NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 KA 0582

STATE OF LOUISIANA

VERSUS

JOHNNY ROBERTSON

Judgment Rendered: NOV 04 2013

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of Washington
State of Louisiana
Docket Number 12 CR8 116397, Division G

Honorable Hillary J. Crain, Judge Presiding

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* * * * * *

BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

GUIDRY, J.

The defendant, Johnny Robertson, was charged by bill of information with possession with intent to distribute cocaine, a violation of La. R.S. 40:967(A)(1). He pled not guilty. The defendant filed a motion to suppress the evidence and, following a hearing on the matter, the motion was denied. Thereafter, the defendant withdrew his prior plea of not guilty and, at a Boykin hearing, entered a plea of guilty to the charge, reserving his right to challenge the trial court's ruling on the motion to suppress. See State v. Crosby, 338 So.2d 584 (La. 1976). The defendant also pled guilty, not under Crosby, to distribution of cocaine, a violation of La. R.S. 40:967(A)(1), a charge under a different docket number and apparently, in a separate bill of information not made part of the appellate record. For each of the convictions, the defendant was sentenced to ten years of imprisonment at hard labor. Eight years of each sentence was suspended, and the defendant was placed on five years of probation for each sentence. Also, for each sentence, the trial court ordered the defendant to pay a $1,500 fine. The sentences were ordered to run concurrently. The defendant now appeals his possession with intent to distribute cocaine conviction, designating one assignment of error. We vacate the conviction and sentence and remand to the trial court.

FACTS

The following facts are developed from the testimony of two police officers at the defendant's motion to suppress hearing. According to the testimony of Sergeant Michael Neal, with the Louisiana State Police narcotics division, on July 12, 2011, he and fellow officers made a sweep of individuals in the Washington Parish area who had outstanding warrants. The defendant had an arrest warrant for distribution of cocaine. Four or five officers, including Sergeant Neal, went to the defendant's home to serve the arrest warrant. The defendant, in his early fifties,

drove up alone in a black vehicle. When he got out of the vehicle, the officers approached him and informed him of the arrest warrant. Sergeant Neal placed himself between the defendant and the black vehicle, arrested the defendant, and handcuffed him. According to Sergeant Neal, he got between the defendant and the vehicle, because the defendant had made a motion as if he were trying to get back into the vehicle. Sergeant Neal testified that after the defendant was arrested, Senior State Trooper Ron Whitaker, Jr. searched the black vehicle.

Trooper Whitaker testified at the motion to suppress hearing that he assisted Sergeant Neal in serving the arrest warrant on the defendant. According to Trooper Whitaker, there were four or five officers who went to the defendant's house. Trooper Whitaker stated that when Sergeant Neal approached the defendant and spoke to him, the defendant's body language suggested he was trying to get back into the vehicle. Sergeant Neal walked between the defendant and the vehicle. According to Trooper Whitaker, as Sergeant Neal began placing the defendant under arrest, the trooper began searching the black vehicle. When asked by the prosecutor if he searched the vehicle before, during, or after the defendant was handcuffed, Trooper Whitaker responded, "It was all simultaneous." Trooper Whitaker searched the front passenger seat, center console, glove compartment, and under the front seat. Inside the center console, he found a steak knife and a clear plastic bag with a white substance. Trooper Whitaker stated it was obvious the substance was cocaine. He seized the plastic bag, which contained 13.81 grams of cocaine.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues the trial court erred in denying the motion to suppress the evidence seized from the vehicle. Specifically, the defendant contends that the warrantless search of the vehicle was not

conducted pursuant to any of the well-recognized exceptions to the warrant requirement, and was therefore illegal. The defendant notes specifically that it was not a valid search incident to arrest, because he was already removed from the vehicle and handcuffed at the time of the search.

Trial courts are vested with great discretion when ruling on a motion to suppress. State v. Long, 03-2592, p. 5 (La. 9/9/04), 884 So.2d 1176, 1179, cert. denied, 544 U.S. 977, 125 S.Ct. 1860, 161 L.Ed.2d 728 (2005). 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.

The defendant contends that any search of the vehicle incident to arrest was illegal under Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). The defendant also contends the drugs could not have been seized pursuant to a valid inventory search.

The Fourth Amendment to the United States Constitution and Article I, § 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. State v. Young, 06-0234, p. 5-6 (La. App. 1st Cir. 9/15/06), 943 So.2d 1118, 1122, writ denied, 06-2488 (La. 5/4/07), 956 So.2d 606. see La. C. Cr. P. art.

703(D).

Probable cause to believe contraband is present is necessary to justify a warrantless search. See State v. Warren, 05-2248, p. 10 (La. 2/22/07), 949 So.2d 1215, 1224. Mere probable cause does not provide the exigent circumstances necessary to justify a search without a warrant. Probable cause is defined as reasonable grounds for belief, supported by less than prima facie proof, but more than mere suspicion. This determination must be made from the totality of the circumstances, based on the objective facts known to the officer at the time. In determining whether sufficient exigent circumstances exist to justify the warrantless entry and search or seizure, the court must consider the totality of the circumstances and the inherent necessities of the situation at the time. Further, the scope of the intrusion must be circumscribed by the exigencies that justified the warrantless search. See Warren, 05-2248 at p. 10, 949 So.2d at 1224. Exigent circumstances may arise from the need to prevent the offender's escape, minimize the possibility of a violent confrontation that could cause injury to the officers and the public, and preserve evidence from destruction or concealment. State v. Brisban, 00-3437, p. 5 (La. 2/26/02), 809 So.2d 923, 927-28.

Under the automobile exception to the warrant requirement, a police officer may search a vehicle based on probable cause alone. The United States Supreme Court in Maryland v. Dyson, 527 U.S. 465, 466-67, 119 S.Ct. 2013, 2014, 144 L.Ed.2d 442 (1999) (per curiam), held that under the "automobile" exception, there is no separate exigency requirement. Further, if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle. United States v. Ross, 456 U.S. 798, 825, 102 S.Ct. 2157, 2173, 72 L.Ed.2d 572 (1982).

In Gant, 556 U.S. at 351, 129 S.Ct. at 1723, the United States Supreme Court held that the police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense related to the arrest. We note initially there would have been no reasonable belief that the vehicle contained evidence of the offense related to the arrest. While the defendant was being arrested on an outstanding warrant for distribution of cocaine, the warrant being served was dated November 15, 2010, and the defendant was arrested for the instant offense about eight months later on July 12, 2011. Sergeant Neal's understanding was that the arrest warrant was based on the defendant's having sold cocaine to an undercover informant. There was no information provided on how or where the drug deal occurred, i.e., in a vehicle, on foot, or in a house. Moreover, the police had no information on who owned the vehicle the defendant was driving when he was arrested. Trooper Whitaker, in fact, testified he thought it was the defendant's wife's vehicle. In any event, given the amount of time between the defendant's drug sale with an informant and his arrest for that offense, the police would have had no probable cause to believe the vehicle the defendant was driving contained evidence of that nearly eight-month-old offense. Had a search warrant for the vehicle been issued at the same time as the arrest warrant, it would have been well beyond stale. See La. C. Cr. P. art. 163(C) (a search warrant cannot be lawfully executed after the expiration of the tenth day after its issuance).

The closer issue is whether the search of the vehicle incident to the defendant's arrest was valid, given the defendant's restraint at the time of the search. New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), held that police may search the passenger compartment of a vehicle and

any containers therein as a contemporaneous incident of a recent occupant's lawful arrest. In reverting to a more narrow reading of Belton, the Gant court found the search of the vehicle was illegal, since Gant, handcuffed and locked in the back seat of a police unit, could not have accessed his vehicle at the time of the search. Gant, 556 U.S. at 346-51, 129 S.Ct. at 1721-24. In the instant case, while the defendant had not yet been placed in a police unit at the time of the vehicle search, he was, at the time of the search, the sole occupant of the vehicle, handcuffed and standing some distance from the vehicle, and hemmed in by up to five police officers. Under these facts, the defendant was clearly not within reaching distance of the passenger compartment at the time of the search. Accordingly, we find that, under Gant, Trooper Whitaker conducted an illegal search of the vehicle.

Sergeant Neal testified at the motion to suppress hearing that he was not in a marked police unit, but the police at the scene were wearing clothes identifying them as police officers. When the defendant drove up, he exited the vehicle and approached the officers, leaving his driver's door open. The police informed the defendant who they were and why they were there. According to Sergeant Neal, the defendant appeared to move back toward the direction of the vehicle. Not wanting the defendant to get back into the vehicle, Sergeant Neal placed himself between the defendant and the open driver's door. Sergeant Neal then arrested the defendant and handcuffed him (with his hands behind him). Sergeant Neal stated the defendant did not resist his arrest in any way.

As Sergeant Neal stayed with the handcuffed defendant, along with about three other officers nearby, Trooper Whitaker walked from the passenger side of the vehicle to the driver's side. He passed behind Sergeant Neal and began searching inside the vehicle. According to Trooper Whitaker, he searched the vehicle "to make a sweep to make sure there was no weapons, contraband,

anything that could hurt any of us on the scene." Thus, at the time of the search, at least two officers were between the defendant and the vehicle. Moreover, despite Trooper Whitaker's statement regarding the simultaneity of the defendant's arrest and the trooper's search of the vehicle, Sergeant Neal's testimony made it clear that Trooper Whitaker had only begun walking around the defendant's vehicle after the defendant had already been arrested and handcuffed.

Based on the foregoing, we find that Trooper Whitaker's search of the vehicle cannot be justified as a valid search incident to arrest. While the defendant was not locked in the back of a police unit like Gant at the time of the vehicle search, the scene was nevertheless secure. The defendant had been moved away from his vehicle and handcuffed. Up to three or four officers remained around or near the vehicle and the defendant, while another officer searched inside of the vehicle. Under these circumstances, the defendant could not have accessed the vehicle to retrieve weapons or evidence at the time of the search. See Gant, 556 U.S. at 335, 129 S.Ct. at 1714.

Finally, we note that the search of the vehicle was not proper pursuant to a valid inventory search. The vehicle was not impounded and, according to Trooper Whitaker, the vehicle was locked and secured on the defendant's property. See State v. Brumfield, 560 So.2d 534 (La. App. 1st Cir.), writ denied, 565 So.2d 942 (La. 1990).

The trial court erred in denying the motion to suppress. Accordingly, the judgment of the trial court on the motion to suppress the evidence is reversed. For the possession with intent to distribute cocaine conviction, the defendant's conviction and sentence are vacated, and the matter is remanded to the trial court for further proceedings.

TRIAL COURT JUDGMENT DENYING MOTION TO SUPPRESS REVERSED. CONVICTION AND SENTENCE FOR POSSESSION WITH INTENT TO DISTRIBUTE COCAINE VACATED AND REMANDED TO TRIAL COURT.