NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-K-2053**
VERSUS	*	**COURT OF APPEAL**
GARY LEWIS AND REUBEN CAREY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

*** * * * * * ***

APPLICATION FOR WRITS DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 431-931, SECTION "H"
Honorable Camille Buras, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge Dennis R. Bagneris, Sr., and Judge David S. Gorbaty)

Harry F. Connick
District Attorney
David M. Abdullah
Assistant District Attorney
619 South White Street
New Orleans, Louisiana 70119
COUNSEL FOR PLAINTIFF/RELATOR

WRIT GRANTED; JUDGMENT OF THE TRIAL COURT AFFIRMED

Reuben Carey and Gary Lewis are charged with one count each of possession of cocaine. As to Carey, his counsel appeared on September 13, 2002 and waived pretrial motions. As to Lewis, the court heard testimony regarding his motion to suppress evidence, and then continued the matter to September 17, 2002. On that date another witness testified. The court then granted the motion to suppress evidence on behalf of Lewis. The State now seeks writs from this ruling.

STATEMENT OF THE FACTS

On July 12, 2002, Officer Kevin Jackson of the Special Operations Division of the N.O.P.D. was conducting a proactive patrol in the First District. Officer Jackson and his partner were in the area of Conti and Broad Streets when they observed a vehicle run a stop sign and enter the second lane of traffic on Broad, causing vehicles on Broad to swerve. The officers activated their lights and siren, and the vehicle pulled over. The driver, later identified as Reuben Carey, immediately responded to the order to exit the vehicle. The officers interviewed him, and Carey produced a valid Louisiana driver's license. Nevertheless, because "he was a little nervous" the officers formally arrested Carey for reckless operation Officer Jackson's partner, Officer Guillard, searched Carey incident to the arrest and found three small bags of cocaine. Officer Jackson then ordered the passenger, the

defendant Gary Lewis, out of the vehicle and directed him to step to the rear and place his hands on the car. Lewis complied, but appeared upset, stating that "he didn't have anything to do with the narcotics that was [sic] found" on Carey.

About the time that Carey was searched and Lewis was ordered to the rear of the car, a second unit of S.O.D. officers arrived. One of them, Officer Duplantier, overheard the statements by Lewis and "placed him in handcuffs at that time pending our investigation." According to the testimony of Officer Jackson, Lewis was handcuffed because narcotics had been found, the officers had not yet searched the vehicle for more contraband or weapons, and Lewis had "become a little nervous and irrate [sic] and he did make some statements as to that he didn't have anything to do with it. He didn't know anything about it. And he was obviously nervous."

During cross-examination, Officer Jackson explained that he and his partner ordered Lewis out of the car for safety reasons. He also stated that they did not specifically call for back-up; rather the units were working in proximity and basically just would back each other up.

Officer LeJon Roberts also testified at the September 13th hearing. He stated that he was Officer David Duplantier's partner on the day of the

defendants' arrests. He stated that he and his partner heard Officers Jackson and Guillard putting it out on the radio that they were doing a vehicle stop so he and Officer Duplantier went to assist. When they arrived at the scene, both defendants were out of the car and were being "detained for further investigation." As he and his partner were approaching, they saw the driver being placed under arrest and searched, which search resulted in a seizure of drugs. He and Officer Duplantier assisted by securing the defendants while Officer Duplantier ran a name check on the passenger. According to Officer Roberts, the defendant Lewis was extremely nervous and fidgety. They observed him reach into his rear pants pocket and remove an "Easy Wad" of rolling papers and throw it to the ground. The papers were retrieved by Officer Duplantier who discovered that inside was a plastic bag containing white powder. When asked to describe in detail what Lewis was doing, Officer Roberts stated that Lewis was extremely fidgety, real curious, and moving around in an agitated state.

During cross-examination, Officer Roberts stated that he believed neither defendant was handcuffed when he arrived on the scene, although they were both being detained. To his recollection, Lewis was placed in handcuffs by Officer Duplantier after Duplantier had recovered the contraband the defendant had dropped. However, he admitted that it was

possible that Lewis had been placed in handcuffs prior to the time he discarded any contraband; Roberts really could not remember. Also, Officer Roberts admitted that he was not in fear from the defendant; rather his suspicions were raised because Lewis was extremely nervous.

The motion hearing was continued to September 17, 2002 at which time Officer Duplantier was called by the defense. He identified the police report which he authored and reviewed prior to testifying. He stated that he and Officer Roberts on their own went to the scene of the traffic stop being conducted by Officer Jackson and his partner. At the time he and Roberts arrived, both defendants were out of the car and in a "secure position" but not handcuffed; after narcotics were found on Carey, both defendants were handcuffed. Officer Duplantier explained that Lewis "was placed in handcuffs as a result of narcotics being found on the driver, at which point the scene was still – the officers primary on the scene were still Officer Jackson and Officer Guillard. Myself and Officer Roberts were there strictly as security." When asked by defense counsel why Lewis, the passenger, was placed in handcuffs when drugs were found on the person of the driver, Officer Duplantier stated that Lewis "became overly excited. He started screaming, `I had nothing to do with it. It's not mine. It's not mine.' We secured him for safety reasons along with the fact that we now had a

narcotics investigation." Officer Duplantier also stated that Lewis did not keep his hands in a relaxed position on the car, that he repeated that he had nothing to do with the drugs in the driver's possession, and that his posture was "rigid."

The State elicited from Officer Duplantier the testimony that Lewis was not told he was arrested when he was handcuffed, rather he was told that he was being investigated for narcotics and he was being secured. While he was handcuffed, he casually reached in his pocket and dropped the rolling papers. On redirect, Officer Duplantier agreed with defense counsel that he had testified on direct that Lewis was under arrest when he was handcuffed, which was before he had discarded any contraband.

The trial court heard brief argument before ruling on the motion to suppress. The State argued that the defendant Lewis was not under arrest "in the legal sense" at the time he discarded the contraband; rather he was simply being detained for investigation because he was irate and excited about the fact that drugs had been found on his companion. Defense counsel countered that Lewis was handcuffed when all he had done was to be a passenger in a car stopped for a traffic violation and then vehemently deny any connection with the drugs found on the driver. Defense counsel suggested that the defendant's behavior was not being irate, it was "being

bold and letting them know that, `I don't have anything to do with that'". For this, he was placed in handcuffs, which meant he could not leave or call for assistance, and thus was physically arrested without probable cause. The State responded by suggesting that the defendant was "disturbing the investigation" and thus could be placed in handcuffs without it being considered an arrest. The State further argued that, although Officer Duplantier initially stated that Lewis was arrested at the time he was handcuffed, he later clarified his testimony by stating that he was not arrested at the time.

After hearing the arguments, the trial court acknowledged that the officers had great discretion to take the steps necessary to insure their safety, including the right to have a passenger exit a vehicle stopped for a traffic violation. However, the court noted that the right to handcuff a person who had not violated any law appeared to be a step too far, especially in light of the testimony that there were four officers on the scene prior to the Lewis being handcuffed and "no real behavior on the part of Mr. Lewis that would warrant a handcuffing," even giving deference to the officers. The court specifically stated that, once the handcuffs were placed on Lewis, he was arrested, and that there was no probable cause for that arrest; therefore the evidence had to be suppressed.

DISCUSSION

The State in its writ application argues that the trial court erred by deciding that the defendant Lewis was arrested before he discarded contraband. The State argues that Lewis was merely being detained pending the ongoing investigation, and thus any contraband he discarded could be seized. Factually, the State concedes in its application that the defendant was handcuffed and restrained prior to the time he threw down the contraband.

On trial of a motion to suppress, the State has the burden of proving the admissibility of all evidence seized without a warrant. La. C.Cr.P. art. 703(D); State v. Jones, 97-2217, p. 10 (La. App. 4 Cir. 2/24/99), 731 So.2d 389, 395. A trial court's ruling on a motion to suppress the evidence is entitled to great weight, because the court has the opportunity to observe the witnesses and weigh the credibility of their testimony. State v. Mims, 98-2572, p.3 (La. App. 4 Cir. 9/22/99), 752 So. 2d 192, 193-194.

La. C.Cr.P. art. 201 defines arrest as the "[t]aking of a person into custody by another. To constitute an arrest there must be an actual restraint of the person. The restraint may be imposed by force or may result from the submission of the person arrested to the custody of the one arresting him." An arrest occurs when the circumstances indicate an intent to effect an

extended restraint on the liberty of the accused, rather than at the precise time an officer tells an accused he is under arrest. State v. Simms, 571 So. 2d 145, 148 (La. 1990); State v. Watson, 99-1448 (La. App. 4 Cir. 8/23/00), 774 So. 2d 232. This Court further elaborated on "arrest" in State v. Dorsey, 99-1819 (La. App. 4 Cir. 4/19/00), 763 So. 2d 21, stating:

> The distinguishing factor between an arrest and the lesser intrusive investigatory stop is that in the former, a reasonable person would not feel that he is free to leave, while in the latter, a reasonable person would feel free to leave after identifying himself and accounting for his suspicious actions; "it is the circumstances indicating intent to effect an extended restraint on the liberty of the accused" that is determinative of when an arrest occurs.

Dorsey, 99-1819 at pp. 5-6, 763 So. 2d at 24-25, quoting State v. Allen, 95-1754, p. 6 (La. 9/5/96), 682 So. 2d 713, 719.

Similarly, in State v. Smiley, 99-0065, p. 3, (La. App. 4 Cir. 3/3/99), 729 So. 2d 743, 745, this Court, quoting from State v. Allen, 95-1754, p. 5-6, 682 So.2d at 718-719, set forth the factors to be considered when determining whether an arrest has occurred:

> La. C.Cr.P. art. 201 defines arrest as "the taking of one person into custody by another ... [by] actual restraint of the person." In distinguishing between an investigatory stop and an arrest, courts have considered numerous factors. In Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), the United States Supreme Court found a stop for questioning was indistinguishable from a traditional arrest because the suspect was not questioned briefly where he was but transported to the police station, was never informed he was free to go and, in fact, would have been restrained had he tried

> to leave. The United States Supreme Court in Michigan v. Chesternut, 486 U.S. 567, 574, 108 S.Ct. 1975, 1979, 100 L.Ed.2d 565 (1988) (quoting INS v. Delgado, 466 U.S. 210, 215, 104 S.Ct. 1758, 1762, 80 L.Ed.2d 247 (1984); United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980)) stated that "any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account all of the circumstances surrounding the incident in each individual case." The Mendenhall Court also stated that in determining whether a person has been seized under the Fourth Amendment, one must determine whether a reasonable person would have believed he was free to leave. Mendenhall, 486 U.S. at 574, 108 S.Ct. at 1979. This court has considered this issue and determined that "it is the circumstances indicating intent to effect an extended restraint on the liberty of the accused, rather than the precise timing of an officer's statements: `You are under arrest,' that are determinative of when an arrest is actually made." State v. Giovanni, 375 So. 2d 1360, 1363 (La.1979) (quoting State v. Sherer, 354 So. 2d 1038, 1042 (La.1978)); see also, State v. Davis, 558 So. 2d 1379, 1382 (La.1990); State v. Simms, 571 So. 2d 145, 148 (La.1990). In both Giovanni and Simms, this court found an arrest based on the fact that the defendant was not free to leave.

In Allen, the officers stopped the defendant in a parking lot and asked him if he owned a gun. The defendant told the officers he had a gun in his trunk and voluntarily allowed the officers to search the car. The Court noted that these circumstances did not amount to an arrest, given the fact that there was no restraint on the defendant's liberty during the initial questioning. The Court noted that no weapon or physical force was used on the defendant, nor was the defendant searched for weapons, handcuffed, or placed in a police vehicle. The Court found that because there was reasonable suspicion for an

investigatory stop, his consent to search was valid. Thus, the trial court properly denied the motion to suppress evidence obtained as a result of the search of the car.

In State v. Bruser, 95-0907 (La. App. 4 Cir. 9/15/95), 661 So.2d 152, the officers activated their lights in order to stop the defendant. After he exited his car, the officers advised him he was under investigation for narcotics violations and advised him of his Miranda rights. This court found there was no arrest because the officers did not order him from his car or physically restrain him.

In State v. Wade, 390 So.2d 1309 (La. 1980), police officers "raced their vehicle until they pulled along side" the fleeing suspect, then stopped their vehicle and jumped out, blocking the suspect's path. The Louisiana Supreme Court concluded that this was an investigatory stop, even though some degree of force was used to accomplish this stop. In State v. Solomon, 93-1199 (La. App. 3 Cir. 3/2/94), 634 So.2d 1330, the suspect fled as the police officers approached on foot. The officers gave chase, caught him, and informed him that "they merely wanted to speak with him." When the defendant began struggling, the deputies handcuffed him. The Louisiana Third Circuit, citing recent cases which focused on the intent of the officers to determine whether a stop is actually an arrest, held that the officers' intent

was to question the defendant, not to formally arrest him. The court found that the defendant was handcuffed only because of his violent struggle with the deputies, and that the stop was brief and reasonable to investigate possible criminal activity.

In State v. Morgan, 540 So.2d 614 (La. App. 5 Cir. 1989), police officers testified that they did not use the sirens or lights in the police vehicle when approaching three suspects sitting in a parked car. The officers also testified that they did not draw their weapons; the officers ordered the suspects out of the car, and the suspects complied without incident. The Fifth Circuit found that the subsequent search conducted by the officers was incident to a lawful stop and frisk authorized by La. C.Cr.P. art. 215.1 and that the defendant was not "arrested" until after the officers found a gun. The court reached this conclusion even though one of the suspects testified that one of the officers approached "with bar lights flashing and ordered everyone out of the car." The witness testified that the deputy approached the car with his gun drawn and another police unit arrived on the scene. The court stated, "the trial court obviously rejected Finley's [the witness's] version of the offense as not credible and accepted as true the version related by the deputy. It is not the function of this Court to evaluate the credibility of witnesses on a cold record and overturn the trial court on its factual

determination." Morgan, 540 So.2d at 616.

In State v. Francise, 597 So.2d 28 (La. App. 1 Cir. 1992), police officers activated the lights and siren on the police vehicle, while immediately behind the suspect's vehicle. The suspect defied the officers' act by accelerating rather than stopping. The officers successfully stopped the defendant's vehicle, drew their weapons, ordered the defendant and another passenger from the vehicle, and had them place their hands on the vehicle. The Louisiana First Circuit held that the officers' actions constituted an arrest. Likewise in State v. Raheem, 464 So.2d 293 (La. 1985), the Supreme Court found that "when the officers stopped the Cadillac, drew their weapons, ordered the defendants out of the car, and had them place their hands on the vehicle, an arrest occurred." In State v. Kinnemann, 337 So.2d 441 (La. 1976), the Court found that defendants were arrested where police officers stopped their vehicle using blue lights and a siren, removed the defendant from the vehicle, and physically restrained the defendants before contraband was found in the vehicle.

In State v. Smith, 99-2129 (La. App. 4 Cir. 4/26/00), 761 So.2d 642, police stopped Smith by boxing in his pickup truck between two police cars. After Smith was stopped, the officer advised him that was conducting an investigation, and that he intended to secure a search warrant for Smith's

residence. Smith was advised of his Miranda rights, and the officer testified that Smith had not been free to go. Police handcuffed Smith, and drove him in a police car to his residence. Smith told the officers where a key was located, and officers entered the residence. They subsequently obtained a search warrant, searched the residence, and seized drugs, cash and guns. This court held that under these circumstances, Smith had been arrested.

However, in State v. Broussard, 2000-3230, (La. 5/24/02), 816 So.2d 1284, the Louisiana Supreme Court stated merely that boxing-in a vehicle did not constitute an arrest. The court discussed the issue of an investigatory stop versus an arrest as follows:

> The definition of arrest in La.C.Cr.P. art. 201 keyed to "an actual restraint of the person" does not provide a bright-line or workable rule for distinguishing arrests from investigatory stops because Louisiana adopted that definition, see 1928 La. Acts 2, § 1, art. 58, well before constitutional and statutory authority existed for detaining persons on less than probable cause to arrest. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); La.C.Cr.P. art. 215.1. The use of actual restraint does not alone transform a street encounter between the police and a citizen into an arrest because an investigatory stop necessarily "involves an element of force or duress, temporary restraint of a person's freedom to walk away." State v. Salazar, 389 So.2d 1295, 1298 (La.1980); see 4 Wayne R. LaFave, Search and Seizure, § 9.2(d), p. 35 (3rd ed. 1996)("A stopping for investigation is not a lesser intrusion, as compared to arrest, because the restriction on movement is incomplete, but rather because it is brief when compared with arrest...."); United States v. Jones, 759 F.2d 633, 637 (8th Cir.1985)("The test is not ... whether a reasonable person would have felt free to leave under the circumstances: That concern marks the line between a fourth amendment seizure of any degree and a

consensual encounter which does not require any minimal objective justification."); see also Terry, 392 U.S. at 21, n. 16, 88 S.Ct. at 1879 ("Obviously, not all personal [encounters] between policemen and citizens involve[ ] 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.").

Like an arrest, an investigatory stop entails a complete restriction of movement, but for a shorter period of time. See United States v. Merritt, 736 F.2d 223, 229 (5th Cir.1984); State v. Bailey, 410 So.2d 1123, 1125 (La.1982). However, brevity alone does not always distinguish investigatory stops from arrests, as the former may be accompanied by arrest- like features, e.g., use of drawn weapons and handcuffs, which may, but do not invariably, render the seizure a de facto arrest. See United States v. Acosta-Colon, 157 F.3d 9, 18-19 (1st Cir.1998) ("There is no question that the use of handcuffs, being one of the most recognizable indicia of a traditional arrest, 'substantially aggravates the intrusiveness' of a putative Terry stop. Thus, when the government seeks to prove that an investigatory detention involving the use of handcuffs did not exceed the limits of a Terry stop, it must be able to point to some specific fact or circumstance that could have supported a reasonable belief that the use of such restraints was necessary to carry out the legitimate purposes of the stop without exposing law enforcement officers, the public, or the suspect himself to an undue risk of harm.") (citations omitted); State v. Raheem, 464 So.2d 293, 296 (La.1985)("[W]hen the officers stopped the Cadillac, drew their weapons, ordered defendants out of the car, and had them place their hands on the vehicle, an arrest occurred."); see also Florida v. Royer, 460 U.S. 491, 499, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229 (1983)("In the name of investigating a person who is no more than suspected of criminal activity, the police may not ... seek to verify their suspicions by means that approach the conditions of arrest."); cf. United States v. Hensley, 469 U.S. 221, 235, 105 S.Ct. 675, 684, 83 L.Ed.2d 604 (1985)(following stop of defendant's vehicle, police officer's approach with service revolver drawn and pointed upwards fell "well within the permissible range [of restraint allowed in an investigatory stop] in the context of

suspects who are reported to be armed and dangerous.").

In State v. Zielman, 384 So.2d 359, 362 (La.1980), this Court held that the police not only seized the defendants but also arrested them without probable cause when the officers pulled into a service station with their lights flashing, boxed in the defendants' van with patrol units front and back, and illuminated the vehicle with a powerful spotlight. We thereby rejected the dissenting view that the officers had made only an investigatory stop of the vehicle on the basis of reasonable suspicion. Zielman, 384 So.2d at 365 (Marcus, J., dissenting). Whatever the merits of the analysis in Zielman under the particular facts of that case, we subscribe to the view that "an otherwise valid stop is not inevitably rendered unreasonable merely because the suspect's car was boxed in by police cars in order to prevent it from being moved, though sometimes the magnitude of such police activity will compel the conclusion [that] an arrest had occurred." 4 LaFave, Search and Seizure, § 9.2(d), pp. 36-37 (footnotes omitted); see, e.g., United States v. Tuley, 161 F.3d 513, 515 (8th Cir.1998)("Blocking a vehicle so its occupant is unable to leave during the course of an investigatory stop is reasonable to maintain the status quo while completing the purpose of the stop."); United States v. Edwards, 53 F.3d 616, 619 (3rd Cir.1995) ("The vast majority of courts have held that police actions in blocking a suspect's vehicle and approaching with weapons ready, and even drawn, does not constitute an arrest per se."); Jones, 759 F.2d at 638 ("Blocking generally will be reasonable when the suspect is in a vehicle because of the chance that the suspect may flee upon the approach of police with resulting danger to the public as well as to the officers involved.").

In the present case, while the police action of boxing in the Jeep subjected respondent to actual restraint imposed by the officers, the encounter lacked other arrest-like aspects which might lead a reviewing court to conclude that a de facto arrest had taken place. The officers did not draw their service revolvers, did not handcuff respondent or confine him in a patrol unit, or force him to "prone out" on the ground before discovering the cocaine packet in his pants pocket. See State v. Tucker, 626 So.2d 707 (La.1993). Moreover, the blocking action reasonably anticipated respondent's reaction to a stop.

> When the lead vehicle driven by Officer Bardy cut him off, respondent put the Jeep into reverse and attempted to elude the police, creating a danger to the officers involved in the stop and to the general public in an area described by Bardy as "very highly populated ... with a lot of kids...." While the officers then ordered respondent from the Jeep, and helped him from the vehicle because he was still suffering the effects of a prior gunshot wound, the police may order the driver out of a vehicle even in the course of a routine traffic stop without subjecting the individual to a de facto arrest. Pennsylvania v. Mimms, 434 U.S. 106, 111-12, 98 S.Ct. 330, 333-34, 54 L.Ed.2d 331 (1977). We therefore conclude that the officers' conduct in this case did not exceed the permissible scope of an investigatory stop.
>
> State v. Broussard, pp. 2-6, 816 So. 2d at 1286-88.

We do not find that the trial court in the instant case was manifestly in error in its finding that the defendant Lewis was arrested at the time he was handcuffed. Initially, he had merely been asked to exit the car and stand at the back in a posture where his hands could be viewed, a reasonable safety precaution by the two officers who were handling the traffic stop. However, the intent to effect an extended restraint on the defendant's liberty became manifest when the additional two officers who arrived on the scene elected to handcuff Lewis after the driver of the car was found in possession of contraband. Clearly Lewis was not free to leave. Furthermore, Officer Duplantier testified that, when he handcuffed Lewis, he informed him that he was being investigated for narcotics; the officer stated at least once during his testimony that he had at that point arrested Lewis. Nothing in the

actions of the police indicates that they intended only a brief minimal restraint of the defendant, and the nature of the contact between the defendant and the officers had clearly escalated despite the fact that Lewis had done nothing to indicate that he personally was engaged in criminal activity, i.e. he did not attempt to flee or struggle with the officers physically.

The State does not contend that there was probable cause for the arrest of Lewis at the time he was handcuffed. They aver only that he was disturbing the investigation by denying any culpability for the drugs, which had been found on the person of the driver. However, there was nothing in the testimony to indicate that Lewis attempted to **interfere** in the investigation of the driver and the search of the vehicle; at most he was denying any involvement in his companion's activities. Based on the testimony, we do not find that the police believed that the defendant was actually interfering with the investigation that was being conducted.

For these reasons, we grant the writ and find that there was no manifest error in the trial court's decision.

WRIT GRANTED; JUDGMENT OF THE TRIAL COURT AFFIRMED