NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2007-KA-0401**
VERSUS	*	**COURT OF APPEAL**
JACQUES GABLE	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 462-234, SECTION "I"
Honorable Raymond C. Bigelow, Judge
* * * * * *
Judge David S. Gorbaty
* * * * * *

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge David S. Gorbaty)

Eddie J. Jordan, Jr.
District Attorney
Alyson Graugnard
Assistant District Attorney
1340 Poydras Street
Suite 700
New Orleans, LA 70112-1221
COUNSEL FOR PLAINTIFF/APPELLEE

Christopher A. Aberle
LOUISIANA APPELLATE PROJECT
P.O. Box 8583
Mandeville, LA 70470-8583
COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

On August 11, 2005, the State charged Jacques Gable with one count each of simple possession of heroin and simple possession of cocaine. At his arraignment on August 23 he pled not guilty. The court set a motion hearing for September 12, 2005. After the storm, the matter was reset a few times, and on March 3, 2006, the court heard and denied the motion to suppress the evidence. On June 13 Gable filed a motion to reconsider the motion to suppress the evidence. The court took further testimony on September 8 and once again denied the motion to suppress the evidence. On November 29, 2006, a twelve-person jury found him guilty as charged on both counts. Although the State indicated it would file a multiple bill against Gable, it failed to do so. On January 26, 2007, the court sentenced Gable on the heroin count to serve eight years at hard labor and on the cocaine count to serve five years at hard labor, the sentences to run concurrently. Gable filed a motion for appeal, which the court granted.

FACTS:

At approximately 8:30 p.m. on June 16, 2005, Deputy Dan Hirsch and Sgt. King Tao of the Orleans Parish Criminal Sheriff's Office had just concluded a traffic stop at the corner of Canal and Rampart Streets when they saw a truck sitting at a red light on the corner. The deputies noticed that the truck's lights were not on, even though it was getting dark. The truck passed the deputies, and they

activated their lights and followed the truck across Canal. The truck tried to pull over so that the deputies' car could go around it, but the deputies pulled behind the truck. The truck eventually stopped in the left lane near Common Street, and the deputies pulled behind it and via a public address system ordered the driver to pull over to the right curb. The driver complied and parked the truck. The deputies ordered the driver to exit his truck with his driver's license, his proof of insurance, and the truck's registration. The driver, Jacques Gable, exited the car and walked back to the area behind his truck and in front of the police car.

At trial, Dep. Hirsch testified that he noticed Gable's eyes were bloodshot, he was sweating, and he appeared to be very nervous. Given the bloodshot eyes and Gable's weaving actions before he stopped the truck, Dep. Hirsch conducted field sobriety tests on Gable, while Sgt. Tao called in to check Gable's paperwork. Dep. Hirsch testified that Gable passed the tests, but he had Sgt. Tao watch Gable while he walked to Gable's truck to check the brake tag and see if he could see any open containers inside the truck. Dep. Hirsch testified that he shined his flashlight inside the truck and did not see any open containers, but he did see what appeared to be rice inside the car. He insisted that he did not shine the flashlight on the truck's floorboards. He stated he issued Gable a citation for driving without headlights. Dep. Hirsch stated that he did not see Gable discard anything during the time he was watching him.

Sgt. King Tao's testimony basically tracked that of Dep. Hirsch with respect to the actual stop of the truck. In addition, Sgt. Tao testified that during the field sobriety test, Gable was standing against the front bumper of the police car. He stated that when Dep. Hirsch finished the field sobriety tests on Gable, he watched Gable while Dep. Hirsch walked to Gable's truck to look for any open containers.

In addition, the deputies were still awaiting the results of the computer search of Gable's name. Sgt. Tao testified that while Dep. Hirsch was looking inside the truck, another police car drove up to see if the deputies needed assistance. Sgt. Tao testified that he turned away from Gable during this conversation, and when he turned back he noticed Gable seemed even more nervous than he was before, was sweating more, and had glassy eyes. Sgt. Tao testified that he became uneasy, and he handcuffed Gable and placed him in the back of the police car to await the information from the computer.

Sgt. Tao testified that he walked back to the front of the police car, looked down, and saw something shiny under the car's front bumper, behind where Gable had been standing. He looked closer and saw a clear plastic bag lying on top of a $20 bill. Sgt. Tao testified that he picked up the bag and saw it contained rice. He opened the bag and found mixed with the rice twenty foil packets as well as two smaller bags containing white powder. Believing that the bag contained heroin and cocaine, he then went to the truck and looked inside. He saw more rice as well as four more foil packets on the driver's side floorboard. He seized the foil packets from the floorboard and placed them with the other drugs in the bag he retrieved from under the police car's bumper.

On cross-examination, Sgt. Tao admitted that he did not see Gable throw down anything while he was watching him. He did not remember the names of the other officers who stopped to talk with him while Dep. Hirsch looked inside the truck, and he admitted he did not mention these officers when he testified at a pretrial hearing. He testified that Gable stood in front of the police car for a short period of time, but he estimated this time at five to ten minutes. He testified that

he searched Gable after finding the drugs, but he did not find any other drugs or weapons.

The parties stipulated that Corey Hall, a criminalist for the N.O.P.D., was an expert in chemistry and analysis of narcotics. Mr. Hill testified that he tested four of the foil packets contained in the plastic bag, and all four tested positive for heroin. He also tested both of the small bags of white powder contained in the bag, and both tested positive for cocaine. He did not test the rice in the bag.

ERRORS PATENT:

A review of the record reveals no patent errors.

DISCUSSION:

By his sole assignment of error, the appellant contends that the trial court erred by denying his motion to suppress the evidence. He argues that the deputies had no reason to detain him after they determined he was not intoxicated. Thus, he contends, the seizure of both the bag under the police car and the foil packets inside his truck was the product of an illegal detention, and these items should have been suppressed.

The officers' testimony at the suppression hearings was almost identical to that they gave at trial. In addition, at the first suppression hearing, Sgt. Tao testified that the appellant was standing in front of the police car after he had been handcuffed, and that he took his eyes off the appellant for a few minutes. He did not mention, however, the arrival of the other police unit. At the second suppression hearing, Dep. Hirsch additionally testified that when Sgt. Tao searched the appellant incident to his arrest, he found some $20 bills in the appellant's pocket, and the appellant indicated that he had just gotten paid. Dep. Hirsch

testified that the appellant's mother and sister retrieved the truck from the scene after the appellant's arrest.

The bag containing the cocaine and the heroin was seized from the ground underneath the police car's bumper, behind where the appellant had been standing during the field sobriety tests and before he was placed in the back of the police car. The State argued at the suppression hearings that the bag was lawfully seized because the appellant had abandoned it. Officers cannot legally seize property abandoned by a defendant if the abandonment occurred pursuant to an infringement on the defendant's property rights. However:

> if . . . property is abandoned without any prior unlawful intrusion into a citizen's right to be free from government interference, then such property may be lawfully seized. In such cases, there is no expectation of privacy and thus no violation of a person's custodial rights.

State v. Belton, 441 So. 2d 1195, 1199 (La. 1983). See also State v. Britton, 93-1990 (La. 1/27/94), 633 So.2d 1208; State v. Tucker, 626 So. 2d 707 (La. 1993), opinion reaffirmed and reinstated on rehearing by 626 So. 2d 720 (La. 1993); State v. Sykes, 2004-1199 (La. App. 4 Cir. 3/9/05), 900 So. 2d 156; State v. Handy, 2002-1025 (La. App. 4 Cir. 9/25/02), 828 So. 2d 1207. In Britton, the Court noted that "the police do not need probable cause to arrest or reasonable suspicion for an investigatory stop every time they approach a citizen in a public place." Britton, 93-1990 at p.2, 633 So. 2d at 1209.

In Handy, this court discussed a stop for purposes of determining whether abandoned property may be lawfully seized:

> An "actual stop" occurs when an individual submits to a police show of authority or is physically contacted by the police. Tucker. An "imminent actual stop" occurs when the police come upon an individual with such force that, regardless of the individual's

> attempts to flee or elude the encounter, an actual stop of the individual is virtually certain. Id. The Supreme Court listed the following factors to be considered in assessing the extent of police force employed in determining whether that force was "virtually certain" to result in an "actual stop" of the individual: (1) the proximity of the police in relation to the defendant at the outset of the encounter; (2) whether the individual has been surrounded by the police; (3) whether the police approached the individual with their weapons drawn; (4) whether the police and/or the individual are on foot or in motorized vehicles during the encounter; (5) the location and characteristics of the area where the encounter takes place; and (6) the number of police officers involved in the encounter. Id. An actual stop is imminent "when the police come upon an individual with such force that, regardless of the individual's attempts to flee or elude the encounter, an actual stop of the individual is *virtually certain*." Tucker, 626 So.2d at 712.

Handy, at pp. 4-5, 828 So. 2d at 1210.

Here, there is no doubt that a stop occurred. The deputies had probable cause to stop the appellant for the traffic violation of driving without his headlights on. The appellant argues that it was unreasonable for the deputies to expect him to have his lights on because it was not yet dark. He cites to various sources to show that it was at best twilight at the time of the traffic stop (approximately 8:30 p.m. on June 16). However, none of this information was introduced either at the suppression hearings or at trial. As this court is a court of record, it cannot consider this new information. In any event, none of the parties at either of the suppression hearings or at trial disputed that it was dark enough at the time of the stop to require the use of headlights. Thus, the State showed that the initial stop was lawful.

When the appellant exited his truck and walked back toward the deputies with his paperwork, he appeared nervous, was sweating, and had bloodshot eyes. The deputies thought he might be intoxicated, and one of them administered field

sobriety tests while the other one ran the appellant's name in the computer. Given the appellant's demeanor and his weaving back and forth across lanes before he stopped his truck, it does not appear that the deputies' decision to administer the field sobriety tests was unreasonable. See State v. Thompson, 2002-0333, p. 5 (La. 4/9/03), 842 So. 2d 330, 335, where the Court defined reasonable suspicion to detain a defendant as "something less than probable cause and must be determined under the specific facts of each case by whether the officer had sufficient knowledge of particular facts and circumstances to justify the infringement on individual's right to be free from governmental interference."

The appellant abandoned the bag containing the drugs while he was standing in front of the police car. He now argues that his abandonment of the bag was the product of an illegal detention in that once the deputies determined he was not intoxicated and saw no open containers in his truck, they should have released him rather than handcuffing him and placing him in the back of their car. The appellant points to Sgt. Tao's testimony that he and the appellant were standing in front of the police car for five to ten minutes before the bag of drugs was found. However, this time frame included the time period starting when the deputies pulled over the appellant and ending when Sgt. Tao handcuffed the appellant and placed him in the back of the police car. This time frame would have included the time spent administering the field sobriety tests. Sgt. Tao also testified that while he and the appellant were standing in front of the police car he was still waiting for the results of the computer check of the appellant's name. It was during this time that the other police unit briefly stopped to talk to Sgt. Tao, and his attention was diverted from the appellant. Therefore, contrary to the appellant's argument, it does not appear that the deputies kept the appellant in front of the police car for ten minutes

after they established that he was not intoxicated. Rather the five-to-ten minute estimation included the stop, the field sobriety tests, and the wait for the computer search results. As such, it appears that the deputies did not unduly extend the duration of the traffic stop, thereby unlawfully holding the appellant until he abandoned the bag of drugs. The deputies validly stopped the appellant for his traffic violation, and during this stop he abandoned the bag of drugs.

The appellant also argues that the fact that the deputy handcuffed him enhanced his detention into an arrest. In this portion of his argument, he cites several cases, but none of them discussed the effect of handcuffing during a detention.[1] In State v. Adams, 2001-3231 (La. 1/14/03), 836 So. 2d 9, the officers detained the female defendant and handcuffed her while they waited fifteen minutes for the arrival of a female officer to frisk her. The Court found that the mere act of handcuffing did not elevate the stop into an arrest or exceed the scope of a Terry detention because the handcuffing was utilized "to maintain the status quo during a detention" and that the handcuffing was a "reasonable response to the situation." Adams, at p. 4, 836 So. 2d at 12.

In State v. Porche, 2006-0312 (La. 11/29/06), 943 So. 2d 335, the defendant

[1] In State v. Walker, 2006-1045 (La. 4/11/07), 953 So. 2d 786, the issue was the defendant's standing to assert a third party's privacy rights; State v. Salazar, 389 So. 2d 1295 (La. 1980),concerned reasonable suspicion to detain the defendant at both the Miami and New Orleans airports; State v. Chopin, 372 So. 2d 1222 (La, 1979), addressed reasonable suspicion to detain a defendant who abandoned contraband; in State v. Parker, 97-1994 (La. App. 4 Cir. 12/9/98), 723 So. 2d 1066, this court addressed the issue of reasonable suspicion to detain a defendant who was sitting on a porch; and in U.S. v. Portillo-Aguirre, 311 F.3d 647, 656, fn. 49 (5th Cir. 2002), the court noted that highway checkpoints are considered a seizure.

knocked on the door of an apartment that the police were searching. The officers knew that the resident of the apartment had called the defendant. The defendant admitted that the resident had called him, but he indicated that he was not sure that he was at the right apartment. The defendant was also visibly nervous. When the defendant admitted he had no identification on him but had some at his nearby apartment, the officers handcuffed him and escorted him to his apartment. One of the officers used the defendant's key to open his door, and the officer immediately smelled the odor of chemicals associated with cocaine and saw stacks of money. The officers arrested the defendant, but he would not consent to a search of his apartment. The officers then obtained a search warrant and pursuant to the warrant seized a large amount of cocaine. The trial court suppressed the cocaine, and the appellate court upheld the trial court's ruling. The Supreme Court reversed. The Court discussed the use of handcuffs and its effects on an investigatory stop:

> Inherent in the right of the police to conduct a brief investigatory detention is also the right to use reasonable force to effectuate the detention. *Mena,* 544 U.S. at 99, 125 S.Ct. at 1470 (" 'Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.' ")(quoting *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 1871-72, 104 L.Ed.2d 443 (1989)); *United States v. Perdue*, 8 F.3d 1455, 1462 (10th Cir.1993)("Since police officers should not be required to take unnecessary risks in performing their duties, they are 'authorized to take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of [a *Terry*] stop.' ")(quoting *United States v. Hensley*, 469 U.S. 221, 235, 105 S.Ct. 675, 683-84, 83 L.Ed.2d 604 (1985)).
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> Nevertheless, the use of handcuffs incrementally increases the degree of force used in detaining an individual. *Mena*, 544 U.S. at 99, 125 S.Ct. at 1470 ("The imposition of correctly applied handcuffs on Mena, who was already being lawfully detained during a search of

> the house, was undoubtedly a separate intrusion in addition to detention in the converted garage."); *State v. Broussard,* 00-3230, p. 4 (La.5/24/02), 816 So.2d 1284, 1287 (" '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.' ")(quoting *United States v. Acosta-Colon,* 157 F.3d 9, 18 (1st Cir.1998)(internal quotation marks omitted)). Thus, because the police conducting an investigatory stop "may not ... seek to verify their suspicions by means that approach the conditions of arrest," *Florida v. Royer,* 460 U.S. 491, 499, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229 (1983), the use of handcuffs must appear objectively reasonable "in light of the facts and circumstances confronting [the police]," taking into account "the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation." *Graham,* 490 U.S. at 397, 109 S.Ct. at 1872; *Broussard,* 00-3230 at 4, 816 So.2d at 1287 (" '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 purpose of the stop without exposing law enforcement officers, the public, or the suspect himself to an undue risk of harm.' ")(quoting *Acosta-Colon,* 157 F.3d at 18-19). If the added intrusion is not warranted under particular circumstances, a *Terry* stop may escalate into a *de facto* arrest requiring probable cause to render it valid. *United States v. Melendez-Garcia,* 28 F.3d 1046, 1053 (10th Cir.1994)("Because the specific nature of this stop [in which defendant was handcuffed and strapped into a police cruiser] was not justified under the *Terry* doctrine, we must treat it as an arrest, requiring probable cause."); *Broussard,* 00-3230, pp. 3-4, 816 So.2d at 1287 ("[B]revity 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.")(citing *Acosta-Colon,* 157 F.3d at 18-19) (emphasis added).

Porche, at pp. 7-9, 943 So. 2d at 339-340. The Court then determined that under the circumstances, including "the brevity of respondent's detention in handcuffs

before he was lawfully arrested, and the changing nature of the police investigation which had begun to focus on a possible link of respondent and Young to narcotics trafficking, and giving due deference to the decisions made in the field by police officers under the press of 'tense, uncertain, and rapidly evolving' circumstances, *Graham*, 490 U.S. at 397, 109 S.Ct. at 1872," Id., at pp. 10-11, 943 So. 2d at 341, handcuffing and escorting the defendant to his apartment to get his identification did not escalate the detention to an arrest.

Here, Sgt. Tao testified that he decided to handcuff the appellant when he looked back at the appellant after conversing with the other officers and noticed that the appellant looked even more nervous, was sweating even harder, and had glassy eyes. Given the Court's rulings in Adams and Porche, it appears Sgt. Tao's decision to handcuff the appellant did not escalate the detention to an arrest under the circumstances of this case. Sgt. Tao also put the appellant in the back of the police car. However, because the bag with the drugs was found under the front bumper of the police car, the defendant necessarily abandoned the bag *before* the officer put him in the car. Thus, the validity of Sgt. Tao's actions in putting the appellant in the car is irrelevant to the legality of the seizure of the bag because he would have abandoned the bag before being put into the car. Thus, the trial court properly denied the motion to suppress the bag and its contents.

The deputies also seized four foil packets from the floorboard of the appellant's truck. Sgt. Tao testified that after he seized the bag of drugs from under his car's bumper, he walked to the appellant's truck, shined his flashlight into the truck, and noticed the packets on the truck's floorboard. He then seized the packets. This evidence was lawfully seized under either of two exceptions to the warrant requirement, the plain view exception or automobile exception. In

order for the plain view exception to apply, Sgt. Tao had to have prior justification to be in a position to see the contraband, and it had to be apparent to him that the object was contraband. See State v. Brown, 2003-2155 (La. App. 4 Cir. 4/14/04), 895 So. 2d 542; State v. Jones, 2002-1171 (La. App. 4 Cir. 6/26/02), 822 So. 2d 205. Here, the deputies lawfully stopped the appellant pursuant to the traffic violation, and the deputies were justified in glancing into the interior of the truck, as would anyone walking by the truck. As noted in State v. Gervais, 546 So. 2d 215, 219 (La. App. 4 Cir. 1989): "Whatever is discovered by shining a flashlight into a vehicle at night is considered to be in plain view." There was some argument about the fact that Dep. Hirsch did not see the foil packets when he looked in the truck, but he explained that he was mainly looking for open containers and did not look on the floorboard. Thus, the deputies could lawfully seize the foil packets in the truck pursuant to the plain view exception.

In addition, the deputies could lawfully search the truck without a warrant after the found the drugs the appellant had abandoned because they had probable cause to believe the truck might contain more drugs. In State v. Anderson, 2006-1031, p. 5 (La. App. 4 Cir. 1/17/07), 949 So. 2d 544, 547-548, this court discussed the automobile-exigent circumstances exception to the warrant requirement:

> Although a warrant is generally required prior to conducting a search, *California v. Carney*, 471 U.S. 386 (1985), the "automobile exception" to this requirement is well-established. *Carroll v. United States*, 267 U.S. 132 (1925). Pursuant to the "automobile exception", there is no separate exigency requirement if there is probable cause to search a vehicle. *U.S. v. Ross*, 456 U.S. 798, 809 (1982); *see Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) ("If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more."); *see also State v. Thompson*, 2002-0333 (La. 4/9/03), 842 So. 2d 330 (if a vehicle is readily

> mobile, there is no difference between seizing the car while obtaining a search warrant and immediately searching the vehicle without a warrant). Thus, if there is probable cause to search and the vehicle is readily mobile, even if stationary at the time the search proceeded, any evidence will be considered constitutionally seized.

See also Maryland v. Dyson, 527 U.S. 465, 119 S.Ct. 2013 (1999); State v. Adams, 2004-2177 (La. App. 4 Cir. 6/29/05), 909 So. 2d 5[2].

CONCLUSION:

In the present case, the deputies had just seized a bag containing heroin and cocaine that the appellant abandoned under the car's bumper during the traffic stop. As such, they had probable cause to believe there might be more drugs inside the appellant's truck. Thus, they could lawfully search the truck and seize any contraband inside. Therefore, under either the plain view or the automobile-exigent circumstances exception to the warrant requirement, the deputies legally seized the packets from the appellant's truck. Thus, the trial court properly denied the motion to suppress this evidence as well. Accordingly, the appellant's convictions and sentences are affirmed.

AFFIRMED

[2] Writ denied 2005-1999 (La. 2/17/06), 924 So. 2d 1013.