtaining an arrest or a search warrant. Because this court made no such finding, the Court remanded the case, declining to address whether there were exigent circumstances in that case.

In State v. Page, 95-2401, p. 10 (La. App. 4 Cir. 8/21/96), 680 So. 2d

700, 709, this court discussed the warrantless entry into a protected area:

> There is a justified intrusion of a protected area if there is probable cause to arrest and exigent circumstances. *State v. Rudolph*, 369 So.2d 1320, 1326 (La. 1979), cert. den., *Rudolph v. Louisiana*, 454 U.S. 1142, 102 S.Ct. 1001 (1982). Exigent circumstances are exceptional circumstances which, when coupled with probable cause, justify an entry into a "protected" area that, without those exceptional circumstances, would be unlawful. Examples of exigent circumstances have been found to be escape of the defendant, avoidance of a possible violent confrontation that could cause injury to the officers and the public, and the destruction of evidence. *State v. Hathaway*, 411 So.2d 1074, 1079 (La. 1982).

See also State v. Julian, 2000-1238 (La. App. 4 Cir. 3/4/01), 785 So. 2d 872; State v. Brown, 99-0640 (La. App. 4 Cir. 5/26/99), 733 So. 2d 1282.

Here, the only officer to testify as to the entry into the Crozat Street apartment stated that the officers decided to enter the apartment while waiting for the warrant because they thought someone might be inside. The officer testified that they believed this because the defendants were arrested right outside Ms. Jackson's grandmother's residence, and they were afraid someone from that residence might call someone at the Crozat Street apartment. The officer admitted, however, that they really had no reason to believe there was anyone else in the apartment. As such, it does not appear the trial court erred by finding the State failed to prove exigent

circumstances for the warrantless entry.

The State argues, however, that the evidence in the apartment need not have been suppressed because the officers obtained the search warrant, and the affidavit for the warrant did not include any reference to anything seen during the warrantless entry. The State argues that because the evidence would have inevitably been discovered when they executed the warrant, its seizure was lawful. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963). In United States v. Crews, 445 U.S. 463, 100 S.Ct. 1244 (1980), the Court noted there are three exceptions to Wong Sun's exclusionary rule: the independent source doctrine, the inevitable discovery doctrine, and the attenuation doctrine. See also State v. Welch, 449 So. 2d 468 (La. 1984); State v. Irby, 93-2220 (La. App. 4 Cir. 2/4/94), 632 So. 2d 801. As this court noted in State v. Tassin, 99-1692, pp. 4-5 (La. App. 4 Cir. 3/15/00), 758 So. 2d 351, 354:

> In *Nix v. Williams*, 467 U.S. 431, 446-47, 104 S.Ct. 2501, 2510-11, 81 L.Ed.2d 377 (1984), the Supreme Court held that the exclusionary rule does not apply when the State proves that the unconstitutionally obtained evidence would inevitably have been found in a constitutional manner. "The court's decision was based on its belief that it is unfair to penalize the government through application of the exclusionary rule where the police would have obtained the evidence even if no misconduct occurred." *State v. Garner*, 621 So.2d 1203, 1208 (La.App. 4 Cir.1993), *writ denied*, 627 So.2d 661 (La.1993).

Here, the trial court did not reach this issue because for some reason *all parties* appeared to forget that a warrant had been issued and the evidence was seized *after* the warrant was signed and executed. If, indeed, there was probable cause for the issuance of the warrant from the circumstances presented in the affidavit (which did not include any information learned pursuant to the warrantless entry), the earlier entry would not have tainted the subsequent seizure pursuant to the warrant. Thus, in order to determine if the evidence must be seized, the trial court should have determined if there was probable cause for the issuance of the warrant.

In State v. Page, 95-2401, p. 12, 680 So. 2d at 709-710, this court noted the standard for determining probable cause to support the issuance of a search warrant:

> Louisiana Code of Criminal Procedure Article 162 provides that a search warrant may be issued "only upon probable cause established to the satisfaction of the judge, by the affidavit of a credible person, reciting facts establishing the cause for the issuance of the warrant." In State v. Duncan, 420 So.2d 1105, 1108 (La. 1982) our Supreme Court held that probable cause exists when:
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> > the facts and circumstances within the affiant's knowledge, and those of which he has reasonably trustworthy information, are sufficient to support

> a reasonable belief that evidence or contraband may be found at the place to be searched. (citations omitted) See also, State v. Roebuck, 530 So.2d 1242 (La. App. 4th Cir. 1988), writ den. 531 So.2d 764 (La. 1988).
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> The facts which form the basis for probable cause to issue a search warrant must be contained "within the four corners" of the affidavit. Duncan, supra at 1108. A magistrate must be given enough information to make an independent judgment that probable cause exists for the issuance of the warrant. State v. Manso, 449 So.2d 480, 482 (La. 1984), cert. denied, Manso v. Louisiana, 469 U.S. 835, 105 S.Ct. 129 (1984). The reviewing Court must determine whether the "totality of circumstances" set forth in the affidavit is sufficient to allow the magistrate to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him that there is a reasonable probability that contraband will be found. The duty of the reviewing court is simply to ensure that the magistrate had a "substantial basis" for concluding that probable cause existed. Manso, supra at 482.

See also State v. Powell, 2001-0638 (La. App. 4 Cir. 12/12/01), 804 So. 2d 802; State v. Hoffpauir, 99-0128 (La. App. 4 Cir. 4/7/99), 731 So. 2d 1026.

Here, the officers had received a tip from one C.I. about drug sales by the defendants, and surveillance had led to the observation of drug transactions by the defendants at the place indicated by the C.I. A search of the car used by the defendants in the drug transactions led to the discovery and seizure of heroin, marijuana, and cocaine, as well as a phone bill in Ms.

Jackson's name for the Crozat Street apartment dated a few months earlier. Incidental to the defendant's arrest, the officers seized key rings from the defendants with identical keys. Although the defendants claimed they lived at different addresses, a second C.I. told the officers that the defendants actually lived in the Iberville Project, that they kept more drugs there, and that Johnson had a Tahoe parked at the apartment. The officers went to the apartment and pressed the car remote on the key ring, and it deactivated the alarm on a Tahoe parked there. A check of the license plate on the Tahoe revealed it was a rental car, and the driver's license number of the lessee of the car matched Johnson's driver's license number. In addition, the keys fit the apartment door.

There is no doubt these factors linked both defendants to the Tahoe and the Crozat apartment. It is not clear that the court would have found probable cause for the issuance of the warrant. Although there was no corroboration of the second C.I.'s tip that drugs would also be found there, an argument could be made that the corroboration of the other factors and the defendants' possession of a large amount of drugs at the scene of their arrest bolstered the second C.I.'s tip about drugs at the apartment. However, just because they had drugs in another place does not necessarily make it more probable than not that there were drugs at the apartment. Because the

trial court never reached this issue, we reverse the trial court's ruling and remand for a determination on this point.

Because the trial court based its ruling on the incorrect assumption that there was no search warrant for the residence, its reasoning was faulty, and it never addressed the more important issue of whether there was probable cause for the issuance of the warrant. Accordingly, this writ is granted, the ruling of the trial court reversed, and the case remanded for a determination of whether there was probable cause for the issuance of the warrant for the Crozat Street apartment.

WRIT GRANTED; RULING REVERSED; REMANDED.