NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 KA 1023

STATE OF LOUISIANA

VERSUS

JONATHAN MYDELL BROWN

On Appeal from the 22nd Judicial District Court
Parish of Washington, Louisiana
Docket No. 12-CR8-118803, 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, Jonathan Mydell Brown, was charged by bill of information with possession of a schedule II controlled dangerous substance (cocaine) with intent to distribute, a violation of LSA-R.S. 40:967(A)(1) (count 1), and resisting a police officer with force or violence, a violation of LSA-R.S. 14:108.2 (count 2). He initially entered a plea of not guilty and filed a motion to suppress the evidence, which the district court denied. Following the denial of his motion, he pled guilty to counts 1 and 2 pursuant to a plea agreement with the state, reserving his right to seek review of the court's ruling on his motion to suppress. See **State v. Crosby**, 338 So.2d 584, 588 (La. 1976). Pursuant to the plea agreement, the defendant was billed as a habitual offender on count 1 only and sentenced to fifteen years of imprisonment at hard labor on that count. He was sentenced to three years of imprisonment at hard labor on count 2. The district court ordered that the sentences were to run concurrently. 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 convictions, habitual offender adjudication, and sentences.

FACTS

Because the defendant pled guilty, the facts of the offenses were not fully developed. According to the testimony at the hearing on the motion to suppress, on July 26, 2012, Officer Paul Pajack with the Bogalusa Police Department initiated a traffic stop shortly before midnight on the corner of East Seventh Street and Sullivan Drive in Bogalusa, Louisiana, after observing a vehicle with one headlight out. He activated his emergency lights on his marked police unit, and the vehicle pulled over to the shoulder of the road. The area was not very well-lit, and Officer Pajack described it as one known for high levels of violent crime and drug activity. As he approached the driver's side of the vehicle and the driver rolled the window down, Officer Pajack smelled a strong odor of burnt marijuana. The defendant was the passenger in the vehicle, and neither occupant had identification. According to Officer Pajack, the driver appeared

nervous, but the defendant seemed "a quite bit more agitated." The defendant refused to make eye contact and was moving and looking around much more than the driver. No other officers were reporting to the scene at that point, and the defendant appeared to present a greater threat than the driver, so Officer Pajack walked around to the passenger's side of the vehicle and asked the defendant to step out. The defendant complied and was instructed to turn around and place his hands on the vehicle. As Officer Pajack began to pat down the defendant, the defendant took his right hand off of the top of the vehicle and placed it over the top of his right pants pocket. Officer Pajack told him to place his hands back on the vehicle and continued to pat down the defendant. He felt the area of the pocket that the defendant attempted to cover, and determined that it contained a round, cylindrical item, which he immediately suspected was a pill bottle. He knew that people often store drugs in pill bottles, so he asked the defendant what it was. The defendant told him that it was medication for his dog. With the confirmation that it was a pill bottle, Officer Pajack pulled the bottle up to the top of the defendant's pocket and looked at it. Because most of the label was ripped off, he could see off-white colored squares, which were consistent with crack cocaine, inside the bottle. He dropped the bottle back into the defendant's pocket, proceeded to handcuff one hand of the defendant, and advised him that he was under arrest.

The defendant began to violently resist, jerked away from the vehicle, and attempted to jerk the handcuffs out of Officer Pajack's hands. He jerked Officer Pajack to the ground and ran in a circle in an attempt to jerk the handcuffs out of his hands. Officer Pajack called for backup and told the defendant he would use his Taser, if he did not stop resisting. The defendant finally complied. During the scuffle, the defendant reached into his pocket and tossed the pill bottle. After the defendant was fully handcuffed, backup officers arrived and placed the defendant in a patrol unit. Officer Pajack then walked toward the general direction where the pill bottle was thrown and located it on the ground.

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 pat down was illegal. He argues in the alternative that even if the pat down were legal, the evidence should be suppressed because the search went beyond the permissible scope.

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 (La. 5/22/95), 655 So.2d 272, 280-81. 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**, 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 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. See LSA-C.Cr.P. art. 703(D); **State v. Johnson**, 98-0264 (La. App. 1st Cir. 12/28/98), 728 So.2d 885, 886.

The defendant does not contest that Officer Pajack made a legitimate traffic stop. See **Whren v. United States**, 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, 110-11, 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, 327, 129 S.Ct. 781, 784, 172 L.Ed.2d 694 (2009). In determining the lawfulness of an officer's pat down 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 Officer Pajack did not have a sufficient basis to conduct a pat down. Officer Pajack testified that he smelled the odor of burnt marijuana when the driver of the vehicle rolled the window down. As he spoke with the driver and the defendant, the defendant appeared agitated, avoided eye contact, and moved around much more than the driver. Given these observations, the nature of the area, the lateness of the hour, and the fact that Officer Pajack was the only officer at the scene, we find that there were reasonable circumstances to justify a protective pat down for weapons.

Having found that Officer Pajack was reasonable in patting down the defendant, we must now determine whether his actions in removing the object from the defendant's pocket were lawful. Evidence discovered during a lawful investigatory pat down may be seized under the "plain feel" exception to the warrant requirement. The "plain view" doctrine, which permits police to seize an object without a warrant if they are lawfully in a position to view it, if its incriminating character is immediately apparent, and if they have a lawful right of access to it, has an obvious application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search. Thus, if an officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that

already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context. **Minnesota v. Dickerson**, 508 U.S. 366, 375-76, 113 S.Ct. 2130, 2136-37, 124 L.Ed.2d 334 (1993).

The defendant disobeyed police orders by removing his hand from the vehicle and reaching for his pants pocket. When Officer Pajack patted the defendant's pants pocket, he felt a round cylindrical item, which he suspected was a pill bottle. Such bottles often contain razor blades, which can be used as weapons, as well as illegal contraband. See **State v. Marshall**, 46,457 (La. App. 2nd Cir. 8/10/11), 70 So.3d 1106, 1111-12. The defendant told him that it was medication for his dog. With confirmation that it was, in fact, a pill bottle of some sort, the officer pulled the bottle up to the top of the pocket and looked at it. Officer Pajack was justified in his reasonable suspicion that the defendant was armed with a weapon, and it was reasonable for him to confirm whether the bottle did or did not contain any weapons by pulling it up and looking into it. Because most of the label was ripped off, he could see off-white colored squares that appeared consistent with crack cocaine. Officer Pajack did not open or otherwise manipulate the pill bottle in order to ascertain that it contained contraband. Upon removal, it was immediately apparent that the bottle contained crack cocaine. Therefore, pursuant to the plain view doctrine, Officer Pajack's seizure of the crack cocaine was lawful.

Moreover, Officer Pajack testified that he smelled the odor of burnt marijuana when the driver rolled the vehicle's window down. This fact, when combined with the other facts enumerated above, gave Officer Pajack probable cause to remove the pill bottle from the defendant's pocket. See **State v. Traylor**, 31,378 (La. App. 2nd Cir. 12/9/98), 723 So.2d 497, 498-500. In **Traylor**, officers smelled the odor of marijuana coming from a parked car in which Traylor was sitting. Officers directed Traylor to put his hands on the car in order to pat him down, and he repeatedly reached for his leg. While patting down his leg, one of the officers found a Tylenol bottle concealed in his

sock. Suspicious of its contents, the officer opened it and found ten rocks of crack cocaine inside. The Second Circuit found that the odor of marijuana emanating from the vehicle in which the defendant was the passenger allowed the officers to reasonably suspect that Traylor was smoking, and thus possessing, marijuana. **Id.** at 498-99.

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

CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.