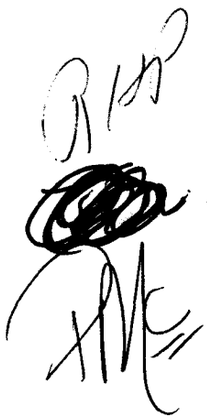
**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2008 KA 2466**



**STATE OF LOUISIANA**

**VERSUS**

**SEDRIC LEVOND JACKSON**

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**On Appeal from the 19th Judicial District Court**
**Parish of East Baton Rouge, Louisiana**
**Docket No. 06-05-0961, Section VII**
**Honorable Todd W. Hernandez, Judge Presiding**

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**Sedric Levond Jackson**

**BEFORE: PARRO, McCLENDON, AND WELCH, JJ.**

**Judgment rendered** JUN 17 2009

welch J. dissents with reasons.

**PARRO, J.**

The defendant, Sedric Levond "Hip" Jackson, was charged by amended bill of information with one count of possession with intent to distribute cocaine (count 1), a violation of LSA-R.S. 40:967(A)(1), and one count of possession of over 200 grams, but less than 400 grams, of cocaine (count 2), a violation of LSA-R.S. 40:967(F)(1)(b). The defendant pled not guilty on both counts. Subsequently, on the second day of his jury trial, he moved to suppress anything seized or discovered through an illegal search and seizure of the defendant and a residence and any fruits of a warrantless search. Following a hearing, the motion was denied. After the completion of the jury trial, he was found guilty as charged on both counts. Thereafter, the state filed a habitual offender bill of information against the defendant, alleging that on counts 1 and 2, he was a second-felony habitual offender.[1] Following a hearing, he was adjudged a second-felony habitual offender on counts 1 and 2.[2] On each count, he was sentenced to twenty-five years of imprisonment at hard labor, with both sentences to run concurrently with each other. He now appeals, designating the following assignment of error:

> The trial court erred in denying the [m]otion to [s]uppress [e]vidence by its failure to find that the police manufactured [their] own exigent circumstances which allowed them to gain entry into the Prescott residence without first obtaining a search warrant based upon probable cause that narcotics would be discovered therein. In reaching its decision, the trial court failed to expressly discuss the five factor test outlined in [**United States v. Rico**, 51 F.3d 495 (5th Cir.), cert. denied, 516 U.S. 883, 116 S.Ct. 220, 133 L.Ed.2d 150 (1995),] which, if applied, would have resulted in a contrary result.

For the following reasons, we affirm the conviction, habitual offender adjudication, and sentence on count 1; affirm the conviction and habitual offender adjudication on count 2; and vacate the sentence on count 2, and remand for resentencing on count 2 in accordance with this decision.

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[1] The state set forth that on April 15, 2003, under Nineteenth Judicial District Court docket number 10-01-346, the defendant pled guilty to committing one count of simple robbery on September 25, 2001.

[2] See **State v. Shaw**, 06-2467 (La. 11/27/07), 969 So2d 1233.

## FACTS

Baton Rouge City Police Detective Drew White testified at a motion to suppress hearing and at the jury trial concerning the pertinent events.[3] On March 9, 2005, a reliable confidential informant (C.I.) advised Detective White that the defendant sold cocaine for Ronrico Howard at 5515 Prescott Road, apartment number 3, in Baton Rouge. On March 10, 2005, at approximately 4:00 p.m., Detective White was advised by the C.I. that he had seen one and one-half kilograms of cocaine in the apartment, and the defendant and Howard were cooking cocaine in the apartment. The C.I. also indicated that the defendant and Howard had been riding around in an approximately 2003 model, white Monte Carlo. Howard was a known drug dealer and a warrant was outstanding for his arrest for distribution of hydrocodone. At approximately 6:00 p.m., in an effort to corroborate the claims of the C.I., Detective White placed the apartment in question under surveillance. The vehicle described by the C.I. was parked in front of the apartment.

At approximately 7:00 p.m., Howard exited the apartment and drove off in the Monte Carlo. Detective White recognized Howard and followed his vehicle. Detective White did not want to stop Howard too close to the apartment because he was afraid of alerting anyone in the apartment to the police investigation. However, Detective White quickly realized that Howard had "made" the surveillance, because he began making random turns. Detective White initiated a traffic stop of Howard, advised him of his **Miranda**[4] rights, and arrested him on the outstanding warrant. Howard lied concerning where he had driven from and denied any involvement with the apartment. However, when the police told Howard they were going to take him back to the apartment to make contact with whomever was inside, Howard became very nervous and protested it was not right for the police to take him "back" to the

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[3] In determining whether the ruling on the motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may also consider all pertinent evidence given at the trial of the case. **State v. Chopin**, 372 So.2d 1222, 1223 n.2 (La. 1979).

[4] **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

apartment. Detective White testified that Howard was using his cellular telephone when stopped, and the phone also began ringing during the traffic stop. Additionally, a crowd of about thirty or forty people gathered around the traffic stop. The police became concerned that anyone in the apartment would be alerted to the traffic stop and begin destroying any cocaine present in the apartment.

The police went to the apartment, knocked on the door, and announced their presence. They heard someone running inside the apartment and saw a figure run from the lighted kitchen area to a dark area of the apartment. They became concerned for their safety and the safety of any evidence in the apartment and kicked their way through the barricaded door to secure the apartment. The defendant was apprehended running from the bathroom. The toilet in the bathroom "was running." After securing the defendant, the police obtained a search warrant before searching the apartment. However, numerous dishes commonly used to cook cocaine, with apparent cocaine residue on them, were on the kitchen counter in plain view. An open notebook, containing names with dollar amounts written next to them, was also on the kitchen counter in plain view. Additionally, a scale and a blender with apparent cocaine residue on them were on the counter in plain view. A trash can containing the wrapper of a kilogram of cocaine was next to the counter. A subsequent search of the apartment pursuant to a warrant revealed nineteen and one-half ounces of cocaine in the apartment. Additionally, the spindle from an electric mixing bowl was in the bathroom, next to the toilet, and cocaine residue was on the toilet.

## MOTION TO SUPPRESS EVIDENCE

In his sole assignment of error, the defendant argues the police created the necessary exigency as a means of bypassing the warrant requirement. He relies on **United States v. Mercadel**, 226 F.Supp.2d 810, 815 (E.D. La. 2002), and **United States v. Vega**, 221 F.3d 789, 800 (5th Cir. 2000), cert. denied, 531 U.S. 1155, 121 S.Ct. 1105, 148 L.Ed.2d 975 (2001), which utilized the following five-factor test from

**Rico**, 51 F.3d at 501, to determine whether exigent circumstances existed:

> (1) the degree of urgency involved and amount of time necessary to obtain a warrant;
>
> (2) [the] reasonable belief that contraband is about to be removed;
>
> (3) the possibility of danger to the police officers guarding the site of contraband while a search warrant is sought;
>
> (4) information indicating the possessors of the contraband are aware that the police are on their trail; and
>
> (5) the ready destructibility of the contraband and the knowledge "that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic." (Footnote omitted).

The defendant concedes the presence of the fifth factor, but argues none of the other four factors were present in this case when the police announced their presence, and thus, the trial court erred in denying the motion to suppress.

Initially, we note that the trial court was under no obligation to follow precedent of the federal fifth circuit in this matter. In state court, federal district and appellate court cases are persuasive, rather than binding, authority. See **Layne v. City of Mandeville**, 98-2271 (La. App. 1st Cir. 11/5/99), 743 So.2d 1263, 1269, writ denied, 99-3432 (La. 2/18/00), 754 So.2d 966.

Further, the trial court had no need to look to the cases relied on by the defendant to determine whether or not exigent circumstances were present in this case. Probable cause alone does not justify the entry into an area otherwise protected by the Fourth Amendment of the United States Constitution and the Louisiana Constitution, Article I, Section 5. There is a justified intrusion of a protected area if there is probable cause to arrest and exigent circumstances. 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). The fact that certain factors under the federal fifth circuit's test were absent in this case does not mean that exigent circumstances were not present.

Moreover, the federal cases relied on by the defendant are distinguishable on their facts. In **Mercadel**, the government argued the presence of marijuana in the defendant's home created an exigency. **Mercadel**, 226 F.Supp.2d at 815. The court found, even assuming that the police saw the marijuana in the defendant's home through a screen door, there was no exigency as the police were undetected and could have attempted to obtain a warrant without creating risk to themselves or the public, and without exposing the evidence to imminent danger of removal or destruction. **Mercadel**, 226 F.Supp.2d at 816-17.

In **Vega**, while investigating possible drug dealing at a home, the police knocked on the door of the home and announced their presence. The police entered the home through the back door the defendant left open after he exited. They subsequently recovered four buckets of marijuana from the home. **Vega**. 221 F.3d at 794. The court found that, without justification, the police had abandoned their secure surveillance positions and had taken action they believed might give the suspects cause and opportunity to retrieve weapons or dispose of drugs. The court held the decision to abandon the secure surveillance was not justified by an absence of time to secure a warrant or any other reasonable predicate. The court specifically noted that the record was devoid of evidence that an exigency was created by the suspects' awareness of police surveillance or that the suspects were attempting to leave the premises with drugs or otherwise seeking to dispose of the same. **Vega**, 221 F.3d at 800.

In the instant case, the exigency was created not by the police announcing their presence at the door of the defendant's apartment, but by Howard's awareness of the police following him and his use of a cellular telephone after that awareness. The police did not create this exigency. Once Howard became aware that the police

had followed him from the apartment, he had every reason to instruct the defendant, his accomplice, to dispose of the drugs in the apartment. The police did not have the luxury of obtaining a search warrant before going to the apartment containing the suspected cocaine. The police knocked on the door in an attempt to further investigate the tip and to determine whether or not the defendant was disposing of evidence. The defendant's actions inside the apartment forced them to enter the apartment to prevent the destruction of evidence and/or to ensure officer safety. See **State v. Farber**, 446 So.2d 1376, 1380 (La. App. 1st Cir.), writ denied, 449 So.2d 1356 (La. 1984) (finding exigent circumstances existed for the police to enter Hymel's apartment without a warrant because Hymel was arrested only a few blocks away from his apartment; there was a possibility that someone could have witnessed the arrest and alerted Farber, who was in the apartment; and the evidence might have been destroyed).

This assignment of error is without merit.

**REVIEW FOR ERROR**

Initially, we note that our review for error is pursuant to LSA-C.Cr.P. art. 920, which provides that the only matters to be considered on appeal are errors designated in the assignments of error and "error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." LSA-C.Cr.P. art. 920(2).

On count 2, the trial court failed to impose the mandatory fine of not less than one hundred thousand dollars, nor more than three hundred fifty thousand dollars. See LSA-R.S. 40:967(F)(1)(b).[5] Accordingly, we vacate the sentence on count 2 and remand for resentencing.

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[5] It is not a crime to be a habitual offender. The statute increases the sentence for a recidivist. The penalty increase is computed by reference to the sentencing provisions of the underlying offense. Similarly, the conditions imposed on the sentence are those called for in the reference statute. **State v. Bruins**, 407 So.2d 685, 687 (La. 1981).

**CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE ON COUNT 1 AFFIRMED; CONVICTION AND HABITUAL OFFENDER ADJUDICATION ON COUNT 2 AFFIRMED; SENTENCE ON COUNT 2 VACATED; REMANDED WITH INSTRUCTIONS.**

**STATE OF LOUISIANA** **NUMBER 2008 KA 2466**

**FIRST CIRCUIT**

**VERSUS**

**COURT OF APPEAL**

**SEDRIC LEVOND JACKSON** **STATE OF LOUISIANA**

**WELCH, J. DISSENTING.**

I respectfully dissent. I believe that the "police manufactured exigency" exception to the exigency justification for a warrantless intrusion into a home applies in this case, and therefore, the warrantless entry into the Prescott residence violated the Fourth Amendment to the United States Constitution.

In this appeal, defendant contends that the evidence clearly demonstrates that the police created their own exigency as a means of bypassing the warrant requirement, making the officers' warrantless forced entry into the Prescott residence presumptively unreasonable. In support thereof, he relies on federal Fourth Amendment jurisprudence which has created an exception to the exigency justification for a warrantless intrusion in the case of a "police manufactured exigency." **U.S. v. Rico**, 51 F.2d 495, 502 (5th Cir. 1995), cert. denied, 516 U.S. 883, 116 S.Ct. 220, 113 L.Ed.2d 150 (1995). Just as exigent circumstances are an exception to the warrant requirement, a police manufactured exigency is an exception to the exception. *Id.* The federal courts have made it clear that exigent circumstances do not pass Fourth Amendment muster if the officers deliberately created them. *Id.*

In determining whether exigent circumstances were manufactured by police officers, consideration is given not only to the motivation of the police in creating the exigency, but also to the "reasonableness and propriety of the investigative tactics that generated the exigency." **Rico**, 51 F.3d at 502 (quoting **United States v. Duchi**, 966 F.2d 1278, 1284 (8th Cir. 1990)). Federal courts do not simply look

at that point in time when the officers made the warrantless entry to determine whether exigent circumstances exist. Where, as here, officers have made their presence known at the entry of a residence, an immediate warrantless entry into the home is a foregone conclusion. **Rico**, 51 F.2d at 501; **United States v. Munoz-Guerra**, 788 F.2d 295, 297-298 (5th Cir. 1986). Therefore, in analyzing a claim of police manufactured exigency, federal courts look the entirety of the police investigative tactics, particularly those leading up to the exigency alleged to have been necessitated by the warrantless entry into the home. **Rico**, 51 F.3d at 501; **Duchi**, 906 So.2d at 1284. Because review is not confined to the circumstances after police made their presence known, the real issue is whether exigent circumstances justified the officer's initial decision to approach the premises. **Munoz-Guerra**, 788 F.2d 297-298.

The crucial question in this case is whether exigent circumstances justified the officers' *initial decision* to approach the apartment door without having first secured a warrant. See **U.S. v. Vega**, 221 F.3d 789, 799 (5th Cir. 2000), cert. denied, 531 U.S. 1155, 121 S.Ct. 1105, 148 L.Ed.2d 975 (2001). The record reflects that on May 9 and 10, 2005, Officer White received information from a confidential informant that drugs were being manufactured and sold at the Prescott residence. On May 10th at 6:00 p.m., officers set up covert surveillance outside the Prescott apartment. One hour later, Ronrico Howard was observed leaving the residence in a vehicle. Officer White stated that there was an outstanding warrant for Howard's arrest for possession of hydrocodone. Officer White and another police officer decided to follow Howard as he drove away from the apartment, not wanting to alert anyone who may have been inside the apartment as to the officers' presence. They waited twelve blocks before pulling Howard over. Officer White got Howard out of the vehicle and placed Howard under arrest. Thereafter, two

officers searched the vehicle and uncovered no evidence of drugs or any other contraband. The officers began to question Howard regarding where he had come from, and Howard gave them a different address than the Prescott apartment they observed Howard exiting.

At the suppression hearing, Officer White candidly admitted on cross examination that he followed Howard and initiated the stop to see if Howard had left the home with any narcotics to provide Officer White with corroboration of the information provided to him by his confidential informant. Officer White indicated that he had seen Howard talking on his cell phone in the vehicle prior to the stop, but made no attempt to ascertain whether Howard made any outgoing calls prior to the detention. Rather, he merely assumed that Howard tipped off individuals who may have been inside the Prescott residence. At trial, Officer White testified that after the stop, a crowd gathered around them and Howard's phone began ringing, and he became concerned that someone would call the Prescott residence to alert anyone there of the events transpiring so that they could destroy evidence the police were looking for.

While the officers were arresting Howard, Officer Eric Burkett continued to conduct surveillance on the Prescott residence. Officer White escorted Howard back to the Prescott residence against Howard's wishes. Officer White then questioned Officer Burkett whether anyone had come and gone and learned that no one had. Officer Burkett testified that he conducted surveillance approximately 20-25 minutes between the time the other officers left and returned to the residence, and saw no one leaving the residence. Officer White and a number of other officers then approached the Prescott residence, knocked on the front door, and announced their presence. Upon realizing that someone was in the home and receiving no response, the officers kicked in the bottom of the door and crawled

through it. Once inside, Officer White telephoned a judge and obtained a telephonic warrant to conduct a search.

In rejecting defendant's claim of police manufactured exigency, the majority finds that the exigency was created by Howard's awareness of the police following him and the use a cellular telephone after that awareness rather than by the actions of the police. However, the circumstances of this case clearly indicate otherwise. If the officers reasonably believed that Howard tipped off the Prescott residence occupants before they stopped Howard in his vehicle, the danger of destruction of evidence would have been imminent, and immediate police action to prevent destruction of evidence would be expected. Yet, the officers continued to follow Howard, stopped his vehicle, searched Howard and placed him under arrest, conducted a full search of the vehicle, questioned Howard, and returned Howard to the Prescott residence against his wishes, all before making the warrantless entry into the home. Moreover, at the stop, the officers made no attempt to ascertain whether Howard even made any outgoing calls prior to the stop of his vehicle.

As all of these events leading to the officers' return to the apartment with Howard were transpiring, the officers clearly had time to obtain a telephonic warrant, which they eventually ended up doing with considerable ease after forcefully entering the residence without a warrant. Under the facts of this case, I can only conclude that the exigency created when the officers' made their presence known at the apartment was of the officers' own making, and their entry into the apartment without a warrant was unreasonable.

In the context of the Fourth amendment, the "single and distinct" purpose for the exclusionary rule is deterrence of police violations of the constitutional protection against unreasonable searches and seizures. **United States v. Brookins**, 614 F.2d 1037, 1046-47 (5th Cir. 1980). Because the warrantless entry into the

Prescott residence under all of the circumstances of this case was unreasonable and violated the Fourth Amendment, the evidence seized as a result of that illegal entry should have been suppressed. Therefore, the trial court erred in denying the motion to suppress.