STATE OF LOUISIANA	*	**NO. 2000-K-0561**
VERSUS	*	**COURT OF APPEAL**
CHRISTOPHER JENKINS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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ON SUPERVISORY WRIT DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 411-679, SECTION "F"
HONORABLE DENNIS J. WALDRON, JUDGE

* * * * * *

JOAN BERNARD ARMSTRONG

JUDGE

* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Charles R. Jones and Judge Patricia Rivet Murray)

(ON REMAND FROM THE SUPREME COURT OF LOUISIANA)

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WRIT GRANTED;
JUDGMENT AFFIRMED.

STATEMENT OF THE CASE

On December 30, 1999, the defendant, Christopher Jenkins, was charged with one count of possession with the intent to distribute marijuana, a charge to which he subsequently pled not guilty. On February 18, 2000, the trial court granted the defendant's motion to suppress the evidence. The State filed an application for supervisory writs seeking reversal of the trial court's ruling. We denied that writ application as follows:

> **WRIT DENIED**
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> On the showing made, we find no error in the trial court's ruling suppressing the evidence. As noted by this Court in State v. Scull, 93-2360, p. 9, 639 So. 2d at 1245: "The trial court is vested with great discretion when ruling on motion to suppress." See also State v. Mitchell, 95-2454 (La. App. 4 Cir. 7/31/96), 679 So. 2d 178.
>
> Accordingly, this writ application is denied.
>
> New Orleans, Louisiana this 5th day of May, 2000.

The State then filed a writ application with the Supreme Court. The Supreme Court granted that application and remanded the case to this court with instructions that there be briefing, oral argument and an opinion of this Court. The State and the defendant have been given an opportunity to file additional briefs, there has been oral argument, and we now render this opinion.

FACTS

No testimony was taken on the motion to suppress. The following facts are taken from the affidavit for the search warrant issued in this case. On November 23, 1999, police officers set up a surveillance of 1702 Poland Avenue. There is no indication in the affidavit that the officers had received any information concerning this address or its occupants, nor is there any indication why the officers conducted the surveillance. In any event, during the surveillance the officers observed a woman walk up to the residence and knock on the front door. A man answered the door, and after a brief conversation the woman gave the man some money. The man went back into the house briefly, then returned and gave the woman an unknown object. The woman walked away, and the man went back inside the house. The officers notified other officers, who stopped the woman and advised her she was under investigation. The officers frisked her and felt a large bulge

in her pocket. The officers retrieved the bulge, which was found to be a plastic bag containing what was later found to be marijuana. The officers then arrested her.

The officers obtained a warrant to search the residence under surveillance. Pursuant to this search, the officers seized over 300 grams of marijuana, over $680, a box of plastic bags, a pair of scissors, a scale, a shoe box, and a hand-rolled cigar "containing vegetable matter." They arrested the defendant, who appears to have been the man inside the residence who answered the door.

ANALYSIS

The trial court suppressed the evidence seized from the residence because it found the officers were not justified in seizing the marijuana from the woman who was involved in the suspected drug buy. The court further found that the "good faith" exception to the exclusionary rule did not apply in this case.

The State argues the trial court erred by suppressing the evidence because the officers had reasonable suspicion to stop the woman who was ultimately found to be in possession of marijuana. In State v. Sneed, 95-2326, p. 3 (La. App. 4 Cir. 9/11/96), 680 So.2d 1237, 1238, this court stated:

> An individual may be stopped and questioned by police if the officer has a reasonable

> suspicion that the person "is committing, has committed, or is about to commit an offense." La. Code Crim. Proc. Ann. art. 215.1. While "reasonable suspicion" is something less than the probable cause needed for an arrest, it must be based upon particular articulable facts and circumstances known to the officer at the time the individual is approached. State v. Smith, 94-1502, p. 4 (La. App. 4th Cir. 1/19/95), 649 So.2d 1078, 1082. The officer's past experience, training and common sense may be considered in determining if the inferences drawn from the facts presented were reasonable. State v. Jackson, 26,138 (La.App.2nd Cir. 8/17/94), 641 So.2d 1081, 1084.

See also State v. Smiley, 99-0065 (La. App. 4 Cir. 3/3/99), 729 So.2d 743; State v. Allen, 95-1754 (La. 9/5/96), 682 So.2d 713.

Here, the officers set up a surveillance of what was apparently the defendant's residence. The search warrant affidavit does not indicate why the officers set up this surveillance, and there was no testimony taken on the matter. The officers observed a woman walk up to the house and exchange money for an object which she put in her pocket before walking away from the house. The officers then stopped her. The State argues these circumstances show the officers had reasonable suspicion to stop her. In its application, the State argues that there were more circumstances which the affidavit did not present which would have shown the officers had reasonable suspicion to stop the woman, including the facts that the area was known for drug trafficking and that the officers involved in the surveillance

had many years of narcotics experience. Further, the State somehow faults the defendant for not bringing out this information and insists the defendant had the burden of proof to show the stop was not lawful. However, the State has the burden of showing that a warrantless stop and seizure is lawful. See C.Cr.P. art. 703(D).

However, even given these deficiencies, there might have been reasonable suspicion to stop the woman. This finding does not automatically mean the seizure of the marijuana from her was lawful. The bulge which was the marijuana was discovered during a frisk of the woman. The scope of any search authorized by an investigatory stop is limited. La. C.Cr.P. art. 215.1(B) provides for a limited frisk for weapons during an investigatory stop:

> When a law enforcement officer has stopped a person for questioning pursuant to this Article 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 also State v. Hunter, 375 So.2d 99 (La. 1979). "The officer need not be absolutely certain that the person is armed, but the officer must be warranted in his belief that his safety or that of others is in danger." State v. Smith, 94-1502 p. 5 (La. App. 4 Cir. 1/19/95), 649 So.2d 1078, 1082. As noted by this

court in State v. Denis, 96-0956, pp. 7-8. (La. App. 4 Cir. 3/19/97), 691 So.2d 1295, 1299:

> We recognize that the police have the right to ensure their own safety in an encounter with a suspected criminal. Under both our federal and state Constitutions, however, this right must be balanced against an individual citizen's right to be free from unreasonable searches. Although sometimes appearing to be a legal technicality, Article 215.1 B represents the legislature's attempt to maintain that balance by allowing the officer, who has lawfully stopped an individual, to perform a pat-down for weapons, but **only** if he "reasonably suspects that he is in danger."
>
> A police officer's duty to enforce and uphold the laws includes not only those statutes that define and prohibit criminal conduct, but also those which define and limit the government's intrusion into the lives of its citizens. Unless the plain language of Article 215.1 B is interpreted as authorizing an officer to frisk every pedestrian who is stopped pursuant to subsection A, the only way a court can determine if the officer reasonably suspected that he was in danger is to require him to express that suspicion, and explain upon what it is based. Eliminating the requirement for such articulation not only eviscerates this statute, but also opens the door for potential abuse by the rare officer who acts upon personal prejudices rather than actual observation and experience. (emphasis supplied)

See also State v. Smiley, 99-0065 at 5-6, 729 So.2d at 746-747.

Here, the affidavit notes that the officers frisked the woman "for the officers' safety". However, the seizure of the marijuana could only be legal

if it were apparent to the officer who conducted the frisk that the "bulge" was contraband. In Denis, 96-0956 pp. 8-9, 691 So.2d at 1300, this court set forth the requirements of the "plain feel" exception to the warrant requirement:

> [E]vidence discovered during a lawful investigatory frisk may be seized under the "plain feel" exception to the warrant requirement, as explained in Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). However, just as the "plain view" doctrine requires that an object's incriminating character be immediately obvious when seen, the "plain feel" doctrine requires the tactile discovery of "an object whose contour or mass makes its identity immediately apparent." Dickerson at ___, 113 S.Ct. at 2137, 124 L.Ed.2d at ___. Thus, in State v. Parker, 622 So.2d 791 (La. App. 4th Cir.), writ denied, 627 So.2d 660 (1993), the seizure of a matchbox containing cocaine detected during a pat-down search was found not to fall within the "plain feel" exception because there was no evidence that a matchbox's shape was identifiable as contraband. In contrast, in State v. Stevens, 95-501 (La. App. 5th Cir. 3/26/96), 672 So.2d 986, the seizure of drugs in a matchbox detected during a lawful pat-down was upheld because the officer testified that her prior experience indicated that most street-level crack dealers carried their drugs in a matchbox. Similarly, where testimony establishes that an object detected during a pat-down was immediately identifiable as a "crack pipe," suppression of the cocaine residue contained within the pipe is not required. State v. Lavigne, 95-0204 at p. 9, 675 So.2d at 778; State v. Livings, 95-251, pp. 5-6 (La. App. 3d Cir. 11/15/95), 664 So.2d 729, 733, writ denied, 95-2906 (La. 2/28/96), 668 So.2d 367.

See also State v. Smiley.

Here, the State did not show any indication that it was immediately apparent to the officer who conducted the frisk that the bulge contained marijuana. Indeed, the affidavit does not indicate what type of drugs, if any at all, the officers suspected were being sold from the residence, if indeed that was the reason for the surveillance. The State did not show that it was immediately apparent to the officer conducting the frisk that the bulge was marijuana. Thus, the seizure of the marijuana from the woman was not lawful.

After finding the seizure of the marijuana from the woman was unlawful, the trial court excised this information and found that the remaining information did not make a showing of probable cause for the issuance of the warrant. The State argues the trial court erred by so doing, citing the "good faith" exception to the exclusionary rule. In State v. Page, 95-2401, p. 12 (La. App. 4 Cir. 8/21/96), 680 So.2d 700, 709-710 this court noted the standard for determining probable cause to support the issuance of a search warrant:

> Louisiana Code of Criminal Procedure Article 162 provides that a search warrant may be issued "only upon probable cause established to the satisfaction of the judge, by the affidavit of a credible person, reciting facts establishing the cause for the issuance of the warrant." In State v.

> Duncan, 420 So.2d 1105, 1108 (La. 1982) our Supreme Court held that probable cause exists when:
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> > the facts and circumstances within the affiant's knowledge, and those of which he has reasonably trustworthy information, are sufficient to support a reasonable belief that evidence or contraband may be found at the place to be searched. (citations omitted) See also, State v. Roebuck, 530 So.2d 1242 (La. App. 4th Cir. 1988), writ den. 531 So.2d 764 (La. 1988).
>
> The facts which form the basis for probable cause to issue a search warrant must be contained "within the four corners" of the affidavit. Duncan, supra at 1108. A magistrate must be given enough information to make an independent judgment that probable cause exists for the issuance of the warrant. State v. Manso, 449 So.2d 480, 482 (La. 1984), cert. denied, Manso v. Louisiana, 469 U.S. 835, 105 S.Ct. 129 (1984). The reviewing Court must determine whether the "totality of circumstances" set forth in the affidavit is sufficient to allow the magistrate to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him that there is a reasonable probability that contraband will be found. The duty of the reviewing court is simply to ensure that the magistrate had a "substantial basis" for concluding that probable cause existed. Manso, supra at 482.

See also State v. Hoffpauir, 99-0128 (La. App. 4 Cir. 4/7/99), 731 So.2d 1026; State v. Bradford, 98-1428 (La. App. 4 Cir. 12/9/98), 729 So.2d 1049.

Here, the officers' observation of the suspected drug deal and the

seizure of the marijuana from the woman involved in the suspected drug deal supplied probable cause for the issuance of the warrant. The trial court suppressed the evidence seized from the residence, however, because it excised the seizure of the marijuana from the woman, and it found the remaining information in the warrant failed to show probable cause to believe there was marijuana in the residence. The court did so because this evidence was not lawfully seized. The State now argues that the trial court erred by so doing because of the "good faith" exception to the exclusionary rule. See United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984). In State v. Hoffpauir, 99-0128 pp. 6-8, 731 So.2d at 1029-1030, this court discussed this exception:

> In State v. Scull, 93-2360 pp. 9-10 (La. App. 4 Cir. 6/30/94), 639 So. 2d 1239, 1245, this court discussed "good faith":
>
> > In Leon, the Court noted that evidence seized pursuant to a warrant for which there was no probable cause to support it need not be suppressed if the officers who executed the warrant believed the warrant was validly issued. The Court listed four instances, however, where suppression remains the appropriate remedy for a search pursuant to an invalid warrant: (1) the affiant misled the magistrate by including in the affidavit misleading statements which the affiant knew were false or which he would have known were false

> except for his reckless disregard of the truth; (2) the magistrate abandoned his neutral and detached role; (3) the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; or (4) the warrant was so facially deficient that it could not be presumed to be valid. Id. at 923, 104 S.Ct. at 3421.

This court found that although the officers may have thought that the affidavit contained probable cause to support the warrant, some of the information contained in the affidavit was learned as the result of an illegal arrest. This court noted: "The purpose of the exclusionary rule is to deter unlawful conduct. Without this factor, there would have not been probable cause for the issuance of the warrant. To allow its use, or to uphold a search based upon its use, would appear to defeat the purpose of the exclusionary rule." Id. at p. 10, 639 So. 2d at 1245. This court then refused to apply the good faith exception to that case.

By contrast, in State v. Varnado, 95-3127 (La. 5/31/96), 675 So. 2d 268, the Court applied the good faith exception to a case where the affidavit for a search of a certain residence was found to be lacking in probable cause. Although the officers had probable cause to make a warrantless arrest of the defendant, they obtained an arrest warrant prior to arresting him. They then obtained the consent of the defendant's father to search the residence, but again they obtained a search warrant. However, the affidavit for the residence failed to provide any connection between the defendant and the residence. The officers then executed the warrant. On review, the Court found that although the affidavit failed to make the necessary connection between the defendant and

the residence, the evidence seized from the house should not have been suppressed because the officers in "good faith" relied upon the warrant. The Court stated:

> Nevertheless, the exclusionary rule "is designed to deter police misconduct rather than to punish the errors of judges and magistrates." Leon, 468 U.S. at 916, 104 S.Ct. at 3417. Its application therefore "must be carefully limited to the circumstances in which it will pay its way by deterring official [] lawlessness." Id., 468 U.S. at 907 n. 6, 104 S.Ct. at 3412 . . . Accordingly, "suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." Id., 468 U.S. at 922 n. 23, 104 S.Ct. at 3420.
>
> The reasonableness inquiry under Leon is an objective one which turns on the totality of the circumstances surrounding the issuance of the warrant. Id., 468 U.S. at 922 n. 23, 104 S.Ct. at 3420 n. 23. Those circumstances include the overall familiarity of the officer applying for the warrant with the investigation and the degree to which he has participated in the events leading to the search. Massachusetts v. Sheppard, 468 U.S. [981] at 989 n. 6, 104 S.Ct. [3424] at 3428 n. 6 [1984].

> State v. Varnado, at pp. 3-4, 675 So. 2d at 270. The Court then held that because the officers in that case had cautiously (and unnecessarily) sought warrants for the defendant's arrest and for the search of his home, the "good faith" exception to the warrant requirement would apply to that case.

In Hoffpauir, this court held that the good faith exception to the exclusionary rule applied, finding none of the four instances listed in Leon applied to that case.

By contrast, in State v. Snee, 99-0257 (La. App. 4 Cir. 9/1/99), 743 So.2d 270, the trial court found the information in the affidavit, gleaned from an out-of-state police officer, was not reliable. The court suppressed the evidence, and on review this court affirmed the trial court's ruling. This court found the "good faith" exception did not apply, stating:

> To reward the state for relying upon the misconduct of a fellow police officer of another state clearly defeats the intent of the exclusionary rule. Without the recitation of facts concerning the Texas officer's actions there would be no reasonable basis to lead the trooper to believe the Texas officer had probable cause to believe the package contained contraband. Thus, the "good faith" exception does not apply to this case, and all of the evidence seized from the defendants resulting from execution of the search warrants must be suppressed.

State v. Snee, 99-0257 p. 10, 743 So.2d at 275-276.

Here, the officers who conducted the illegal seizure of the marijuana

from the woman were part of the same group who applied for and obtained the search warrant. As such, it appears the trial court did not err by finding the "good faith" exception does not apply to this case. As per Scull, the trial court excised the illegally-obtained information from the affidavit. The remaining information in the affidavit does not show that it is more probable than not that the residence contained contraband. Thus, the trial court did not err by suppressing the evidence.

As noted by this Court in State v. Scull, 93-2360, p. 9, 639 So.2d at 1245: "The trial court is vested with great discretion when ruling on motion to suppress." See also State v. Mitchell, 95-2454 (La. App. 4 Cir. 7/31/96), 679 So.2d 178. Given the illegality of the seizure of marijuana from the woman and the officers' participation in obtaining the warrant, it appears the trial court did not err by finding the good faith exception to the exclusionary rule did not apply to this case. The court properly excised the illegally-obtained information and found the remaining information did not support a finding of probable cause for the issuance of the warrant.

For the foregoing reasons, the writ is granted and the ruling of the trial court affirmed.

WRIT GRANTED;
JUDGMENT AFFIRMED.