NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 KA 0971

STATE OF LOUISIANA

VERSUS

RICHARD A. SAM

On Appeal from the 22nd Judicial District Court
Parish of Washington, Louisiana
Docket No. 12-CR8-119286, Division "G"
Honorable Hillary J. Crain, Judge Pro Tempore Presiding

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BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

Judgment rendered FEB 18 2014

PARRO, J.

The defendant, Richard A. Sam, was charged by bill of information with possession of a firearm by a convicted felon, a violation of LSA-R.S. 14:95.1. The defendant pled not guilty. The defendant filed a motion to suppress the evidence and a statement he allegedly made. A hearing was held on the matter, and the motion to suppress the evidence and statement was denied. The defendant subsequently withdrew his not guilty plea and entered a plea of guilty under **State v. Crosby** to the possession of a firearm by a convicted felon charge, reserving the right to appeal the trial court's ruling on the motion to suppress. See **State v. Crosby**, 338 So.2d 584 (La. 1976). The defendant was sentenced to ten years of imprisonment at hard labor, without benefit of probation, parole, or suspension of sentence, and was also ordered to pay a $1,000 fine. The defendant now appeals, designating one assignment of error. We affirm the conviction and sentence.

FACTS

The testimony of several witnesses at the motion to suppress hearing established the following facts. On September 10, 2012, at about 11:00 p.m., Detective Jason Garbo and Deputy Stephen Galloway, members of the Drug Task Force with the Washington Parish Sheriff's Office, were patrolling on Union Street, a high-crime area in Bogalusa. With Detective Garbo driving and Deputy Galloway a passenger, they observed a white vehicle with only its parking lights on in a parking space at the Sunset Apartments. Detective Garbo made a couple of passes and, when he noticed the vehicle had not moved, he parked his unit about twenty-five feet behind the vehicle. Detective Garbo then activated his emergency lights. The defendant got out of the backseat of the vehicle and began quickly walking away from the officers. Deputy Galloway got out of the unit and asked the defendant to stop. The deputy informed the defendant that he was with the Sheriff's Office and told him to come back and talk to him. The defendant asked, "Who?" Deputy Galloway replied, "You," and told the defendant to come back. The defendant fled on foot. Detective Garbo approached the

two men who remained in the vehicle and spoke to them. He patted down the men, searched the vehicle, and found nothing illegal.

Deputy Galloway chased the defendant through the apartment complex, or about two blocks. Throughout the chase, the deputy told the defendant to stop running, but the defendant ignored him. Around the second block of the complex, the defendant ran between two cars and fell down. As he fell, Deputy Galloway momentarily lost sight of him, but heard a metal-sounding object hit the concrete. The defendant then got back up and continued running. Detective Kendall Temples, with the Washington Parish Sheriff's Office, was nearby when he heard about the chase over his radio. Detective Temples looked out of his driver-side window, saw the defendant running, and began chasing the defendant on foot. Like Deputy Galloway, Detective Temples also witnessed the defendant briefly fall. Deputy Galloway finally caught up to the defendant and subdued him in a nearby wooded area. Detective Temples arrived moments later and handcuffed the defendant. Deputy Galloway and Detective Temples walked back to the area where the defendant had fallen and found and seized a Glock .40 caliber handgun. The defendant informed Detective Temples that the gun was his.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues that the trial court erred in denying his motion to suppress the evidence and the statement. Specifically, the defendant contends that the seizure of the gun and the statement he provided the officer regarding ownership of the gun were the result of an illegal seizure of his person.

When the constitutionality of a warrantless seizure is placed at issue by a motion to suppress, the state bears the burden of proving the admissibility of evidence seized without a warrant. See LSA-C.Cr.P. art. 703(D); **State v. Warren**, 05-2248 (La. 2/22/07), 949 So.2d 1215, 1226. Trial courts are vested with great discretion when ruling on a motion to suppress. **State v. Long**, 03-2592 (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 (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 (La. 12/1/09), 25 So.3d 746, 751.

The Fourth Amendment of the United States Constitution and Article I, § 5 of the Louisiana Constitution protect persons from unreasonable searches and seizures. The police may not, therefore, 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**, 01-2629 (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**, 09-2205 (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 **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 (La. 1993); see **Belton**, 441 So.2d at 1199.

The **Tucker** court, in adopting the United States 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 LSA-Const. art. I, § 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,* or 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.

The defendant argues in his brief that Deputy Galloway did not have probable cause to approach the vehicle that he was in. According to the defendant, Deputy Galloway did not have specific facts to justify a brief seizure, and there was no probable cause to suggest a crime had been committed. Pursuant to the first **Fisher** tier, particularly given the late hour, the high-crime area noted for its drug activity, and the specific purpose of being in that area to ferret out drug use, Deputy Galloway had the right to engage the defendant in conversation, even without reasonable grounds to believe he committed a crime. Moreover, Deputy Galloway did not need probable cause to arrest or reasonable suspicion to detain or approach the defendant. See **Hamilton**, 36 So.3d at 212. When Deputy Galloway made verbal contact with the defendant and asked him to come speak with him, the defendant took off running. No seizure had taken place at this point. However, the defendant's headlong flight past 11:00 p.m. in a high-crime area provided Deputy Galloway with reasonable suspicion for an investigatory detention, which justified his pursuit of the defendant. See **Illinois v. Wardlow**, 528 U.S. 119, 124-25, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000); **State**

v. Morgan, 09-2352 (La. 3/15/11), 59 So.3d 403, 406-07. As he was being chased, but prior to being seized by a police officer, the defendant discarded the handgun he had concealed on his person (or the gun became dislodged from his person when he fell).

Accordingly, despite the defendant's contention, it is of no moment whether or not Deputy Galloway had probable cause to believe the defendant had committed a crime, because the deputy clearly had reasonable suspicion to pursue and stop the defendant. Moreover, the defendant abandoned his property prior to any Fourth Amendment seizure of his person; and since the Fourth Amendment had not attached at the moment he discarded his gun, there was no reasonable expectation of privacy and, thus, no violation of his custodial rights. 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 lost possession of the gun while being chased, he was not actually stopped, nor was an actual stop imminent. Deputy Galloway was not so near the defendant when he fled from the vehicle that he could have simply seized the defendant; instead, the defendant was thirty to forty yards away from Deputy Galloway when he first fled, and the deputy had to engage the defendant in about a two-minute foot chase; the defendant was clearly not surrounded by any police as he was attempting to make his escape; only one officer initially was in pursuit of the defendant, and a second officer, Detective Temples, subsequently joined the chase; and Deputy Galloway never drew his weapon. See **Tucker**, 626 So.2d at 712-13.

Thus, while the defendant was clearly seized and subsequently arrested after dropping the gun on the ground, at the moment the defendant lost the gun as he was fleeing from Deputy Galloway, no Fourth Amendment stop or seizure had occurred. Under the circumstances of this case, it is clear Deputy Galloway 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. See **Tucker**, 626 So.2d at

712; see also **State v. Jackson**, 00-3083 (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 his gun before any actual stop was imminent or an actual stop occurred. Thus, Detective Temples lawfully seized the gun. Accordingly, the trial court did not err or abuse its discretion in denying the motion to suppress the evidence.

Regarding the defendant's statement that the gun was his, the defendant provides little discussion in his brief about the admissibility of the statement. He does note, "Without any showing that [he] participated in any criminal activity either before or during the time that the officers descended on him, the district court should have suppressed the evidence and the statement." The assertion regarding the statement is baseless.

It is well-settled that the ruling in **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), protects an individual's Fifth Amendment privilege during incommunicado interrogation in a police-controlled atmosphere. Before a confession or inculpatory statement made during a custodial interrogation may be introduced into evidence, the state must prove beyond a reasonable doubt that the defendant was first advised of his **Miranda** rights, that he voluntarily and intelligently waived those rights, and that the statement was made freely and voluntarily and not under the influence of fear, duress, intimidation, menaces, threats, inducements, or promises. See LSA-C.Cr.P. art. 703(D); LSA-R.S. 15:451; **State v. Hunt**, 09-1589 (La. 12/1/09), 25 So.3d 746, 754. The trial court must consider the totality of the circumstances in determining whether or not a confession is admissible. **State v. Hernandez**, 432 So.2d 350, 352 (La. App. 1st Cir. 1983). Testimony of the interviewing police officer alone may be sufficient to prove a defendant's statements were freely and voluntarily given. **State v. Maten**, 04-1718 (La. App. 1st Cir. 3/24/05), 899 So.2d 711, 721, writ denied, 05-1570 (La. 1/27/06), 922 So.2d 544.

Detective Temples testified that he **Mirandized** the defendant shortly after

apprehending him. The defendant informed him that he understood his rights. Shortly thereafter (after the gun was found), Detective Temples questioned the defendant about the gun, and the defendant told him that the gun was his and that he was a convicted felon. The defendant indicated he was aware that he was not supposed to be in possession of a firearm, but needed to carry a gun for protection.

The foregoing testimony established that the defendant was given his **Miranda** rights, that he waived those rights, and that the statement, about the gun being his, was freely and voluntarily given. Accordingly, the trial court did not err or abuse its discretion in denying the motion to suppress the statement.

The assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.