NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 KA 0230

STATE OF LOUISIANA

VERSUS

JOHN J. ESPERANCE, JR.

Judgment rendered NOV 0 1 2013

* * * * * *

Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. 525726
Honorable Peter J. Garcia, Judge

* * * * * *

HON. WALTER P. REED
DISTRICT ATTORNEY
COVINGTON, LA

KATHRYN LANDRY
SPECIAL APPEALS COUNSEL
BATON ROUGE, LA

CAMERON MARY
MANDEVILLE, LA

ATTORNEYS FOR
STATE OF LOUISIANA

ATTORNEY FOR
DEFENDANT-APPELLANT
JOHN ESPERANCE, JR.

* * * * * *

BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

PETTIGREW, J.

The defendant, John J. Esperance, Jr., was charged by felony bill of information with possession of a Schedule II controlled dangerous substance (CDS), cocaine, a violation of La. R.S. 40:967(C). He initially entered a plea of not guilty and filed a motion to suppress confession, identification, and physical evidence, which the district court denied. He then withdrew his former plea and pled guilty pursuant to **State v. Crosby**, 338 So.2d 584, 588 (La. 1976), reserving his right to challenge the ruling on the motion to suppress. The district court sentenced the defendant to five years at hard labor. His sentence was suspended, and he was placed on probation for five years. As conditions of probation, the defendant was ordered to submit to random drug screens, complete a drug rehabilitation program, and pay a fine of $1,500.00 plus costs. The defendant now appeals, arguing that the district court erred in denying his motion to suppress. For the following reasons, we affirm the defendant's conviction and sentence.

FACTS

Because the defendant pled guilty, the facts of the case were not fully developed. According to the police report, submitted into evidence in lieu of testimony at the hearing on the motion to suppress, on May 23, 2012, Detective John Cole and Sergeant Sean McLain with the Slidell Police Department were patrolling areas known for high drug trafficking. When they arrived near the area of Rocket Ranch Trailer Park, they observed the defendant walking away from the residence of a known drug dealer. They followed the defendant as he drove away on his motorcycle and stopped the defendant for speeding. When they asked the defendant where he was coming from, he stated that he had been at his brother's house, which was in an area that was not close to the Rocket Ranch Trailer Park. The officers obtained consent to search the defendant's motorcycle, and an unused glass pipe was located. After observing the defendant adjust his rolled-up right shirt sleeve several times, the officers became suspicious that he was concealing contraband. A "pat search" of the elbow area of the defendant's shirt sleeve was conducted, and the detective felt an object that was consistent with crack cocaine. The

item was removed and was determined to be cocaine. The defendant was placed under arrest for the possession of a schedule II CDS and speeding.

MOTION TO SUPPRESS

In his sole assignment of error, the defendant argues that the district court erred in denying his motion to suppress. Specifically, he contends that the evidence seized should have been suppressed because the initial pat down was illegal. He argues in the alternative that even if the initial pat down were legal, the evidence should be suppressed because the plain feel doctrine did not apply. He also contends that the search was not incident to an arrest.

When a district court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the district 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, 280-281. As a general rule, this court reviews district court rulings under a deferential standard with regard to factual and other trial determinations, while legal findings are subject to a *de novo* standard of review. **State v. Hunt**, 2009-1589, p. 6 (La. 12/1/09), 25 So.3d 746, 751.

The Fourth Amendment to the United States Constitution and article 1, § 5, of the Louisiana Constitution protect people against unreasonable searches and seizures. Subject only to a few well-established exceptions, a search or seizure conducted without a warrant issued upon probable cause is constitutionally prohibited. Once a defendant makes an initial showing that a warrantless search or seizure occurred, the burden of proof shifts to the state to affirmatively show it was justified under one of the narrow exceptions to the rule requiring a search warrant. La. Code Crim. P. art. 703(D); **State v. Johnson**, 98-0264, p. 3 (La. App. 1 Cir. 12/28/98), 728 So.2d 885, 886.

The defendant does not contest that the officers made a legitimate traffic stop for speeding. See **Whren v. U.S.**, 517 U.S. 806, 810, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89 (1996) ("[T]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.") During a legitimate traffic stop, an officer may order the driver to exit the vehicle for the officer's safety.

Pennsylvania v. Mimms, 434 U.S. 106, 110-111, 98 S.Ct. 330, 333, 54 L.Ed.2d 331 (1977) (per curiam). In addition, an officer may conduct a pat down of the driver and any passengers if he has a reasonable suspicion that the person is armed and dangerous. **Arizona v. Johnson**, 555 U.S. 323, 326-327, 129 S.Ct. 781, 784, 172 L.Ed.2d 694 (2009). 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." The relevant question is not whether the officer subjectively believes he is in danger, but "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." **Terry v. Ohio**, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L.Ed.2d 889 (1968). The defendant argues that the officers did not have a sufficient basis to conduct a pat down of the defendant. The record is devoid of any testimony or evidence that the officers were reasonably in fear of their safety. Rather, the officers were "suspicious that [the defendant] was concealing contraband" because they observed him "several times adjusting his rolled up right shirt sleeve[.]" Thus, when the officer conducted, by his own admission, a "pat search" of the defendant, he was searching for suspected contraband instead of a weapon as required under **Terry**. See La. Code Crim. P. art. 215.1(B); **State v. Temple**, 2002-1895, pp. 5-9 (La. 9/9/03), 854 So.2d 856, 860-862. Accordingly, Sergeant McLain's subsequent "pat search of the elbow area of [the defendant's] shirt sleeve" was arguably not a valid search under **Terry**.

Our analysis under **Terry** notwithstanding, we find that the seizure of the cocaine was valid as a search incident to a lawful custodial arrest.[1] It is well-established that searches incident to arrest conducted immediately before formal arrest are valid if probable cause to arrest existed prior to the search. **State v. Sherman**, 2005-0779, p. 9

[1] The officer's characterization of his actions as a "pat search" has no significance. The mere mislabeling of his actions does not change the reasonableness or constitutionality of those actions. See **State v. Brumfield**, 2005-2500, p. 11 n.10 (La. App. 1 Cir. 9/20/06), 944 So.2d 588, 597 n.10, writ denied, 2007-0213 (La. 9/28/07), 964 So.2d 353.

(La. 4/4/06), 931 So.2d 286, 292; **State v. Melton**, 412 So.2d 1065, 1068 (La. 1982). Prior to the "pat search" of the defendant's shirt sleeve, the officers observed the defendant walking away from the residence of a known drug dealer, the officers had been given false information from the defendant regarding where he had driven from, and, pursuant to the defendant's consent to search his motorcycle, the officers had found a glass pipe, which they knew was commonly used for smoking cocaine. The officers also observed the defendant driving well over the posted speed limit. At this point, the officers had sufficient probable cause to arrest the defendant for the possession of drug paraphernalia, a violation of La. R.S. 40:1023(C) and general speeding, a violation of La. R.S. 32:64.[2]

Considering the above, we find no error or abuse of discretion in the district court's denial of the motion to suppress the evidence.[3] Accordingly, this assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.

[2] Louisiana Revised Statutes 40:1023(C) provides, in pertinent part, "[i]t is unlawful for any person to use, or to possess with intent to use, any drug paraphernalia[.]"

[3] Although the defendant's motion to suppress sought to exclude all confessions, identifications, and physical evidence, he appeals only the suppression of the evidence.