NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2003-KA-0988**
VERSUS	*	**COURT OF APPEAL**
GARY T. PILOT	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 418-420, SECTION "H"
Honorable Camille Buras, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *
(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris, Sr., and Judge Edwin A. Lombard)

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CONVICTION AFFRIMED AND SENTENCE VACATED

REMANDED FOR RESENTENCING

STATEMENT OF CASE

On December 5, 2000, defendant Gary Pilot was charged by bill of information with one count of possession of heroin in violation of La. R.S. 40:966(C)(1). Defendant pleaded not guilty at his December 7, 2000, arraignment. On February 1, 2001, the trial court denied the defendant's motion to suppress the evidence finding probable cause and set the matter for trial. On December 3, 2002, a twelve-person jury found the defendant guilty as charged. On January 17, 2002, the state filed a multiple bill. On October 25, 2002, the defendant was sentenced to ten years with benefits in the Department of Corrections. On February 28, 2003, the defendant pled guilty to the multiple bill. On that same date, the trial court vacated its previous sentence and re-sentenced the defendant to ten years in the DOC as a second offender. The trial court also granted the defendant's oral motion for appeal.

STATEMENT OF FACT

Officer James Neyrey, of the New Orleans Police Department,

testified that on November 9, 2000, he pulled over the vehicle the defendant was driving because the inspection sticker was expired and the defendant was not wearing a seatbelt. Officer Neyrey approached the vehicle on the driver's side and informed the defendant of the reason for the stop. The officer asked the defendant for his driver's license. The defendant informed the officer that he did not have a driver's license, and that he never had a driver's license. Officer Neyrey ordered the defendant out of the vehicle because he was under arrest for driving without a license. As Officer Neyrey ordered the defendant out of the vehicle, his partner, Officer David Abbott, approached the vehicle. Officer Neyrey testified that the defendant hesitated getting out of the vehicle and put his hand in his jacket pocket. Both officers ordered the defendant to remove his hand from his pocket, fearing the defendant was reaching for a weapon. As the defendant exited the vehicle, the officers observed the defendant throw something on the front passenger floorboard. Officer Neyrey handcuffed the defendant. Officer Abbott retrieved the object from the floor of the vehicle and informed Officer Neyrey that it was a clear plastic bag containing several foil packets he believed to contain cocaine. Officer Abbott questioned the two passengers in the vehicle, and both stated the bag did not belong to either of them.

Officer David Abbott gave corroborating testimony. The parties stipulated that if Harry O'Neal, of the New Orleans Police Department Crime Lab, were available to testify he would state he analyzed the contents of the foil packets and they tested positive for heroin.

Dorothy Blanchard, the backseat passenger at the time of the stop and owner of the vehicle, testified that at the time of the stop the defendant was her granddaughter's boyfriend. Ms. Blanchard further testified that her granddaughter was also a passenger in the vehicle at the time of the stop. Ms. Blanchard testified that she did not see the defendant toss anything on the floor of the vehicle.

DISCUSSION

ERRORS PATENT/ASSIGNMENT OF ERROR NUMBER 1/PILOT'S PRO SE ASSIGNMENT OF ERROR NUMBER 3

A review of the record revealed that the trial court ruled on the defendant's pro se motion for new trial after he was re-sentenced at the multiple bill hearing.

La. C.Cr.P. art. 853 provides in part:

> A motion for a new trial must be filed and disposed of before sentence.

La. C.Cr.P. art. 873 provides:

> If a defendant is convicted of a felony, at least three days shall elapse between conviction and

> sentence. If a motion for a new trial, or in arrest of judgment, is filed, sentence shall not be imposed until at least twenty-four hours after the motion is overruled. If the defendant expressly waives a delay provided for in this article or pleads guilty, sentence may be imposed immediately.

This court in State v. Allen, 00-0013, p.6 (La. App. 4 Cir. 1/10/01), 777 So.2d 1252, 1256 addressing the sentencing of a defendant prior to the ruling on the defendant's motions found:

> A review of the record reveals that the trial court ruled on the defendant's motions for new trial and post verdict judgment of acquittal after sentencing the defendant. Defendant's sentences must be vacated and the case remanded for resentencing because the sentences were imposed before the motions were disposed of in violation of La. C.Cr.P. arts. 821, 853 and 873. (Citations omitted).

The defendant was found guilty as charged on December 3, 2001. On January 11, 2002, the docket master and minute entry indicate the defendant filed a pro se motion, but they do not indicate what kind of motion. The defendant was initially sentenced to ten years in the DOC on October 25, 2002. On January 15, 2003, this court granted the defendant's writ directing the trial court to rule on the defendant's pro se motion for new trial. The motion was set for hearing and continued several times. On February 28, 2003, the defendant pled guilty to the multiple bill and was re-sentenced to

ten years in the DOC. On March 26, 2003, the trial court denied the defendant's motions for new trial, to quash, and arrest of judgment.

Based on this court's findings in Allen, we vacate the defendant's sentence and remand the case for re-sentencing.

PILOT'S PRO SE ASSIGNMENT OF ERROR NUMBER 1

The defendant complains the arresting officers lacked probable cause to search the vehicle he was driving.

> La. C.Cr.P. art. 215.1 provides in part:
>
> A. 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 demand of him his name, address, and an explanation of his actions.

This court in State v. Anderson, 96-0810, p.2 (La. App. 4 Cir. 5/21/97), 696 So.2d 105, 106, noted:

> A police officer has the right to stop a person and investigate conduct when he has a reasonable suspicion that the person is, has been, or is about to be engaged in criminal conduct. Reasonable suspicion for an investigatory stop is something less than probable cause; and, it must be determined under the facts of each case whether the officer had sufficient articulable knowledge of particular facts and circumstances to justify an infringement upon an individual's right to be free from governmental interference. The totality of the circumstances must be considered in determining whether reasonable suspicion exists.

> An investigative stop must be justified by some objective manifestation that the person stopped is or is about to be engaged in criminal activity or else there must be reasonable grounds to believe that the person is wanted for past criminal conduct. (Citations omitted)

In reviewing the totality of the circumstances, the officer's past experience, training and common sense may be considered in determining if his inferences from the facts at hand were reasonable. State v. Short, 96-1069 p.4 (La. App. 4 Cir. 5/7/97), 694 So.2d 549, 552.

When a law enforcement officer has probable cause to believe that a person has committed a crime, he may place that person under arrest. Incident to such lawful arrest, the officer may lawfully conduct a full search of the arrestee and the area within his immediate control for weapons and for evidence of a crime. State v. Morgan, 445 So.2d 50, 51 (La. App. 4th Cir. 1984).

Though law enforcement officers are given the discretion to stop a person and investigate suspicious activity, it is juxtaposed against an individual's rights under the Fourth Amendment of the United States Constitution and the Louisiana Constitution Art.1, Section 5, which provides in part:

> Every person shall be secure in his person, property, communications, houses papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue

> without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose for the search.

In Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89, (1996), the United States Supreme Court found, "as a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." The Court in Whren also found that the constitutional reasonableness of a traffic stop does not depend on the actual motivations of the individual officers involved.

In State v. Lopez, 2000-0562 (La. 10/30/00), 772 So.2d 90, the Louisiana Supreme Court found once an officer stops a vehicle for a traffic violation the officer is not precluded from conducting a routine driver's license and vehicle registration check.

In the instant case, the officers may have lacked the probable cause necessary to retrieve the contraband without a warrant. The vehicle the defendant was driving was stopped for having an expired inspection sticker, and the defendant was not wearing a seatbelt. Officer Neyrey then had probable cause to believe a traffic violation had been committed. Officer Neyrey approached the vehicle and asked the defendant for his driver's license. The defendant responded by telling the officer he did not have a

license and had never possessed one. Officer Neyrey then had probable cause to arrest the defendant for driving without a driver's license. Prior to exiting the vehicle after being told he was under arrest, the defendant was seen tossing an object from his pocket onto the floor of the vehicle. The defendant then exited the vehicle, was taken into custody, and handcuffed.

It is well settled that a search conducted without a warrant issued upon probable cause is per se unreasonable under the fourth amendment, subject to a few specifically established and well delineated exceptions. State v. Spencer, 374 So.2d 1195 (La. 1979). The automobile exception was established due to the mobility of automobiles. Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). The exception was then extended to packages located within the vehicle. United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). To apply this exception the officers had to have probable cause to believe drugs were in the vehicle. Neither Officer Neyrey nor Officer Abbott testified that they suspected the item thrown from the defendant's pocket to be drugs prior to Officer Abbott retrieving the item from the vehicle. Therefore, it appears the automobile exception does not apply. Additionally, the above reasoning does not allow the plain view exception to the fourth amendment warrant requirement to apply because, again the officers could not determine prior to retrieving the

item from the vehicle that it was an illegal substance.

When a law enforcement officer has probable cause to believe that a person has committed a crime, he may place that person under arrest. Incident to such lawful arrest, the officer may lawfully conduct a full search of the arrestee and the area within his immediate control for weapons and for evidence of a crime. State v. Morgan, 445 So.2d 50 (La. App. 4 Cir. 1984).

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. Brown, 99-0640 (La. App. 4 Cir. 5/26/99), 733 So. 2d 1282; State v. Blue, 97-2699 (La. App. 4 Cir. 1/7/98), 705 So. 2d 1242; State v. Tate, 623 So. 2d 908 (La. App. 4 Cir. 1993).

In the instant matter, the officers had probable cause to arrest the

defendant for driving without a license. The seizure of the object from the vehicle driven by the defendant may have been covered by a search incident to arrest. State v. Hill, 99-1021 (La. App. 4 Cir. 9/8/99), 743 So.2d 773. See also State v. Alaimo, 95-1044 (La.App. 4 Cir. 6/29/95), 657 So.2d 1102, 1104, citing New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) and State v. Mitchell, 97-2774, 98-1128, 98-1129 (La.App. 4 Cir. 2/3/99), 731 So.2d 319. In addition, the officers had probable cause to believe the vehicle driven by the defendant-contained contraband when the defendant discarded the object as he exited the vehicle, thereby allowing the officers to search the vehicle without a warrant. Maryland v. Dyson, 527 U.S. 465, 119 S.Ct. 2013 (1999); United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157 (1982); State v. Tatum, 466 So. 2d 29 (La. 1985); State v. Toca, 99-1871 (La. App. 4 Cir. 9/6/00), 769 So. 2d 665; State v. Scull, 93-2360 (La. App. 4 Cir. 6/30/94), 639 So. 2d 1239. In State v. Pham, 2001-2199 (La. App. 4 Cir. 1/22/03), 839 So.2d 214, 221, this court found that probable cause to arrest was sufficient to support a lawful search of a box found in the defendant's pocket. Therefore, this assignment is without merit.

PILOT'S PRO SE ASSIGNMENT OF ERROR NUMBER 2

The defendant complains his procedural and substantive due process rights were violated under the chain of custody doctrine. Specifically, the

defendant argues he was booked for possession of cocaine, but the bill of information charged him with possession of twenty grams of heroin. The defendant further argues the substance was tampered with.

Officer David Abbott testified that he placed the twelve foil packets retrieved from the vehicle into a sealed evidence bag and deposited it into the police department's central evidence. Both the state and defense stipulated, without objection, that substance in the foil packets had tested positive as heroin. Additionally, the defendant's rights were not violated because the officer, in the field with no way to determine the exact nature of the substance, took an educated guess, based on his own knowledge and experience, and determined the substance to be cocaine. If the substance was determined to be cocaine or heroin the defendant was still in possession of an illegal controlled and dangerous substance and arrested for it. This assignment of error is without merit.

CONCLUSION

Accordingly, the defendant's conviction is affirmed, his sentence vacated and the case remanded to the trial court for resentencing.

CONVICTION AFFRIMED AND SENTENCE VACATED

REMANDED FOR RESENTENCING