NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2015 KA 0570

STATE OF LOUISIANA

VERSUS

CHAUNCEY DWAYNE KELLY

Judgment rendered November 9, 2015.

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Appealed from the
18th Judicial District Court
in and for the Parish of Pointe Coupee, Louisiana
Trial Court No. 79333-F
Honorable James J. Best, Judge

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BEFORE: PETTIGREW, HIGGINBOTHAM, AND CRAIN, JJ.

PETTIGREW, J.

Defendant, Chauncey Dwayne Kelly, was charged by amended bill of information with simple burglary, a violation of La. R.S. 14:62 (count one), and possession of cocaine, a violation of La. R.S. 40:967(C) (count two). Defendant initially pled not guilty on both counts. He filed several motions, including a motion to suppress physical evidence. Following a series of hearings, the trial court denied defendant's motion to suppress. Defendant subsequently withdrew his former pleas of not guilty, and he pled nolo contendere to misdemeanor illegal possession of stolen things, a violation of La. R.S. 14:69(B)(3) (count one), and to possession of cocaine (count two).[1] These pleas were made in accordance with **State v. Crosby**, 338 So.2d 584 (La. 1976), with defendant reserving his right to review the trial court's denial of his motion to suppress. On count one, the trial court sentenced defendant to six months in the parish prison. On count two, the trial court sentenced defendant to five years at hard labor. The trial court ordered these sentences to run concurrently. Defendant filed a pro se motion for reconsideration of sentence, which the trial court denied.

Defendant now appeals, raising a single issue related to the denial of the motion to suppress the physical evidence. For the following reasons, we affirm defendant's conviction and sentence on count two. With respect to the conviction and sentence on count one, the misdemeanor charge is not appealable, and defendant should have applied for a writ of review. See La. Const. art. V, § 10; La. Code Crim. P. arts. 782 & 912.1(C)(1). However, we choose to exercise our supervisory jurisdiction and also affirm his conviction and sentence on count one. See La. Const. art. V, § 10(A).

[1] The state did not amend count one of the bill of information prior to defendant's pleas, and illegal possession of stolen things is not a responsive offense to the charge of simple burglary. See La. Code Crim. P. art. 814(A)(42). Nonetheless, the trial court was not without jurisdiction to accept defendant's knowing and voluntary guilty plea simply because the plea was not responsive to the offense charged in the bill of information and the district attorney did not amend the bill to conform to the plea. See **State v. Jackson**, 2004-2863 (La. 11/29/05), 916 So.2d 1015, 1023.

JURISDICTIONAL ISSUE

At the outset, we note a jurisdictional issue. The appellate jurisdiction of this court in criminal cases extends only to those cases triable by a jury. See La. Const, art. I, § 17; La. Const, art. V, § 10; La. Code Crim. P. art. 782. A misdemeanor is not triable by a jury unless the punishment that may be imposed exceeds six months' imprisonment. See La. Const. art. I, § 17(A); La. Code Crim. P. art. 779.

In the instant case, while defendant was charged in a single bill of information with two felonies, he pled guilty (without amendment to the bill of information) to a nonresponsive misdemeanor on count one and to a felony on count two. Defendant's instant appeal seeks review of his convictions on both counts. However, the proper procedure for seeking review of a misdemeanor conviction or sentence is an application for writ of review directed to this court to exercise its supervisory jurisdiction.

Rather than dismissing the defendant's appeal with respect to count one, we find that the interests of justice are better served by reviewing count one under our supervisory jurisdiction. In this case, we find that the facts of the misdemeanor and felony convictions are intertwined to the point that the interests of justice are best served by considering the matters together. Accordingly, under our supervisory jurisdiction, we will review the misdemeanor conviction on count one. See La. Const. art. V, § 10(A); **State v. Trepagnier**, 2007-0749 (La. App. 5 Cir. 3/11/08), 982 So.2d 185, 188, writ denied, 2008-0784 (La. 10/24/08), 992 So.2d 1033.

FACTS

Because defendant pled guilty, the facts of his offenses were not developed at trial. The following facts are taken from Officer Troy LeCoq's testimony given in two hearings on defendant's motion to suppress.

Around 9:30 a.m. on November 23, 2013, a weekend morning, Officer LeCoq, of the New Roads Police Department, was performing a routine patrol on Hospital Road. During this patrol, Officer LeCoq passed Pointe Coupee Veterinary Clinic and observed that its front door was open, the lights were off, and there were no vehicles located on the premises. Believing that a possible burglary had occurred, Officer LeCoq called

dispatch and asked for backup. When an additional officer arrived, he and Officer LeCoq cleared the building and determined that the building had been burglarized and no one was present. They then contacted the detective on call and the owner of the veterinary hospital, who confirmed that the door of his business had been kicked or pried open and that some veterinary supplies were missing. Among the missing veterinary supplies were two boxes of syringes and needles, and three boxes of vaccinations, including Vanguard.

Officer LeCoq remained at the veterinary clinic while the on-call detective collected evidence. Around 11:30 a.m., Officer LeCoq received a dispatch, after a report from an anonymous caller: "Chauncy [sic] Kelly from Mandela Drive is going around trying to sell vet supplies[.] He was last seen near the Chinese store on Hwy[.] 10." Officer LeCoq, who was familiar with defendant before the day of the incident, immediately relocated to the area described by the anonymous caller – La. Hwy. 10 at Anthony's (the "Chinese store"). There, Officer LeCoq observed defendant walk across the parking lot of Anthony's and enter a white, flatbed, dual-wheel pickup truck that was towing a horse trailer. Officer LeCoq followed the truck as it drove along La. Hwy. 10 until it turned onto Parent Street. As the vehicle turned onto Parent Street, Officer LeCoq noticed that the horse trailer had a flat tire. Officer LeCoq activated his emergency lights and stopped the truck in the parking lot of Farmers Feed Mill on Parent Street.

Upon stopping the vehicle, Officer LeCoq instructed defendant, who was a passenger in the truck, to exit the vehicle while Officer Williams, who had followed in another patrol car, made contact with the truck's driver. As Officer LeCoq tried to speak with defendant regarding the anonymous tip, defendant became combative and belligerent. Defendant also attempted to "pull away" from Officer LeCoq. For his and defendant's safety, Officer LeCoq placed defendant into handcuffs and patted him down. During this pat down, Officer LeCoq felt that defendant possessed a three-quarter-inch drill bit and two razor knives (box cutters) in the front pockets of his pants. In removing the drill bit from defendant's right front pocket, Officer LeCoq also

recovered some drug paraphernalia. Following his recovery of the drug paraphernalia, Officer LeCoq patted down defendant's back pockets, where he found a bottle of Vanguard matching the type stolen from the veterinary hospital. Based on the evidence he recovered, Officer LeCoq placed defendant under arrest for simple burglary and possession of drug paraphernalia.

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 he was illegally detained and arrested because Officer LeCoq failed to corroborate the anonymous tip of illegal activity. Defendant also avers that Officer LeCoq had no probable cause to handcuff and search him because his combativeness did not rise to a level to implicate officer harm.

Trial courts are vested with great discretion when ruling on a motion to suppress. **State v. Long**, 2003-2592 (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. However, a trial court's legal findings are subject to a *de novo* standard of review. See **State v. Hunt**, 2009-1589 (La. 12/1/09), 25 So.3d 746, 751.

The Fourth Amendment to 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. La. Code Crim. P. art. 703(D); **State v. Johnson**, 98-0264 (La. App. 1 Cir. 12/28/98), 728 So.2d 885, 886. Evidence derived from an unreasonable seizure will be excluded from trial. See **State v. Benjamin**, 97-3065 (La. 12/1/98), 722 So.2d 988, 989.

The right of law enforcement officers to stop and interrogate one reasonably suspected of criminal conduct is, however, recognized by both federal and state jurisprudence. **Terry v. Ohio**, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); **State v. Ducre**, 604 So.2d 702, 706 (La. App. 1 Cir. 1992). A law enforcement officer may stop a person in a public place whom he reasonably suspects is committing, has committed, or is about to commit an offense and may demand of him his name, address, and an explanation of his actions. La. Code Crim. P. art. 215.1(A); **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). Reasonable suspicion to stop is something less than the probable cause required for an arrest, and the reviewing court must look to the facts of each case to determine whether a detaining officer had knowledge of sufficient facts and circumstances to justify an infringement of the suspect's rights. **State v. Robertson**, 97-2960 (La. 10/20/98), 721 So.2d 1268, 1269.

In order to assess the reasonableness of an officer's conduct, it is necessary to balance the need to search or to seize against the harm of invasion. **State v. Scott**, 561 So.2d 170, 173 (La. App. 1 Cir.), writ denied, 566 So.2d 394 (La. 1990). The totality of the circumstances must be considered in determining whether reasonable suspicion exists. **State v. Payne**, 489 So.2d 1289, 1291-92 (La. App. 1 Cir.), writ denied, 493 So.2d 1217 (La. 1986). The detaining officer must have knowledge of specific, articulable facts which, taken together with rational inferences from those facts, reasonably warrant the stop. **State v. Flowers**, 441 So.2d 707, 714 (La. 1983), cert. denied, 466 U.S. 945, 104 S.Ct. 1931, 80 L.Ed.2d 476 (1984); **State v. Turner**, 500 So.2d 885, 887 (La. App. 1 Cir. 1986). The officer's past experience, training, and common sense may be considered in determining if his inferences from the facts at hand were reasonable, and deference should be given to the experience of the officers present at the time of the incident. **State v. Lowery**, 2004-0802 (La. App. 1 Cir. 12/17/04), 890 So.2d 711, 718, writ denied, 2005-0447 (La. 5/13/05), 902 So.2d 1018.

Although an anonymous tip alone seldom demonstrates an informant's basis of knowledge or veracity, there are situations in which an anonymous tip, suitably

corroborated, exhibits sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop. Among the factors used in determining whether an anonymous tip has sufficient indicia of reliability is whether the tip provides predictive information so the police may test the informant's knowledge and credibility. See **Florida v. J.L.**, 529 U.S. 266, 270-71, 120 S.Ct. 1375, 1378-79, 146 L.Ed.2d 254 (2000).

An accurate description of a subject's readily observable location and appearance is reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster had knowledge of concealed criminal activity. In order for a tip alone, to provide reasonable suspicion, it must be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. See **Florida v. J.L.**, 529 U.S. at 272, 120 S.Ct. at 1379.

In the instant case, Officer LeCoq received a dispatch of an anonymous tip while he was on the scene of a suspected burglary at a veterinary clinic. This anonymous tip specifically named defendant, advised that he was attempting to sell veterinary supplies, and located him in the area of La. Hwy. 10 at the "Chinese store," which was known to Officer LeCoq as Anthony's. Officer LeCoq immediately relocated to Anthony's, where he observed defendant walk across the parking lot and enter a pickup truck.

The initial question is whether the anonymous tip was sufficient to give Officer LeCoq reasonable suspicion to conduct an investigatory stop. We note first that the tip alone would not have been sufficient to give rise to reasonable suspicion. Taken by itself, the tip identified defendant (by name) as being present at a particular location, and it alleged that he was trying to sell veterinary supplies. When Officer LeCoq relocated to Anthony's, he simply observed defendant walk across the parking lot and enter a pickup truck. Thus, while Officer LeCoq corroborated the tip to the extent it identified defendant and his location, he did not corroborate the tip with respect to the alleged illegal activity. In this sense, the tip and subsequent corroboration were similar

to that in **Robertson.** In that case, officers received a tip that a dark-complexioned, short, black male, known as "Will," drove a dark green Pontiac Grand Am with dark tinted windows and was involved in the illegal sale of narcotics within the Magnolia Housing Development. The officers located the suspect vehicle in an area identified by the caller and followed it until it parked, at which time the driver exited the vehicle and the police observed that he fit the caller's description. After detaining the driver based upon this information and verification alone, the officers discovered narcotics in the vehicle by a canine sniff and subsequent search. See **Robertson**, 721 So.2d at 1268-69. The Louisiana Supreme Court determined that while certain information in the tip had been corroborated by the investigating officers, the tip contained no predictive information regarding Robertson's future actions, and it failed to predict the certain time period in which defendant would be engaged in illegal activity. See **Robertson**, 721 So.2d at 1270. Thus, the court found that there was no reasonable suspicion to detain the defendant. See **Robertson**, 721 So.2d at 1271.

While the tip in the instant case is similar to that in **Robertson**, the circumstances surrounding the tips differ in significant ways. Officer LeCoq was aware of, and actually participated in, the investigation of the suspected burglary of Pointe Coupee Veterinary Clinic. Furthermore, Officer LeCoq was familiar with defendant by both name and face, and he was aware of defendant's prior criminal history. Under the totality of the circumstances, and in light of Officer LeCoq's experience, training, and common sense, we find that the anonymous tip – corroborated to the extent that it placed defendant at a certain location and that it alleged behavior that might follow from the burglary Officer LeCoq investigated – was sufficient to give Officer LeCoq reasonable suspicion to conduct an investigatory stop of defendant.

Having determined that Officer LeCoq had reasonable suspicion to conduct an investigatory stop of defendant, we must next determine whether Officer LeCoq acted appropriately in handcuffing defendant and patting him down for weapons. Because the police conducting an investigatory stop may not seek to verify their suspicions by means that approach the conditions of arrest, the use of handcuffs must appear

objectively reasonable in light of the facts and circumstances. **State v. Porche**, 2006-0312 (La. 11/29/06), 943 So.2d 335, 339 (per curiam). When a law enforcement officer has stopped a person for questioning as authorized by La. Code Crim. P. art. 215.1(A) and reasonably suspects that he is in danger, he may frisk the outer clothing of such person for a dangerous weapon. If the law enforcement officer reasonably suspects the person possesses a dangerous weapon, he may search the person. See La. Code Crim. P. art. 215.1(B).

Officer LeCoq testified that defendant became combative, belligerent, and irate when he was asked to step out of the vehicle. He further described that defendant began to pull away from him as he attempted to ask questions. Under these facts and circumstances, Officer LeCoq was justified in handcuffing defendant for his own safety without this restraint rising to the level of an arrest. In addition, in light of Officer LeCoq's familiarity with defendant's criminal history, defendant's belligerent and combative words and actions could have given rise to an objective and reasonable suspicion on Officer LeCoq's behalf that he was in danger. Therefore, Officer LeCoq was justified in conducting a pat down of defendant's clothing to determine if he was armed. Contrary to defendant's assertion in his brief that his pockets were actually searched without a pat down, Officer LeCoq's testimony indicates otherwise. In the ensuing pat down, Officer LeCoq felt three items – a drill bit and two razor knives – which could have been used as weapons. Having felt these items during the frisk, Officer LeCoq was then justified in searching defendant's entire person. See La. Code Crim. P. art. 215.1(B). During this subsequent search, Officer LeCoq found the contraband that ultimately led to defendant's arrest and convictions. Because this evidence was seized legally, the trial court did not err or abuse its discretion in denying defendant's motion to suppress.

For the foregoing reasons, we find the defendant's assignment of error is without merit. Accordingly, the convictions and sentences are affirmed.

AFFIRMED.