NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2015 KA 0044

STATE OF LOUISIANA

VERSUS

CHARMAINE NIXON

Judgment rendered JUN 05 2015

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Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 07-11-0752
Honorable Anthony Marabella, Jr., Judge

* * * * * *

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* * * * * *

BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

PETTIGREW, J.

Defendant, Charmaine Nixon, was charged by bill of information with possession with intent to distribute a schedule I controlled dangerous substance (marijuana), a violation of La. R.S. 40:966(A)(1). He pled not guilty and filed a motion to suppress, which the trial court denied. Following a jury trial, defendant was found guilty as charged. The trial court denied defendant's motions for new trial and postverdict judgment of acquittal. The State subsequently filed a habitual offender bill of information, alleging defendant to be a second-felony habitual offender.[1] Defendant stipulated that he was a second-felony habitual offender. The trial court accepted this stipulation and sentenced defendant to imprisonment at hard labor for fifteen years, without the benefit of probation or suspension of sentence.[2] Defendant now appeals, alleging a single assignment of error relating to the trial court's denial of his motion to suppress. For the following reasons, we affirm defendant's conviction, habitual offender adjudication, and sentence. We remand solely for the trial court to correct the minute entry from defendant's sentencing.

FACTS

On the afternoon of May 16, 2011, Baton Rouge Police Department Lieutenant Randall Wiedeman and Officer Jonathan Medine were on patrol in the area of Thomas H. Delpit Drive and Cotton Street. Lieutenant Wiedeman observed that the driver (identified at trial as defendant) of a vehicle was not wearing his seat belt. Lieutenant Wiedeman activated his emergency lights and sirens, effecting a traffic stop of defendant in the parking lot of the McKinley High School Alumni Center.

[1] The habitual offender bill alleged that defendant had a February 28, 2001 predicate conviction for possession of marijuana with intent to distribute, under 19th JDC docket number 06-00-0164.

[2] The minute entry from defendant's sentencing reflects that defendant's sentence was also imposed without the benefit of parole. However, the trial court never imposed this restriction, and it is not authorized either by the underlying sentencing statute or by the applicable enhancement provision. Where there is a discrepancy between the minutes and the transcript, the transcript must prevail. See **State v. Lynch**, 441 So.2d 732, 734 (La. 1983).

Lieutenant Wiedeman approached the driver's side of the vehicle and made contact with defendant through the window. Immediately, Lieutenant Wiedeman detected what he described as an odor of high-grade marijuana. Lieutenant Wiedeman informed defendant that he was being stopped for a seat belt violation. At that time, defendant informed him that the car was a rental vehicle, but that he was not on the rental agreement. Defendant complied with Lieutenant Wiedeman's instruction to exit the vehicle. Lieutenant Wiedeman escorted defendant to his patrol vehicle, where he informed defendant of his **Miranda**[3] rights. In an ensuing pat down, Lieutenant Wiedeman felt what appeared to have been a large wad of cash in defendant's front pocket. During this time, Officer Medine removed two other occupants from the stopped vehicle, patted them down, and placed them into his patrol unit.

Lieutenant Wiedeman then informed defendant that he was going to search the vehicle, explaining that the strong odor of marijuana gave him probable cause. Defendant stated that he had no objection to a search. Upon opening the driver's side door, Lieutenant Wiedeman found fourteen bags of what appeared to be marijuana on the floorboard, at the base of the driver's seat. This evidence later tested positive as marijuana. Lieutenant Wiedeman also recovered $978.00 in cash from the center console of the vehicle, as well as $3000.00 in cash from defendant's front pocket. The officers also found the rental agreement, which did not list defendant's name as an authorized driver of the vehicle.

During a subsequent on-scene conversation, defendant stated that he wanted to cooperate and help himself, by providing information and setting up transactions with other drug traffickers in the Baton Rouge area. Defendant was arrested for his seat belt violation, as well as possession of marijuana with intent to distribute, but he was released the same day in order to operate as a confidential informant. The two other men were released, and the vehicle was released to a female with an apparent

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

connection to defendant. Defendant was rearrested about a week later, after he failed to provide any actionable information about further drug activity.

MOTION TO SUPPRESS

In his sole assignment of error, defendant argues that the trial court erred in denying his motion to suppress. Specifically, he contends that Lieutenant Wiedeman had no justification for conducting the traffic stop and that there was no strong odor of marijuana in the vehicle.

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). 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**, 2001-0908, p. 4 (La. App. 1 Cir. 11/8/02), 835 So.2d 703, 706, writ denied, 2002-2989 (La. 4/21/03), 841 So.2d 791. Reviewing courts should defer to the credibility findings of the trial court unless its findings are not adequately supported by reliable evidence. See **State v. Green**, 94-0887, p. 11 (La. 5/22/95), 655 So.2d 272, 281. However, a trial court's legal findings are subject to a *de novo* standard of review. See **State v. Hunt**, 2009-1589, p. 6 (La. 12/1/09), 25 So.3d 746, 751.

At the suppression hearing and at trial,[4] Lieutenant Wiedeman testified that he stopped the vehicle defendant was driving after observing that he was not wearing a seat belt. Upon walking up to the window of the vehicle, Lieutenant Wiedeman detected a strong odor of what his experience made him believe was high-grade marijuana. Lieutenant Wiedeman testified that he informed defendant that he would be searching the vehicle as a result of this strong odor, and defendant stated that he had

[4] In determining whether the ruling on defendant's motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may consider all pertinent evidence given at the trial of the case. **State v. Chopin**, 372 So.2d 1222, 1223 n.2 (La. 1979).

no problem with the officers searching the vehicle. This conversation took place after Lieutenant Wiedeman had informed defendant of his **Miranda** rights. During the ensuing search, Lieutenant Wiedeman found the marijuana he ultimately seized. In addition to the marijuana, the officers found the rental agreement for the vehicle, which did not list defendant or the other two occupants as authorized users of the vehicle.

Randall Johnson, defendant's cousin and one of the other occupants of the vehicle, testified at the suppression hearing and at trial. In contrast to Lieutenant Wiedeman's testimony, Johnson testified that defendant was wearing his seat belt at the time of the stop. He stated that Lieutenant Wiedeman pulled defendant from the vehicle, rather than defendant voluntarily exiting the vehicle.

Taiesha Holmes, defendant's girlfriend who rented the vehicle, testified only at trial. She stated that on the day of the incident, defendant had dropped her off at work using the rental vehicle. He also later picked her up from work, presumably after he had been released by the police and had retrieved the vehicle from whomever had taken possession of it following his arrest. Holmes admitted that defendant was not listed on the vehicle's rental agreement.

Following the suppression hearing, the trial court issued written reasons for denying defendant's motion to suppress. The court cited **State v. Jackson**, 2009-1983 (La. 7/6/10), 42 So.3d 368 (per curiam), finding that defendant had no standing to raise any alleged illegality of Lieutenant Wiedeman's search of the vehicle because he had no reasonable expectation of privacy as the unauthorized user of a rental vehicle. In addition to this line of reasoning, the trial court also found Lieutenant Wiedeman's testimony to be credible with respect to the seat belt violation, giving justification to the initial stop. However, in its written reasons, the trial court did not make a finding regarding Officer Wiedeman's testimony regarding the smell of marijuana or defendant's purported consent to the search of his vehicle.

In **Jackson**, the defendant was a passenger in a rental vehicle that was pulled over for what was described as a routine traffic stop. The driver of the vehicle was arrested for several traffic violations and unauthorized use of a movable (because

neither he nor his passengers were listed as renters or authorized users on the rental agreement). Jackson was arrested for possession of marijuana after one of the police officers found, pursuant to a protective sweep, a false-bottomed can of bug spray containing thirteen bags of marijuana. **Jackson**, 2009-1983 at 1-2, 42 So.3d at 369-370.

Jackson did not challenge the initial stop of the vehicle, nor did he challenge the officers' direction for the occupants to step away from the vehicle. Instead, citing **Arizona v. Gant**, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), Jackson argued that because all three occupants of the vehicle had been removed a distance away from it, the officer's warrantless entry exceeded the scope of a search incidental to a lawful arrest of the driver for a traffic violation and was otherwise unsupported by any reasonable belief that the vehicle contained evidence of a crime. **Jackson**, 2009-1983 at 3, 42 So.3d at 370.

In reviewing the fourth circuit's decision overturning the trial court's denial of the motion to suppress, the Supreme Court in **Jackson** recognized Louisiana's standing provision, which is more expansive than that provided for under the U.S. Constitution. See La. Const. art. I, § 5. The court found that the officer's entry into the vehicle used in violation of the contract between the rental company and the renter did not violate any privacy rights of the rental company as the owner of the vehicle. Further, the court found that there was no evidence adduced at the suppression hearing as to the identity of the person who rented the vehicle or how the driver came to possess it out of the renter's presence, *i.e.*, whether he did so with or without the renter's permission. In the latter case, where the driver had no permission, the court noted that the driver would have no more of an expectation of privacy in the rental vehicle than he would in a stolen vehicle, thereby extinguishing the defendant's derivative right under La. Const. art. I, § 5. In the former case, where the driver may have had permission, the court cited substantial authority for the proposition that such a driver has no reasonable expectation of privacy. However, the court also noted that some cases have found

permissive drivers to have some reasonable expectation of privacy. **Jackson**, 2009-1983 at 6-8, 42 So.3d at 372-373.

Ultimately, the court looked to the facts presented at the suppression hearing and determined that Jackson had made no showing that the driver had permission of the actual renter to use the vehicle out of the renter's presence. Therefore, neither the driver nor Jackson had any reasonable expectation of privacy in the vehicle. **Jackson**, 2009-1983 at 9-10, 42 So.3d at 373-374.

As the trial court noted in its written reasons, the facts presented in the instant case are very similar to those in **Jackson**. As in **Jackson**, defendant was not listed on the rental agreement as the renter or an authorized user. Further, defendant failed to present any evidence at the suppression hearing that he had received permission from the renter to use the vehicle. Therefore, under the facts presented at the suppression hearing, the trial court did not err or abuse its discretion in relying upon **Jackson** to find that defendant did not have standing to challenge the officers' search of the rental vehicle.

Despite the above conclusion, we note that at trial, Taiesha Holmes testified that she rented the vehicle. Although Holmes did not explicitly state that she gave defendant permission to use the rental vehicle, her testimony seems to imply that she authorized defendant to do so. Most notably, she allowed defendant to use the vehicle after he dropped her off at work. Therefore, we further assess whether the stop and search were lawful under the assumption that defendant had a reasonable expectation of privacy in the rental vehicle.

In determining whether the rental vehicle was lawfully stopped and searched, we first note the trial court's finding that Lieutenant Wiedeman's testimony was credible as it regarded defendant's seat belt violation. Although this testimony clearly conflicted with that given by Randall Johnson, the trial court's finding is based upon its credibility determination regarding the witnesses. Nothing in the record indicates that this credibility determination is manifestly erroneous. Therefore, when he observed that defendant was not wearing a seat belt, Lieutenant Wiedeman was within his rights to

lawfully stop defendant's vehicle and to detain the occupants. 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."); see also La. Code Crim. P. art. 215.1(A).

Having determined that Lieutenant Wiedeman was justified in performing the initial stop of the rental vehicle, we must next determine whether his subsequent warrantless search of that vehicle was also lawful. An exception to the warrant requirement exists when there is probable cause to search an automobile. The warrantless search of an automobile is not unreasonable if there is probable cause to justify the search, without proving additional exigency, when the automobile is readily mobile because there is an inherent risk of losing evidence. See **Maryland v. Dyson**, 527 U.S. 465, 466-467, 119 S.Ct. 2013, 2014, 144 L.Ed.2d 442 (1999) (per curiam). The determination of probable cause for arrest does not rest on the officer's subjective beliefs or attitudes, but turns on a completely objective evaluation of *all* the circumstances known to the officer at the time of the challenged action. **State v. Landry**, 98-0188, p. 2 (La. 1/20/99), 729 So.2d 1019, 1020 (per curiam). In considering those circumstances, a reviewing court should give deference to the inferences and deductions of a trained police officer that might well elude an untrained person. **State v. Huntley**, 97-0965, p. 3 (La. 3/13/98), 708 So.2d 1048, 1049 (per curiam) (quoting **United States v. Cortez**, 449 U.S. 411, 418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981)). If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits the police to search the vehicle without more. **Pennsylvania v. Labron**, 518 U.S. 938, 940, 116 S.Ct. 2485, 2487, 135 L.Ed.2d 1031 (1996) (per curiam).

At the suppression hearing and at trial, Lieutenant Wiedeman testified that he smelled a strong odor of high-grade marijuana as soon as he approached defendant's window. He described that he had one-and-a-half years of experience as a plainclothes narcotics agent. Lieutenant Wiedeman has had extensive narcotics training, and he estimated that he had made thousands of marijuana arrests.

We conclude that Lieutenant Wiedeman's observation of a strong, distinct odor of marijuana, when evaluated in light of his extensive training and experience, gave rise to probable cause to search the rental vehicle's interior for contraband. We further note that Lieutenant Wiedeman informed defendant prior to the search of his intent to search the vehicle. At that time, defendant stated that he had no problem with a search of the vehicle. Therefore, although Lieutenant Wiedeman already had probable cause to search the vehicle, defendant's statement might also be viewed as granting consent to search. A consent search is also a recognized exception to the warrant requirement. See **State v. Thompson**, 2011-0915, p. 30 (La. 5/8/12), 93 So.3d 553, 574; **State v. Musacchia**, 536 So.2d 608, 610-611 (La. App. 1 Cir. 1988).

Having evaluated the record as a whole, we find that the trial court did not err or abuse its discretion in denying defendant's motion to suppress. Defendant failed to present any evidence at the suppression hearing that he had his own, or a derivative, reasonable expectation of privacy in the rental vehicle. Even assuming arguendo that defendant had a reasonable expectation of privacy in the rental vehicle, the State demonstrated that Lieutenant Wiedeman's decisions to stop and search the vehicle were lawful and supported by the facts of the incident. Therefore, the trial court properly denied defendant's motion to suppress.

For the foregoing reasons, defendant's conviction, habitual offender adjudication, and sentence are affirmed. Having noted a mistake in the minute entry from defendant's sentencing, we remand only for the trial court to correct that minute entry. See Footnote 2 herein.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED; REMANDED FOR CORRECTION OF SENTENCING MINUTES.