NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 KA 0767

STATE OF LOUISIANA

VERSUS

ADRIAN MARKS

Judgment Rendered: DEC 1 0 2014

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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 118486, DIVISION G

HONORABLE SCOTT GARDNER, JUDGE

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BEFORE: PARRO, PETTIGREW AND McDONALD, J.J.

McDONALD, J.

The defendant, Adrian R. Marks, was charged by bill of information with one count of possession with intent to distribute a Schedule II Controlled Dangerous Substance (cocaine) (count I), a violation of La. R.S. 40:967(A)(1); and one count of possession with intent to distribute a Schedule I Controlled Dangerous Substance (marijuana) (count II), a violation of La. R.S. 40:966(A)(1). At his arraignment, he pled not guilty to both counts. The defendant filed a motion to suppress evidence and, following a hearing on the matter, the motion was granted as to any statements made by the defendant following arrest, but was denied as to the physical evidence. On the first day of jury selection, a plea agreement was reached between the defendant and the State. The defendant withdrew his previously entered plea of not guilty, and entered a **Crosby**[1] guilty plea to counts I and II, reserving his right to challenge the trial court's ruling on the motion to suppress. After a **Boykin**[2] examination, the trial court accepted the defendant's guilty plea.

Before sentences were imposed on counts I and II, the State filed a habitual offender bill of information against the defendant alleging that on count I, the defendant was a second-felony habitual offender. The defendant admitted the allegations contained in the bill and was, therefore, adjudged a second-felony habitual offender.[3] On count I, he was sentenced to imprisonment at hard labor for fifteen years, the first two years being without benefit of probation, parole, or suspension of sentence. On count II, he was sentenced to imprisonment at hard labor for fifteen years. The trial court ordered the sentences to run concurrently with each other, but consecutively to any other sentence the defendant was

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[1] **State v. Crosby**, 338 So.2d 584 (La. 1976).
[2] **Boykin v. Alabama**, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).
[3] Predicate #1 was set forth as the defendant's February 8, 2005 guilty plea, under Twenty-Second Judicial District Court Docket No. 03-CR8-89141, to possession of a Schedule II Controlled Dangerous Substance (cocaine).

currently serving. A motion to reconsider sentence was filed, but denied by the trial court. The defendant now appeals, assigning error to the lower court's denial of his motion to suppress. For the following reasons, we affirm the defendant's convictions, habitual offender adjudication, and sentences.

STATEMENT OF FACTS

The facts of this case were not fully developed, because the defendant entered a plea of guilty. Testimony at the hearing on the motion to suppress indicated that on May 23, 2012, at approximately 5:15 p.m., Lieutenant D. Ray Phelps, a narcotics agent with the Bogalusa Police Department, received a call from a confidential informant, who informed Lieutenant Phelps that the defendant was driving a maroon Pontiac, license plate number BKM280, and that he was traveling from Bogalusa towards Franklinton on La. Highway 10. Additionally, Lieutenant Phelps was informed that the defendant was in possession of a coin pouch and that cocaine and marijuana were contained therein. Lieutenant Phelps contacted the Franklinton Police Department, spoke with Officer Chad Dorsett regarding the lead provided by the informant, and the two agreed to meet at a nearby flooring store to wait for the defendant.

Within a few minutes, a vehicle matching the informant's description passed their location. Officer Dorsett, believing the vehicle's windows were improperly tinted, initiated a traffic stop.[4] Officer Dorsett approached the defendant's vehicle and asked for his driver's license and registration information. The defendant complied with Officer Dorsett's request for the vehicle information, but indicated that although he had a valid driver's license, he did not have it with him. Officer Dorsett went back to his squad car to confirm the defendant had a driver's license,

[4] Officer Dorsett later testified that the vehicle's tint was within legal parameters, and the citation he issued was "nol [prossed]."

and he also informed Lieutenant Phelps that the passenger (later identified as Ray Lynn Robinson), appeared nervous.

Eventually, the two men were instructed to step out of the vehicle, and Lieutenant Phelps conducted a pat down on the defendant. Lieutenant Phelps grabbed the defendant's shorts, shook them, and an item fell out of the defendant's waistband and onto the roadway. The item was a small, zippered coin pouch, measuring four inches wide by two and one-half to three inches tall, with a metal zipper on the top. Officer Dorsett noticed the defendant step on the pouch once it fell, and called Lieutenant Phelps's attention to it. The defendant then reached down, grabbed the pouch, and put it in his mouth. Though Lieutenant Phelps verbally advised the defendant to stop, a struggle ensued to keep the defendant from swallowing the bag. Officer Dorsett described the defendant as being very aggressive and resistant. Next, the defendant was maced and dry-stunned with a taser, but he continued to forcefully resist. Eventually, once the defendant was subdued, the police officers were able to retrieve the item from the defendant's mouth. Lieutenant Phelps looked inside the pouch and observed twenty bags of powder cocaine and three bags of marijuana. The contents of the pouch were consistent with the information received from the confidential informant, as Lieutenant Phelps was told the defendant was carrying a coin pouch containing cocaine and marijuana. The defendant was read his **Miranda**[5] rights at the scene, and Lieutenant Phelps recalled the defendant saying "he had to try something to try to get away, he was backing up time, probation or either parole."

MOTION TO SUPPRESS

In his sole assignment of error, the defendant contends the trial court erred in denying his motion to suppress. Specifically, he argues that the "arresting officers did not have probable cause to conduct an investigatory stop," and thus the white

[5] **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

pouch should have been classified "as being inadmissible under the fruit of the poisonous tree doctrine." Therefore, the trial court committed reversible error when it denied the motion to suppress. As such, the defendant avers his convictions and sentences should be set aside.

The Fourth Amendment to the United States Constitution and Article 1, Section 5 of the Louisiana Constitution protect persons against unreasonable searches and seizures. A defendant adversely affected may move to suppress any evidence from use at the trial on the merits on the ground that it was unconstitutionally obtained. La. Code Crim. P. art. 703(A); **State v. Jones**, 2001-0908 (La. App. 1st Cir. 11/8/02), 835 So.2d 703, 706, writ denied, 2002-2989 (La. 4/21/03), 841 So.2d 791.

The State bears the burden of proof when a defendant files a motion to suppress evidence obtained without a warrant. See La. Code Crim. P. art. 703(D). A trial court's ruling on a motion to suppress the evidence is entitled to great weight, because the court had the opportunity to observe the witnesses and weigh the credibility of their testimony. **State v. Jones**, 835 So.2d at 706.

A search conducted without a warrant is *per se* unreasonable, subject only to a few specifically established and well-delineated exceptions. **Schneckloth v. Bustamonte**, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973). Pursuant to the investigatory stop recognized by the United States Supreme Court in **Terry v. Ohio**, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), a police officer may briefly seize a person 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 conduct or is wanted for past criminal acts. Louisiana Code of Criminal Procedure article 215.1(A) provides that an officer's reasonable suspicion of a crime allows a limited investigation of a person. However, reasonable suspicion is insufficient to justify custodial interrogation, even though

the interrogation is investigative. **State v. Caples**, 2005-2517 (La. App. 1st Cir. 6/9/06), 938 So.2d 147, 154, writ denied, 2006-2466 (La. 4/27/07), 955 So.2d 684. Reasonable suspicion for an investigatory detention is something less than probable cause and must be determined under the specific facts of each case by whether the officer had sufficient knowledge of facts and circumstances to justify an infringement on the individual's right to be free from governmental interference. **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); **State v. Harris**, 2011-0779 (La. App. 1st Cir. 11/9/11), 79 So.3d 1037, 1041.

As the Louisiana Supreme Court indicated in **State v. Smith**, 2000-1838 (La. 5/25/01), 785 So.2d 815, 816 (per curiam), "[a]n anonymous tip may provide probable cause for an arrest," citing **Illinois v. Gates**, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), or "reasonable suspicion for an investigatory stop," citing **Alabama v. White**, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), "if it accurately predicts future conduct in sufficient detail to support a reasonable belief that the informant had reliable information regarding the suspect's illegal activity." To determine whether the information furnished by a confidential informant provides probable cause for an arrest or search, a court must utilize a "totality of the circumstances analysis" and consider, among other things, the informant's veracity, facts relating to the informant's basis of knowledge, and corroboration of the informant's information. **Gates**, 462 U.S. at 232-33, 103 S.Ct. at 2329-30; **State v. Lumpkin**, 2001-1721 (La. App. 1st Cir. 3/28/02), 813 So.2d 640, 644, writ denied, 2002-1124 (La. 9/26/03), 854 So.2d 342.

The decision to stop an automobile is reasonable if the police have probable cause to believe a traffic violation has occurred. **Whren v. United States**, 517 U.S. 806, 810, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89 (1996). Further, 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 officer need not be absolutely certain that the individual is armed; the issue is "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**, 392 U.S. at 27, 88 S.Ct. at 1883.

The facts of this case are similar to those in **Lumpkin**. In that case, a Bogalusa Police Department officer was informed by a confidential informant that the defendant would be traveling into Bogalusa between 8:30 and 9:00 p.m. with 100-200 "hits of LSD." The informant also indicated that the defendant was a white male and that he would be driving in from the Bush area on Highway 21 in a white Pontiac Grand Am. The police officer set up surveillance and a few minutes later, a white Pontiac Grand Am was observed coming from Bush toward Bogalusa. It was followed and pulled over, with the defendant identified as the driver. After the police searched the vehicle for approximately five minutes, LSD was discovered. **Lumpkin**, 813 So.2d at 642-43.

In **Lumpkin**, the defendant contended the trial court erred in denying his motion to suppress, arguing that the police failed to obtain a search warrant and that the search was not conducted pursuit to an exception to the warrant requirement. This court noted that the confidential informant correctly described Lumpkin and predicted his future conduct as follows: (1) a white male, (2) named Brian Lumpkin, (3) driving a white Pontiac Grand Am, (4) coming from Bush, La.,

(5) going to Bogalusa, La., (6) traveling on La. Hwy. 21, (7) on July 19, 1999, (8) at about 8:30-9:00 p.m. -- actually 10:00 p.m. This court concluded that "[u]nder the totality of the circumstances, the information given by the CI, as corroborated, justified an investigative stop. When the officers confirmed the identity of Lumpkin,... they had probable cause to arrest him and search the vehicle." **Lumpkin**, 813 So.2d at 649 (citations omitted).

The court in **Lumpkin** clearly stated the same issue as in the instant case: "The question in this case is whether *the future conduct* of Lumpkin predicted by the CI was *in sufficient detail* that, when verified, the police officers had probable cause to believe that illegal activity was taking place and that Lumpkin should be arrested and/or his vehicle searched." **Lumpkin**, 813 So.2d at 649. Here, as in **Lumpkin**, the confidential informant correctly described the defendant's future conduct. The informant indicated to Lieutenant Phelps that the defendant would be driving a maroon Pontiac, gave an exact license plate number, and reported that the defendant would be traveling along Highway 10 from Bogalusa towards Franklinton on May 23, 2012. Further, the informant told Lieutenant Phelps that the defendant was carrying a coin pouch, which contained both cocaine and marijuana. Because the informant's tip was verified and corroborated, once the police officers confirmed the identity of the defendant, this alone created reasonable suspicion for an investigatory stop. See **Lumpkin**, 813 So.2d at 649. In its reasons for denying the motion in this case, the district court noted:

> Now regarding the stop of the vehicle and the subsequent search which resulted in the initial abandonment of the powder cocaine and marijuana, this Court does find that this was a vehicle search and thus controlled by the line of cases that stems from those specific [warrantless] cases. I likewise find that there was in fact an exigency in that [the] item was dropped and then was in danger of being consumed.
>
> I find that this was a situation where police officers relying upon the reliability of a C.I. had to wait to see whether or not further details of what the C.I. said would become manifest. That in doing

> so, the statements by the C.I., particularly with regard to factors about what would be found, who would have it, the type of vehicle and the point at which the vehicle was likely to arrive, were all corroborated. And in that this Court finds that probable cause existed for the search and therefore I deny the motion to suppress the evidence.

Furthermore, the traffic stop of the vehicle driven by the defendant was supported by probable cause to believe he had violated La. R.S. 32:361.1.[6] See **State v. Wyatt**, 99-2221 (La. App. 4th Cir. 9/27/00), 775 So.2d 481, 483 ("[police officer] was therefore justified in stopping the car to further investigate a possible [window-tinting] infraction"); and **State v. Pena**, 43,321 (La. App. 2nd Cir. 7/30/08), 988 So.2d 841, 847 ("Even if the trooper had later determined that the degree of tint on the windows was acceptable, he was justified in stopping the vehicle to further investigate a possible infraction.")

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 a 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 trial 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 (La. 12/1/09), 25 So.3d 746, 751.

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[6] La. R.S. 32:361.1(B) reads in pertinent part as follows:

> [N]o person may operate a motor vehicle with any object or material placed on or affixed to the front windshield or to front side windows of the vehicle so as to obstruct or reduce the driver's clear view through the front windshield or front side windows, nor place on or affix to the front windshield or the front side windows of a motor vehicle, any transparent material if the material alters the color or reduces the light transmission of the windshield or front side windows.

Furthermore, La. R.S. 32:361.1(C)(1) notes that these provisions do not apply to:

> [a] sun screening device when used in conjunction with automotive safety glazing materials on the front side window, with a light transmission of at least forty percent, all tolerances included, side window behind the driver with a light transmission of at least twenty-five percent, all tolerances included, and rearmost windows with a light transmission of at least twelve percent, all tolerances included. All sun screening devices shall not have a luminous reflectance of more than twenty percent.

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.