

NOT DESIGNATED FOR PUBLICATION

**STATE OF LOUISIANA** \* **NO. 2010-KA-1185**  
**VERSUS** \*  
**ELLIS R. MARTIN** \* **COURT OF APPEAL**  
\* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**  
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APPEAL FROM  
CRIMINAL DISTRICT COURT ORLEANS PARISH  
NO. 491-071, SECTION "G"  
Honorable Julian A. Parker, Judge

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**Judge Daniel L. Dysart**

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(Court composed of Chief Judge Joan Bernard Armstrong, Judge Michael E. Kirby, Judge Daniel L. Dysart)

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**AFFIRMED**

**March 2, 2011**

Ellis Martin pleaded guilty to possession of marijuana with intent to distribute, subject to his appeal pursuant to *State v. Crosby*, 338 So.2d 584 (La. 1976). For the following reasons, we affirm his conviction and sentence.

**STATEMENT OF CASE:**

On October 6, 2009, the State charged appellant Martin with one count of possession with intent to distribute marijuana. A hearing on motions was held on January 28, 2010. The district court found probable cause and denied the motions to suppress the evidence and statement. The defense noted its intent to file a writ on the matter; the writ was denied by this Court, noting that Martin had an adequate remedy on appeal.<sup>1</sup> On March 10, 2010, Martin pled guilty as charged under La. Code Crim. Proc. article 893 and *State v. Crosby*, 338 So.2d 584 (La. 1976). He was sentenced to a five-year suspended sentence at hard labor, to run concurrently with any other sentence. Martin was placed on five years of active

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<sup>1</sup> *State v. Martin*, unpub., 2010-0304 (La.App. 4 Cir. 3/9/10). The writ denial also noted that counsel on appeal would have the opportunity to fully develop the argument and would also have the opportunity to orally argue the matter. No oral argument was requested on appeal.

probation and various fines, fees, and conditions were imposed. His motion for appeal was granted on March 22, 2010.

**STATEMENT OF FACT:**

Sgt. Octavia Baldassaro testified at the motions hearing that he had been a NOPD officer for twelve years, and on May 1, 2009 was assigned to the Fourth District (Algiers) task force. At about 9:53 p.m., he was patrolling alone in the 3400 block of Garden Oaks, a high crime area known for narcotics trafficking. He was traveling in a marked unit heading toward General De Gaulle at a slow speed. The sergeant observed a Lincoln town car parked off the side of the road in the grass with no lights on. Sgt. Baldassaro said that as he approached within one hundred feet of the vehicle, he observed the subject, later identified as Ellis Martin, sitting in the vehicle. Sgt. Baldassaro testified that when Martin observed the marked police unit, he immediately ducked down towards the floor board area of the vehicle. The officer was prompted to investigate because of Martin's activity after spotting the police car, along with the fact that the officer did not know whether Martin was trying to steal or burglarize the car. Sgt. Baldassaro pulled his vehicle in front of the Lincoln and illuminated the interior of the vehicle with a spotlight. The sergeant exited his vehicle and approached the Lincoln. Upon doing so, he detected a strong odor of marijuana coming from inside the vehicle. The sergeant said that the driver's side window was partially down. As the sergeant approached, he told Martin to sit up and show his hands. Sgt. Baldassaro testified that upon coming in contact with the driver's side of the vehicle, he observed Martin still bent over towards the floorboard with both hands underneath the driver's seat. For the sake of his safety, the sergeant advised Martin to remove his hands from under the seat and step out of the vehicle, and he complied.

The sergeant explained that because he was alone that night, he handcuffed and placed Martin in the back seat of the police vehicle. Sgt. Baldassaro returned to Martin's vehicle, where he observed a plastic bag partially protruding from underneath the driver's seat. He denied having to manipulate the seat in order to see the plastic bag. According to Sgt. Baldassaro, he used his flashlight to illuminate the interior of that bag; there were sixteen smaller bags containing marijuana inside the plastic bag. The officer placed Martin under arrest and searched him. He found \$934.00 in various denominations in his right front pants pocket. The sergeant then told Martin that he was being arrested for possession with intent to distribute marijuana, and advised him of his *Miranda* rights, which Martin later waived. When he and Martin arrived at lockup, the sergeant asked if Martin had any other drugs on him. Martin answered affirmatively, stating that he had a plastic bag of marijuana in the front zipper area of his pants and a marijuana cigar in his left sock. Sgt. Baldassaro field tested the vegetable matter, which tested positive for marijuana.

On cross-examination the sergeant admitted that he was not responding to a complaint or a call; he was just patrolling in his battle dress uniform in a marked unit. Martin was inside a Lincoln town car parked on the side of the road. According to the sergeant, when he first observed Martin, he was sitting up in the car, but when he saw the police car, he bent over or ducked down. Martin's actions raised the sergeant's suspicions. He did not see any illegal activity at that point in time; he had no information that the car had been stolen. Later he found out that the car belonged to Martin. When defense counsel asked the sergeant if he decided to conduct an investigatory stop after Martin ducked down when he saw the police unit, the officer replied: "Correct." When counsel asked if the sergeant

pulled his car in front of Martin's car, he replied: "Yes." Counsel asked if it was correct that the sergeant pulled his car in front of Martin's car so that Martin could not drive off. Sgt. Baldassaro explained: "Well, from my advantage [sic] when he ducked down, I would like, you know, the reason why I do that is because I would want to see what he's doing." He also stated: "He could have drove [sic] it. He could have backed up, and went around me." "He [Martin] had enough room to move around me, or he could have backed up."

Sgt. Baldassaro said that he pointed the spotlight to illuminate the interior of the Lincoln. Counsel asked whether the sergeant saw narcotics when he first approached Martin's vehicle or when he made Martin take his hands out from under the seat and exit, and he answered negatively. The sergeant stated that he placed Martin in handcuffs in the back seat of his police unit for safety reasons because he was patrolling alone that night. When Sgt. Baldassaro was asked if his testimony was that he smelled burned and unburned marijuana when he reached Martin's car, he replied: "Correct." When defense counsel asked the sergeant if he looked in Martin's Lincoln when he returned to it, he replied: "Yes. As I approached the vehicle, I seen [sic] the bag protruding from underneath the seats." Counsel produced the police report where Sgt. Baldassaro wrote that he saw "a portion of the bags sticking out from underneath the seat." The sergeant admitted that he did not see the full bag or the actual contents at that time; he used his flashlight to light up the area underneath the driver's seat, and then he saw the marijuana.

#### **ERRORS PATENT:**

A review of the record reveals that there is no indication that Martin was ever arraigned and initially pled not guilty. However, this error, if it did occur, is

harmless. As per La. Code Crim. Proc. art. 555, the failure to arraign a defendant is waived if the defendant “enters upon trial without objecting thereto, and it shall be considered as if he had pleaded not guilty.” See *State v. Foreman*, 08-0902 (La.App. 4 Cir. 4/29/09), 10 So.3d 1238. Here, Martin did not go to trial; nonetheless, before pleading guilty, he specifically withdrew his prior plea of “not guilty.” Thus, all of the parties were under the impression that he had formerly pled not guilty. Therefore, any error that may have occurred by the court’s failure to arraign Martin was cured when he pled guilty to the bill of information.

No other errors patent were found.

#### **ASSIGNMENT OF ERROR:**

By his sole assignment of error, Martin argues, as he did in his writ application to this Court, that the sergeant lacked reasonable cause to justify the investigatory stop, and the evidence and statements resulting from the illegal stop should be suppressed. Martin claims that the sergeant’s pulling his marked unit in front of his Lincoln and then shining a spotlight into his car constituted a seizure or an imminent seizure, and he submitted to the sergeant’s show of force or authority.

The State has the burden of proving the admissibility of all evidence seized without a warrant. La. Code Crim. Proc. art. 703(D). In *State v. Anderson*, 06-1031 (La. App. 4 Cir. 1/17/07), 949 So.2d 544, this Court set out the State’s burden of proof and the standard of review:

[W]here ... evidence is seized without a warrant as required by the federal and state constitutions, the burden is on the State to show that a search is justified by some exception to the warrant requirement. *Vale v. Louisiana*, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970); *State v. Tatum*, 466 So.2d 29 (La.1985); *State v. Pomes*, 376 So.2d 133 (1979). Trial courts are vested with great discretion when ruling on a motion to suppress and, consequently, the ruling of a trial judge on a motion to suppress will not be disturbed absent an abuse of that discretion. *State v. Long*, 2003-2592, p. 5 (La.9/9/04), 884 So.2d

1176, 1179 (citations omitted); *State v. Oliver*, 99-1585, p. 4 (La.App. 4 Cir. 9/22/99), 752 So.2d 911, 914 (trial court vested with great discretion when ruling on a motion to suppress). The district court's findings of fact on a motion to suppress are reviewed under a clearly erroneous standard and the district court's ultimate determination of Fourth Amendment reasonableness is reviewed *de novo*. *State v. Pham*, 2001-2199 (La.App.1/22/03), 839 So.2d 214, 218. Accordingly, "on mixed questions of law and fact, the appellate court reviews the underlying facts on an abuse of discretion standard, but reviews conclusions to be drawn from those facts *de novo*." *Id.* (citation omitted). "Where the facts are not in dispute, the reviewing court must consider whether the trial court came to the proper legal determination under the undisputed facts." *Id.* (citation omitted).

*Anderson*, 06-1031, p. 2, 949 So.2d at 546.

In *State v. Carey*, 03-0067 (La.App. 4 Cir. 5/7/03), 847 So.2d 680, this Court discussed what constitutes reasonable cause for a stop:

"Reasonable suspicion" to stop is something less than the probable cause required for an arrest, and the reviewing court must look to the facts and circumstances of each case.... Evidence derived from an unreasonable stop, i.e., seizure, will be excluded from trial. In assessing the reasonableness of an investigatory stop ...[t]he totality of the circumstances must be considered in determining whether reasonable suspicion exists. The detaining officers must have knowledge of specific, articulable facts, which, if taken together with rational inferences from those facts, reasonably warrant the stop. In reviewing the totality of the circumstances, the officer's past experience, training and common sense may be considered....

*Carey*, 03-0067, p. 4, 847 So.2d at 683, quoting *State v. Dank*, 99-0390, pp. 4-5 (La.App. 4 Cir. 5/24/2000), 764 So.2d 148, 155. Using a flashlight to illuminate the interior of a car has been found not to constitute a search, and courts have held that the use of artificial means to illuminate a darkened area or a car does not constitute a search without other circumstances. *See State v. Richardson*, 09-0638, pp. 5-6 (La. 10/20/09), 23 So.3d 254, 258.

It is far from clear that Sgt. Baldassaro actually stopped Martin, who was sitting in his Lincoln parked on a public street in a high crime area with no lights on. The sergeant articulated reasons for investigating the subject in the parked car.

The sergeant testified that Martin's action of ducking when he saw the marked unit raised his suspicions because the subject could have been stealing or burglarizing the car. The officer said that he decided to investigate and pulled his marked unit in front of the Martin's Lincoln; he used the spotlight on the police vehicle to illuminate the interior of the car in order to see what Martin was doing. The officer noted that Martin could have driven away. Within minutes of the sergeant stopping his vehicle and turning on the spotlight, he approached the Lincoln and detected the strong odor of marijuana emanating from the car. At that point the sergeant had probable cause to search the vehicle. *See State v. Wyatt*, 99-2221, pp. 2-3 (La.App. 4 Cir. 9/27/00), 775 So.2d 481, 483. Sgt. Baldassarro legally seized the marijuana from the Lincoln.

**CONCLUSION:**

Accordingly, we find that the district court properly denied the motions to suppress the evidence and statements. The conviction and sentence are affirmed.

**AFFIRMED**