NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

2013 KA 0603

STATE OF LOUISIANA

VERSUS

CLAYTON WILSON

Judgment Rendered: NOV 0 1 2013

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On Appeal from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. 05-11-0499, Section 2, Division G

The Honorable Richard D. Anderson, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

DRAKE, J.

The defendant, Clayton Wilson, was charged by bill of information with possession of cocaine, a violation of Louisiana Revised Statutes 40:967(C). The defendant pled not guilty and, following a jury trial, was found guilty as charged. The defendant filed motions for new trial and post-verdict judgment of acquittal, which were denied. The defendant was sentenced to five years imprisonment at hard labor. The defendant now appeals, designating one assignment of error. We affirm the conviction and sentence.

FACTS

On January 29, 2011, at about 5:30 p.m.,[1] Sergeant Joel Pattison and Captain Noel Joseph Salomoni, both with the Baton Rouge Police Department, were running radar on Perkins Road. In the 45 miles-per-hour zone, a truck sped past the officers at 61 miles-per-hour, followed by a car speeding past at 55 miles-per-hour. Captain Salomoni pursued the truck while Sergeant Pattison pursued the car. Captain Salomoni turned on the lights and siren on his marked unit and followed the truck, but the driver of the truck refused to stop. Finally, to effect a stop, Captain Salomoni cut across the front of the truck and blocked the road. He motioned for the driver of the truck, a female, to pull the truck over into a parking lot. The defendant, who was the passenger, jumped from the truck and ran. Captain Salomoni told the defendant to stop, but he kept running. Captain Salomoni handcuffed the female driver, placed her in the front seat of his unit, and drove after the defendant. Following fifteen feet behind the running defendant and waiting for him to become tired, Captain Salomoni observed the defendant retrieve something from the side of his body, then toss it away behind him. Captain Salomoni saw that the defendant had thrown a small red and white pill bottle. Captain Salomoni continued to follow the defendant and, as the defendant began to

[1] Sergeant Pattison testified that the incident took place around 6:00 or 6:30 p.m.

slow down, Captain Salomoni sped up, then stopped, jumped from his unit, and apprehended the defendant. Shortly thereafter, Sergeant Pattison arrived and handcuffed the defendant. Captain Salomoni went back to the spot where he saw the pill bottle thrown and retrieved it. He opened the bottle, which contained .82 grams of crack cocaine.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues the trial court erred in denying his motions for new trial and post-verdict judgment of acquittal. Specifically, the defendant contends that he was arrested without probable cause. As such, the drugs were illegally seized.

At the motion to suppress hearing, defense counsel failed to inform the State and the trial court about what specific items of evidence he was seeking to suppress and the grounds for such suppression. Accordingly, the trial court denied the motion to suppress for lack of specificity. The trial court further noted that the motion was untimely.[2] Therefore, there is no ruling on the motion to suppress. When tangible objects are sought to be excluded from evidence on the basis of an unconstitutional search or seizure, a defendant must timely file a motion to suppress such evidence. Otherwise, he is deemed to have waived any objection to its admission based on an infirmity in the search and seizure. Since no motion to suppress was timely filed in the instant case, the defendant cannot now complain on appeal that the object was seized pursuant to an unconstitutional search. *See* La. C.Cr.P. art. 703; *State v. Quimby*, 419 So. 2d 951, 959 (La. 1982); *State v. Johnson*, 333 So. 2d 286, 289 (La. App. 1st Cir. 1976).

In any case, we briefly address the merits of the defendant's argument. The Fourth Amendment of the United States Constitution and Article I, Section 5 of the

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[2] In a writ application, the defendant sought review of the trial court's ruling. In an unpublished action, the writ was denied. *State v. Wilson*, 2012-0607 (La. App. 1 Cir. 4/27/12).

Louisiana Constitution protect persons from unreasonable searches and seizures. The police may not make a warrantless arrest of a citizen without probable cause that the citizen has engaged in criminal conduct. In order to discourage police misconduct, evidence recovered as a result of an unconstitutional search or seizure is inadmissible. Consequently, property abandoned by an individual and recovered by the police as a direct result of an unconstitutional seizure may not be used in a subsequent prosecution. If, however, property is abandoned prior to any unlawful intrusion into a citizen's right to be free from governmental interference, then the property may be lawfully seized and used in a resulting prosecution. In this latter situation, the citizen has no reasonable expectation of privacy and there is no violation of his custodial rights. *State v. Dobard*, 2001-2629 (La. 6/21/02), 824 So. 2d 1127, 1129-30.

In *State v. Fisher*, 97-1133 (La. 9/9/98), 720 So. 2d 1179, 1182-83, our supreme court recognized a useful three-tiered analysis of interactions between citizens and the police from *United States v. Watson*, 953 F.2d 895, 897 n.1 (5th Cir.), *cert. denied*, 504 U.S. 928, 112 S.Ct. 1989, 118 L.Ed.2d 586 (1992). In the first tier, there is no seizure or Fourth Amendment concern during mere communication between police officers and citizens where there is no coercion or detention. The second tier consists of brief seizures of a person, under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), if the officer has an objectively reasonable suspicion, supported by specific and articulable facts, that the person is, or is about to be, engaged in criminal activity. *See State v. Belton*, 441 So.2d 1195, 1198 (La. 1983), *cert. denied*, 466 U.S. 953, 104 S.Ct. 2158, 80 L.Ed.2d 543 (1984). The third tier is custodial arrest where an officer needs probable cause to believe that the person has committed a crime. *See State v. Hamilton*, 2009-2205 (La. 5/11/10), 36 So. 3d 209, 212.

Within the first tier, officers have the right to engage anyone in conversation, even without reasonable grounds to believe that they have committed a crime. Further, the police do not need probable cause to arrest or reasonable suspicion to detain an individual each time they approach a citizen. *Hamilton*, 36 So. 3d at 212; *see also Dobard*, 824 So. 2d at 1130. The protections from unwarranted, forcible governmental interference, therefore, are not implicated when an individual encountered by a law enforcement officer remains free to disregard the encounter and walk away. It is only when the citizen is actually stopped without reasonable cause or when a stop without reasonable cause is imminent that the right to be left alone is violated, thereby rendering unlawful any resultant seizure of abandoned property. *State v. Tucker*, 626 So. 2d 707, 710-11, *opinion reinstated on reh'g.*, 626 So. 2d 720 (La. 1993); *see also Belton*, 441 So. 2d at 1199.

The *Tucker* court, in adopting the U.S. Supreme Court's pronouncement in *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991), held that an individual has been "actually stopped," *i.e.*, seized, for purposes of Louisiana Constitution Article I, Section 5, when he submits to a police show of authority or when he is physically contacted by the police. Additionally, the *Tucker* court determined that even when an actual stop has not been effectuated, our constitution still mandates a finding that an individual has been seized if an actual stop is "imminent." An actual stop is imminent "only when the police come upon an individual with such force that, regardless of the individual's attempts to flee or elude the encounter, an actual stop of the individual is *virtually certain*." *Dobard*, 824 So. 2d at 1130 (citing *Tucker*, 626 So. 2d at 712 (emphasis in original)).

In determining whether an "actual stop" of an individual is "imminent," the focus must be on the degree of certainty that the individual will be "actually

stopped" as a result of the police encounter. This degree of certainty may be ascertained by examining the extent of police force employed in attempting the stop. It is only when the police come upon an individual with such force that, regardless of the individual's attempts to flee or elude the encounter, an actual stop of the individual is *virtually certain,* that an "actual stop" of the individual is "imminent." *Tucker*, 626 So. 2d at 712. The *Tucker* court listed the following factors for use in assessing the extent of police force employed and determining whether or not that force was virtually certain to result in an "actual stop" of the individual: (1) the proximity of the police in relation to the defendant at the outset of the encounter; (2) whether the individual has been surrounded by the police; (3) whether the police approached the individual with their weapons drawn; (4) whether the police and/or the individual are on foot or in motorized vehicles during the encounter; (5) the location and characteristics of the area where the encounter takes place; and (6) the number of police officers involved in the encounter. *Tucker*, 626 So. 2d at 712-13; *State v. Collins*, 93-1198 (La. App. 1st Cir. 5/20/94), 637 So. 2d 741, 744.

In the instant matter, despite the defendant's assertion, Captain Salomoni had probable cause to arrest the defendant. The driver of the truck refused to stop, engaging Captain Salomoni in a chase with his lights and siren on. He was only able to effect a stop because he pulled in front of the truck in the middle of the road. The defendant then exited the passenger side of the truck and took off running. Despite Captain Salomoni's order to stop, the defendant continued to run. While Captain Salomoni followed the defendant in his police unit, he observed the defendant toss a pill bottle. Captain Salomoni testified that he had experienced similar situations like this when a person being pursued discarded a pill bottle that contained narcotics. When Captain Salomoni finally caught up to the defendant, he apprehended and arrested him. Thus, having witnessed the defendant flee from

a traffic stop and throw a pill bottle while he was being chased, Captain Salomoni had probable cause to believe a crime had occurred, or at least was reasonably probable under the totality of the known circumstances. *See* La. C.Cr.P. art. 213; *State v. Simms*, 571 So. 2d 145, 149 (La. 1990).

The foregoing discussion of probable cause to arrest notwithstanding, the defendant discarded the drugs prior to being seized by Captain Salomoni. Accordingly, even if Captain Salomoni did not have probable cause to arrest the defendant, the seizure of the pill bottle was still lawful because, as noted, property abandoned prior to even an unlawful intrusion may be lawfully seized and used in a resulting prosecution. *See Dobard*, 824 So. 2d at 1129-30. A review of the *Tucker* factors to determine whether or not force was virtually certain to result in an actual stop clearly indicates that when the defendant threw the pill bottle on the ground while being chased, he was not actually stopped, nor was an actual stop imminent. Captain Salomoni was not so near the defendant when he fled from the truck that he could have simply seized the defendant; instead, he had to chase the defendant in his police unit. The defendant was clearly not surrounded by any police as he was attempting to make his escape, as only one officer was in pursuit of the defendant, and it does not appear from the record that Captain Salomoni drew his weapon. *See Tucker*, 626 So. 2d at 712-13.

Thus, while the defendant was clearly seized and subsequently arrested after throwing the drugs on the ground, at the moment the defendant tossed the drugs on the ground as he was fleeing from Captain Salomoni, no Fourth Amendment stop or seizure had occurred. Under the circumstances of this case, it is clear Captain Salomoni did not come upon the defendant with such force that, regardless of the defendant's attempts to flee or elude the encounter, an actual stop of him was virtually certain at the time he discarded the pill bottle. *See Tucker*, 626 So. 2d at 712; *see also State v. Jackson*, 2000-3083 (La. 3/15/02), 824 So. 2d 1124, 1125-27

(per curiam); *Collins*, 637 So. 2d at 744.

Based on the foregoing, we find the defendant abandoned the cocaine before any actual or imminent actual stop occurred. Captain Salomoni, thus, lawfully seized the drugs. Accordingly, the trial court did not err or abuse its discretion in denying the motion to suppress. *See State v. Hunt*, 2009-1589 (La. 12/1/09), 25 So. 3d 746, 751-52; *see also State v. Green*, 94-0887 (La. 5/22/95), 655 So. 2d 272, 280-81. Further, the trial court did not err in denying the motion for new trial and motion for post-verdict judgment of acquittal. The assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.