

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

**2011 KA 0367**

STATE OF LOUISIANA

VERSUS

QUINTIN J. CARLSON



**Judgment Rendered:** SEP 14 2011

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APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT  
IN AND FOR THE PARISH OF ST. TAMMANY  
STATE OF LOUISIANA  
DOCKET NUMBER 487,403, DIVISION "B"

THE HONORABLE AUGUST J. HAND, JUDGE

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**BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.**

*Hughes, J., concurs.*

## **McDONALD, J.**

The defendant, Quintin J. Carlson, was charged by bill of information with possession of alprazolam (Xanax), a schedule IV controlled dangerous substance, a violation of La. R.S. 40:969(C). The defendant pleaded not guilty. After the state filed a notice of intent to use a crime laboratory report showing the substance seized from defendant contained alprazolam, the defendant filed a motion to suppress.

After a hearing, the trial court denied the motion to suppress. Later that same day, the defendant withdrew his not guilty plea and entered a plea of guilty, pursuant to **State v. Crosby**, 338 So.2d 584 (La. 1976) and La. C.Cr.P. art. 893. After a **Boykin**<sup>1</sup> examination, the trial court accepted the plea. The trial court deferred imposition of the sentence and placed defendant on supervised probation for three years, with conditions.<sup>2</sup> The defendant now appeals, urging as his sole assignment of error that the trial court erred in denying the motion to suppress. For the reasons which follow, we affirm the defendant's conviction.

### **FACTS**

St. Tammany Parish Sheriff's Office Detective Thomas Schlessinger testified at the hearing on the motion to suppress that he conducted the vehicle stop that led to the defendant's arrest. A few minutes after midnight on March 21, 2010, the narcotics officer was on routine patrol in a marked police car when he saw a vehicle leave the roadway for a short time. After following the vehicle and observing it cross the fog line and move into the opposite lane, the detective activated his emergency lights. The driver stopped the vehicle on the shoulder of the road, exited, and approached the police vehicle. Detective Schlessinger used his public address system to advise the driver to return to his vehicle and drive a

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<sup>1</sup> Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

<sup>2</sup> The suspension of the imposition or execution of a sentence under article 893 shall be regarded as a sentence for the purpose of granting or denying a new trial or appeal. La. C.Cr.P. art. 893A & B(1)(b).

short distance to a safer location in a nearby parking lot. The driver complied and after stopping, again left his vehicle, and walked toward the police vehicle. The detective again asked the driver to return to the stopped vehicle and obtain his vehicle registration and driver's license.

When Detective Schlessinger approached the driver's side of the vehicle, the driver was sitting with his legs outside. In addition to the driver, two passengers, one in the front and the other in the back, occupied the vehicle. Detective Schlessinger identified the defendant as the passenger he saw sitting in the front seat. The driver produced the vehicle's registration and proof of insurance, but advised he did not have a driver's license. The detective asked the passengers for their names and identification. Although both passengers stated their names, neither had any identification. Later, at the sheriff's station another officer told Detective Schlessinger that the defendant gave a false last name, and the officer provided the detective with the defendant's correct last name.

Detective Schlessinger called for backup and another officer in the area arrived on the scene. The detective asked the driver to exit his vehicle; he conducted a quick pat-down of the driver's outer clothing for weapons. The detective then handed the driver off to the backup officer.

Detective Schlessinger explained that when a person leaves his vehicle and approaches a police unit at a quick pace, it is usually because the person does not want the police officer to be around the vehicle. In this case, the driver's behavior in exiting his vehicle and approaching the police unit was significant. The detective further explained that while he is obtaining the vehicle information from a driver, he uses that time to talk to the person and observe the surroundings for things such as smells and people whispering. In this case, while he was talking to the driver, he noticed both passengers were looking straight ahead and were extremely rigid, behavior he interpreted as nervousness. Detective Schlessinger

found this behavior unusual because he had already explained the reason for the stop was a traffic violation – improper lane usage – and was not because of the passengers' behavior. The detective noted that most passengers relax when they find out they are not receiving a ticket. But in this case, even after he announced in a loud voice the reason for the stop, the passengers' demeanor remained the same. However, on cross-examination, the detective admitted that he might have interpreted other behaviors, such as movement by the passengers, as suspicious behavior. He agreed that "anything can be suspicious," depending on how it is done. And although most passengers are not nervous and relax when they discover he is not writing them a ticket, the detective admitted people react differently and even an innocent person could be nervous.

Based on all of the circumstances, the detective decided to have the passengers exit the vehicle one at a time. Detective Schlessinger walked around to the passenger side and asked the defendant to exit, so that he could conduct an outer clothing pat-down. The detective advised defendant to turn around and face the vehicle while holding his hands behind his back in a "backwards prayer" fashion. The detective testified the requested "backward prayer clasp" allows him to conduct the pat-down without holding the person's hands. The detective further testified that during the pat-down, he is feeling for any weapons; later, he testified that he conducts the pat-down for anything that is illegal.

Detective Schlessinger testified that he advised the defendant he was not under arrest. The detective testified that he preferred to remove a vehicle's occupants one at a time and conduct a pat-down, in case there is a weapon in the vehicle. On cross-examination, the detective stated that "[a]s a general rule, I get people out of the vehicle and pat . . . them down for weapons and get them away from the vehicle just in case there is a weapon in the vehicle."



The detective explained that, as is his usual procedure, he had the passengers exit the vehicle and conducted a “weapon pat-down.” He described the method he used for the pat-down and stated he was feeling for knives, guns, and other types of weapons. He distinguished the pat-down, which is done on a person's outer clothing, from a search, which would include pockets, hats, and shoes.

In this case, the defendant made a “prayer sign” with his hands but had one hand clenched. This behavior aroused the detective’s suspicion and when he grabbed the defendant’s hand, he heard a crinkling noise of some type of wrapper. Although nothing was found during the pat-down, the detective was still concerned about the item in the defendant’s hand. Detective Schlessinger testified that he could not rule out a weapon in the defendant’s hand and noted that there could be any of a number of items, such as a syringe, a razor blade, or anthrax, in the clenched hand.

Because he was concerned, Detective Schlessinger asked the defendant, “Why is your hand clenched, what’s in your hand?” and the defendant replied, “it’s gum.” The detective then stated, “Well, you show me” and the defendant voluntarily opened his hand. The detective saw a clear cellophane wrapper from a cigarette pack that contained white pills, which he recognized as Xanax. The detective seized the evidence, handcuffed the defendant, and advised him he was under arrest for possession of a Schedule IV drug. Detective Schlessinger admitted that he left out of his report the fact that he asked the defendant to open his hand, but denied prying open the defendant’s hand. After the detective advised the defendant of his **Miranda**<sup>3</sup> rights, the defendant indicated he understood and “he waived his rights.” When the detective asked if the drugs belonged to all the vehicle’s occupants, the defendant replied they were his.

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<sup>3</sup> **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

The defendant never stated at any time that he wanted an attorney or wished to invoke his rights to an attorney. Detective Schlessinger denied coercing, threatening, or making any promises to the defendant. The written consent form was completed and defendant signed the form indicating he understood and waived his rights.

Over the state's objection, the detective was asked what he would have done if he heard cellophane in the defendant's pocket. He answered that depending on the circumstances, if the defendant had said he had gum in his pocket and there was no other reason to search the pocket, he would "have left it at that." The detective further admitted he did not observe any weapons in the vehicle and did not see the passengers reaching under the seat or toward the glove compartment. Nor did he see any illegal actions by the passengers. He reiterated that the reason for removing the passengers and conducting the pat-down was to check for weapons.

The defendant testified that he was in the vehicle with the driver and his brother; he was nervous because he had been stopped in the past by the police. Although the defendant did not deny he had possession of the drugs, he claimed that while his hands were behind him, the detective grabbed "the stuff" out of his pocket. He denied the drugs were taken from his hand and stated that the detective had also searched the driver's pockets. The defendant further stated he had produced a Department of Motor Vehicles photo identification to the detective, but admitted he did not have that identification in court. The defendant also denied being advised of his **Miranda** rights and stating the drugs were his. The defendant testified he did not tell the detective who the drugs belonged to, but just stated they were not his. Although he admitted signing the waiver of rights form, he did so after the detective found the pills.

On cross-examination, the defendant stated he provided his correct name to the detective and only signed the waiver form to conform with the incorrect name written on the form by the detective. The defendant also testified he could not correctly sign his name because the handcuffs were too tight.

The defendant further testified that the detective who testified during the hearing was not the officer who conducted the stop. The defendant claimed the arresting officer had a lot of hair and was younger. When asked by his own attorney if it was possible that the testifying officer was actually the detective who made the stop, the defendant said no.

### RULING

The trial court denied the motion to suppress. In his oral reasons, the judge noted that he had listened to the testimony of both the detective and the defendant and in light of the contradictory testimony between the two witnesses, the judge placed greater weight on the detective's testimony. The judge further noted that the defendant, in signing the rights form with a false name, was attempting to hide his identity, and the judge did not believe the defendant's explanation that his hands were cuffed and he could not write properly.

The trial court referred to the United States Supreme Court holding in **Arizona v. Johnson**, 555 U.S. 323, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009), that authorized pat-downs of passengers in a vehicle due to the risk of harm in automobile stops. The trial court noted that the pat-down of passengers was permissible "if it's conducted immediately upon their removal from the vehicle" and acknowledged that searches, which are not contemporaneous with the stop and are conducted after a long detention period, are not authorized under **Arizona v. Johnson**. The trial court found that in this case, the order to defendant to exit the vehicle and the immediate pat-down search was "appropriate at the point that the officer noted that the defendant was not compliant with his request to place his

hands, for purposes of the pat-down search, in the position as he requested ... [and] the defendant had something clutched in his hand." The court further found that the pat-down and subsequent request that defendant open his hand were permissible for the detective's safety and that the defendant had consensually opened his hand.

#### APPLICABLE LAW

Louisiana Code of Criminal Procedure article 215.1(D) provides that in conducting a traffic stop "an officer may not detain a motorist for a period of time longer than reasonably necessary to complete the investigation of the violation and issuance of a citation for the violation, absent reasonable suspicion of additional criminal activity."

In **Arizona v. Johnson**, the question was whether the officer had the authority to stop and frisk a passenger in a motor vehicle that was temporarily seized because of a traffic infraction. In that case, a traffic stop occurred when three officers, who were members of Arizona's gang task force, were patrolling in a neighborhood associated with a gang. The vehicle was stopped based on an insurance-related violation and a civil infraction. At the time of the stop, the officers had no reason to suspect anyone in the vehicle (the driver and the two passengers) of criminal activity. When the officers approached the stopped vehicle, the occupants were instructed to keep their hands visible. The occupants denied they had weapons in the vehicle and each officer dealt with a different occupant of the vehicle. The officer attending the defendant, the back seat passenger, noticed that the defendant looked back and kept his eyes on the officers while they approached. That officer also observed the defendant was wearing a blue bandana, an item consistent with a gang membership, and noticed a scanner in the defendant's pocket. The officer noted that most people do not carry around a police scanner unless they are going to be involved in criminal activity or evade

the police. In response to the officer's questioning, the defendant provided his name and date of birth, but indicated he had no identification with him. The officer also discovered that the defendant had served time in prison for burglary, was out for about a year, and was from a town that the officer knew was home to a gang. Based on these observations and answers to her questions, the officer suspected the defendant might have a weapon on him and asked him to get out of the vehicle. While the officer was conducting a pat-down for officer safety, she felt the butt of a gun near the defendant's waist. At that point the defendant began to struggle and she placed him in handcuffs. The trial court denied the defendant's motion to suppress and he was subsequently convicted of possession of a weapon by a prohibited possessor. The Arizona Court of Appeals reversed the conviction, and the Arizona Supreme Court denied review. The United States Supreme Court, in reversing the judgment of the Arizona Court of Appeals, stated:

A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave. See **Brendlin** [v. **California**], 551 U.S. [249], at 258, 127 S.Ct. 2400[, 168 L.Ed.2d 132 (2007)]. An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop. See **Muehler v. Mena**, 544 U.S. 93, 100-101, 125 S.Ct. 1465, 161 L.Ed.2d 299 (2005).

In sum, as stated in **Brendlin**, a traffic stop of a car communicates to a reasonable passenger that he or she is not free to terminate the encounter with the police and move about at will. See 551 U.S. [249], at 257, 127 S.Ct. 2400. Nothing occurred in this case that would have conveyed to Johnson that, prior to the frisk, the traffic stop had ended or that he was otherwise free "to depart without police permission." *Ibid.* Officer Trevizo surely was not constitutionally required to give Johnson an opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her.

**Arizona v. Johnson**, 555 U.S. at \_\_\_\_, 129 S.Ct. at 788 (footnote omitted).

In determining the lawfulness of an officer's frisk of a suspect, a court must give due weight, not to an officer's "inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." **Terry v. Ohio**, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L.Ed.2d 889 (1968); **State v. Sims**, 02-2208, p. 6 (La. 6/27/03), 851 So.2d 1039, 1044. Unlike the thorough and intrusive search conducted incident to an actual arrest, the **Terry** frisk is limited to a more specific pat-down of a suspect's outer clothing for the purpose of detecting weapons only. **State v. Sims**, 02-2208, at p. 11, 851 So.2d at 1046.

In **State v. Robinson**, 09-1137, pp. 1-7 (La. App. 4th Cir. 3/24/10), 33 So.3d 1019, 1021-23, writ denied, 10-1242 (La. 12/17/10), 51 So.3d 18, the defendant was observed late at night crawling out from under a house in an area known for drug activity. Because there had been thefts in the area, the officers conducted an investigatory stop of the defendant. When the officers asked the defendant if he owned the house, the defendant replied he did not and asked, in an agitated manner, if the officers had anything better to do than mess with him. The testifying officer stated that because of the defendant's agitated manner and for safety purposes, he asked the defendant to open his fists. The officer further testified that the defendant was asked to relax his fists because "[w]e just wanted to make sure he didn't take a swing at us." When the defendant reluctantly opened his hand, a glass pipe and a piece of plastic containing a rock-like substance consistent with crack cocaine fell from the defendant's fists.

On appeal, the defendant argued that the request by the officer that he relax his clenched fists constituted an illegal search and warranted a suppression of the cocaine seized. The defendant argued the officer's testimony that he was not afraid of the defendant was proof that the request to open the fists was not justified as a reasonable search for weapons. The defendant also argued he was not free to

refuse the request. In affirming the defendant's conviction, the Fourth Circuit noted that the stop was justified, and the issue was whether the officers obtained the evidence by way of a request or demand. The court further noted the inquiry was whether a reasonable person would feel free to decline the request, that the defendant's subjective belief was irrelevant, and that the encounter would be judged from the viewpoint of a reasonable, innocent person. In finding that the motion to suppress lacked merit, the Fourth Circuit concluded that no search, much less an illegal search, occurred. The court further concluded that as a safety precaution, the officer requested (as opposed to directed, ordered, instructed, or demanded) that the defendant relax his clenched fists, and the defendant reluctantly complied. The court also found the testimony supported the officers' concerns that the defendant might have become violent and hit them. **Robinson**, 09-1137 at p. 6, 33 So.3d at 1022-23.

In **State v. Bridges**, 610 So.2d 827, 828-29 (La. App. 4th Cir. 1992), affirmed on rehearing, 617 So.2d 515 (La. App. 4th Cir.) (per curiam), writ granted and remanded on other grounds, 629 So.2d 1156 (La. 1993), when police officers were investigating a report of suspicious activity involving a person fitting the suspect's description, they stopped the defendant to conduct an interview. The area was known for a high amount of use and sales of narcotics. The officers decided to frisk the defendant and asked him to place his hands against a wall. The defendant placed his left hand flat, but kept his right hand clenched. The defendant was asked to unclench his fist and when he refused to do so, a struggle ensued between him and the police officers. After the defendant was subdued and handcuffed, a broken glass tube with burned residue was discovered in the hand that had been clenched. At the motion to suppress hearing, one officer testified that the defendant's hand was forced open to see if he held weapons or narcotics. The officer testified unequivocally that he believed the defendant could have had a



weapon, such as a pocketknife, in his hand. The defendant argued there was no reasonable basis to believe he actually held a weapon in his closed hand. After finding that the officers had reasonable suspicion to make an investigatory stop, the court addressed the issue of the frisk of defendant. The court noted that an officer may frisk the outer clothing of a person lawfully stopped and if the officer reasonably suspects that the person has a dangerous weapon, he may search the person. The court also found that under the circumstances, the officers were justified in forcing open the defendant's clenched fist.

When a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, *i.e.*, unless such ruling is not supported by the evidence. See State v. Green, 94-0887, p. 11 (La. 5/22/95), 655 So.2d 272, 280-81. However, a trial court's legal findings are subject to a *de novo* standard of review. See State v. Hunt, 09-1589, p. 6 (La. 12/1/09), 25 So.3d 746, 751.

### DISCUSSION

We first note that defendant's motion to suppress seeks to exclude "evidence, including but not limited to the field sobriety test and the intoxylizer [sic] test, to be used against defendant ... ." Defendant's motion claimed the evidence was seized without his consent, without probable cause, that the tests were unreliable, and "for any other reasons." The record shows that the evidence the defendant actually was seeking to suppress was the seized drugs and a statement that the seized drugs belonged to him. Moreover, the defendant does not argue there was no authorization for the vehicle stop. As defense counsel noted at the motion hearing, the real issue is "did the officer have a reason to perform a pat-down search" of the passenger.

Defendant contends that the officer conducting the vehicle stop lacked a reasonable basis to suspect he was armed and/or dangerous and thus, had no lawful



basis to conduct a pat-down. The defendant argues that the trial court misapplied the holding in **Arizona v. Johnson** to the facts in this case. He contends that the detective testified that as a routine matter when he makes a vehicle stop, he conducts a pat-down of all the vehicle's occupants. The defendant further argues that Detective Schlessinger's testimony shows the pat-down conducted on him was not based on individualized suspicion.

As stated in **Brendlin v. California**, 551 U.S. at 255-57, 127 S.Ct. at 2406-07, for the duration of a traffic stop, a police officer effectively seizes "everyone in the vehicle" and communicates to the passenger that he or she is not free to terminate the encounter with the police and move at will. Although the defendant is correct that Detective Schlessinger testified that his practice was to pat-down all the occupants of a stopped vehicle, the pat-down of defendant was justified under **Arizona v. Johnson**. The testimony reveals the short duration of the stop before the drugs were found in the defendant's hand. Moreover, the detective testified about certain facts that made him suspicious before he conducted the frisk of the vehicle's occupants. He noted that the driver twice left his vehicle, an indication that the driver was distancing himself from the vehicle and did not want the detective to approach. Even though the detective advised the vehicle's occupants the reason for the stop was a traffic violation, the passengers appeared to be nervous as they sat rigidly in their seats. The detective further noted that the stop occurred shortly after midnight in a desolate business area. Although a backup officer arrived on the scene, the two officers were still outnumbered by the three occupants of the vehicle.

When the defendant refused to comply with the request to stand in a position that was conducive to the detective's safety, the defendant's own actions in clenching his fist gave rise to Detective Schlessinger's reasonable request to open the hand. At that point, the defendant was not under arrest, but the detective had

reasonable suspicion that the defendant's hand contained a weapon. The defendant then voluntarily opened his hand to reveal the drugs. The detective's testimony further reveals that after the defendant signed the written waiver of rights form, he admitted the drugs belonged to him.

Moreover, the trial court obviously believed the detective's testimony and not that of defendant. Accordingly, we find the trial court did not err or abuse its discretion in denying the motion to suppress. This assignment of error lacks merit. Thus, we affirm the conviction.

**CONVICTION AFFIRMED.**