STATE OF LOUISIANA	*	**NO. 2000-KA-0721**
VERSUS	*	**COURT OF APPEAL**
ORELIUS CALDWELL	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 403-744, SECTION "K"
Honorable Arthur Hunter, Judge
* * * * * *
JOAN BERNARD ARMSTRONG

JUDGE
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge James F. McKay, III and Judge Dennis R. Bagneris, Sr.)

HON. HARRY F. CONNICK, DISTRICT ATTORNEY
NICOLE BRASSEAUX BARRON, ASSISTANT DISTRICT ATTORNEY
619 SOUTH WHITE STREET
NEW ORLEANS, LA 70119

COUNSEL FOR PLAINTIFF/APPELLEE

KAREN G. ARENA

LOUISIANA APPELLATE PROJECT
PMB 181
9605 JEFFERSON HIGHWAY, SUITE I
RIVER RIDGE, LA 70123

COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED.

STATEMENT OF THE CASE

By bill of information dated December 21, 1998, the defendant, Orelius Caldwell, was charged with possession of cocaine; and, he pleaded not guilty. On July 7, 1999, he was tried by a six-member jury that found him guilty as charged. On January 7, 2000, the defendant was sentenced to forty months at hard labor. The trial court denied defendant's motion for reconsideration of sentence. On appeal, the defendant raises one assignment of error.

STATEMENT OF THE FACTS

Officer Byron Francois testified that on October 14, 1998, he and Officer Amos, a trainee, were on patrol in the 2600 block of Ursuline where there had been numerous complaints of drug dealing. He saw a man in a red shirt and blue jeans riding a bicycle the wrong way on Ursuline. Francois stated that he and Amos decided to stop this man, later identified as the defendant, for a traffic violation in order to see why he was riding a bicycle

at 3:00 a.m. Amos pulled the defendant over and questioned him, while Francois walked toward Dorgenois Street where there were two other officers who needed assistance. Francois testified that when he returned from assisting the other officers, Amos showed him a bag of crack cocaine Amos found on the defendant.

Officer Mark Amos testified that the defendant acted nervously when he was stopped for riding his bicycle the wrong way on Ursuline. Amos asked the defendant to place his hands on the police car; as he frisked the defendant, he asked the defendant if he had anything on him that Amos should know about, such as a weapon or narcotics. Amos testified that the defendant told him that he (defendant) had drugs in his right pocket. Amos further testified that he told the defendant to remove the drugs, which Amos then took from him. Amos said that it was a small packet that contained what he recognized to be crack cocaine. Amos placed the defendant under arrest.

Officer Christopher Martin testified that he and his partner were on Dorgenois when they saw several people at the corner of Dorgenois and Ursuline. He further testified that this group of people dispersed as the patrol car approached; as he and his partner stopped this group, he saw the defendant riding a bicycle the wrong way on Ursuline. He stated that

Officer Francois came up to help him and his partner with the group of people they had stopped.

The defendant testified that he was the leaving the home of a "lady friend" when he saw five police cars hurriedly turn from Broad Street. He further testified that he had made it to the street when the first two cars passed by and that the third car nearly hit him, causing him to jump from his bicycle. The defendant said that he wanted to know "what it was all about" and that the officer would not tell him. He testified that the officer then ordered him to get up against the car and that he got against the car. He denied being in possession of cocaine, and he stated that all he had were two packs of Camel cigarettes and two cigarette lighters in his pocket. He further stated that Officer Amos patted him down about five times and that on the last pat-down, Amos reached one arm across his (defendant's) shoulder and stated, "I've got some." He testified that he did not receive any citations for having an unregistered bicycle or for riding his bicycle the wrong way down the street. The defendant admitted having two prior convictions for possession of cocaine.

ANALYSIS

ERRORS PATENT

A review of the record reveals no errors patent.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant complains that the trial court erred in denying his motion to suppress the evidence. He argues that the cocaine should have been suppressed because it was found pursuant to an illegally obtained statement and that the drugs would not have inevitably been discovered. The defendant asserts that he was under arrest when Officer Amos ordered him to the police car and that Amos should have advised him of his Miranda rights before asking him if he possessed any weapons or drugs. He further asserts that the traffic violation did not justify an arrest and that the cocaine would not have been found in a pat-down search for weapons. The defendant does not argue that his statement was inadmissible and should have been suppressed.

A police officer has the right to detain briefly and interrogate a person when the officer has a reasonable articulable suspicion that the person is, has been, or is about to be engaged in criminal conduct. La. C.Cr.P. art. 215.1; Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968); State v. Tucker, 626 So.2d 707 (La. 1993). "Reasonable suspicion" is something less than probable cause, and the reviewing court must look to the facts and circumstances of each case to determine whether the detaining officer had sufficient facts within his knowledge to justify an infringement of an individual's right to be

free from governmental interference. State v. Robertson, 97-2960 (La. 10/20/98), 721 So.2d 1268. Mere suspicious activity is not a sufficient basis for police interference with an individual's freedom. State v. Williams, 421 So.2d 874 (La. 1982). However, the level of suspicion need not rise to the probable cause needed for a lawful arrest. State v. Huntley, 97-0965 (La. 3/13/98), 708 So.2d 1048. The totality of the circumstances must be considered in determining whether reasonable suspicion exists. State v. Belton, 441 So.2d 1195 (La. 1983), cert. denied Belton v. Louisiana, 466 U.S. 943, 104 S.Ct. 2158 (1984). An investigative stop must be justified by some objective manifestation that the person to be stopped is or is about to be engaged in criminal activity, or else there must be reasonable grounds to believe that the person is wanted for past criminal conduct. State v. Moreno, 619 So.2d 62 (La. 1993).

When a police officer stops someone pursuant to Article 215.1, he may frisk the outer clothing of such person for a dangerous weapon. State v. Curtis, 96-1408 (La. App. 4 Cir. 10/2/96), 681 So.2d 1287. The officer need not be absolutely certain 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. Williams, 98-3059 (La. App. 4 Cir. 3/3/99), 729 So.2d 142; State v. Smith, 94-1502 (La. App. 4 Cir. 1/19/95), 649 So.2d 1078. An officer may not

automatically frisk every person that he stops under Article 215.1 in the hope of finding contraband; rather the officer must perceive articulable facts that create a reasonable suspicion of danger. State v. Fortier, 99-0244 (La. App. 4 Cir. 1/26/00), 756 So.2d 455. As noted by this court in State v. Denis, 96-0956 (La. App. 4 Cir. 3/19/97), 691 So.2d 1295, writ denied, 97-1006 (La. 6/20/97), 695 So.2d 1352:

> While it is true that an officer is never justified in conducting a pat-down for weapons unless the original detention itself was justified, a lawful detention for questioning does not necessarily give the officer the authority to conduct a pat-down for weapons. Even after a lawful investigatory stop, a police officer is justified in frisking the subject only under circumstances where a "reasonably prudent man ... would be warranted in the belief that his safety or that of others was in danger." Terry v. Ohio, 392 U.S. at 27, 88 S.Ct. at 1883, 20 L.Ed.2d at 909. Further, the officer's belief is not reasonable unless the officer is "able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous." Sibron v. New York, 392 U.S. [40] at 64, 88 S.Ct. [1889] at 1903, 20 L.Ed.2d [917] at 935 [1968]. It is not necessary that the investigating officer establish that it was more probable than not that the detained individual was armed and dangerous; it is sufficient that he establish a "substantial possibility" of danger.
>
> State v. Hunter, 375 So.2d 99, 101-02 (La.1979) (final citation omitted).

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 an officer, who has lawfully stopped an individual, to perform a pat-down for weapons, but only if he "reasonably suspect [sic] 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.

96-0956 at pp. 7-8, 691 So.2d at 1299.

At the hearing on the motion to suppress the evidence, Officer Amos testified that he performed a frisk of defendant for “Officers’ [sic] safety.” On cross-examination, the officer was asked what were defendant’s actions that gave him reasonable suspicion to believe that defendant was armed; Amos replied that he gave a protective frisk to anyone he stopped, questioned, or dealt with on the street. Amos was also asked whether he could give any articulable facts as to what made him feel that he was in danger from defendant for riding his bicycle the wrong way down the street;

he answered that he wanted to make sure that nothing was concealed under defendant's jacket and that he believed that the area defendant was riding through was a "high narcotics area."

Officer Amos, who lawfully stopped the defendant for the traffic violation, did not frisk the defendant because the defendant was actually perceived as being possibly armed with a dangerous weapon, but because it was his usual practice whenever he stopped someone. He did not state that he saw any suspicious bulges in the defendant's clothing or that the defendant made any suspicious gestures which led him to believe that the defendant was in possession of a dangerous weapon. He did not link the defendant with the group of people at the end of the block who had been stopped by other officers. But Amos also stopped the defendant, wearing a jacket, in a high narcotics area at 3:00 a.m.; therefore, Amos could frisk the defendant to determine if he was armed.

However, Amos would not have known about the contraband in the defendant's pocket but for defendant's responding to Amos' inquiry as to whether he had any weapons or contraband. The defendant argues that Amos was required to give him a Miranda warning before making that inquiry.

Miranda warnings are required to be given whenever a citizen is

deprived of his liberty in a significant way or is not free to go as he pleases. State v. Nguyen, 97-0020, p. 3 (La. App. 4 Cir. 1/14/98), 707 So.2d 66, 67. In Nguyen, law enforcement officers went to an apartment to arrest a suspect in a cellular telephone fraud investigation. After arresting the suspect at his apartment, which was occupied by the defendant and others, the officers obtained the suspect's consent to search the apartment. All of the occupants of the apartment were told to go into the living room during the search. In the course of the search, an officer found a bag of what appeared to be marijuana; he asked the occupants of the apartment what it was. The defendant responded that it was his and that it was marijuana. The trial court granted the defendant's motion to suppress because of the lack of Miranda warnings; however this court reversed and set out the following factors to aid in determining whether there was a significant detention requiring the giving of Miranda warnings:

> (1) whether the police officer had reasonable cause under C.Cr.P. art. 213(3) to arrest the interrogee without a warrant; (2) the focus of the investigation on the interrogee; (3) the intent of the police officer, determined subjectively; (4) the belief of the interrogee that he was being detained, determined objectively.

97-0020 at p. 3, 707 So.2d at 67, citing State v. Thompson, 399 So.2d 1161, 1165 (La. 1981). The Nguyen court further set forth four similar factors to

aid in determining the necessity for Miranda warnings:

> (1) whether, prior to interrogation, probable cause existed to arrest the accused; (2) statements or actions by the police indicating an intention to hold or restrain him; (3) statements or actions by the accused indicating his reasonable belief that he is in custody and (4) the extent to which the investigation had focused on the accused.

97-0020 at p. 4, 707 So.2d at 67, citing State v. Roach, 322 So.2d 222, 227 (La. 1975).

In State v. Fisher, 97-1133 (La. 9/9/98), 720 So.2d 1179, the Supreme Court, citing United States v. Watson, 953 F.2d 895 (5th Cir. 1992), set forth a three-tiered analysis of interactions between citizens and police under the Fourth Amendment. The first tier implicated no Fourth Amendment concerns where there were mere communications between citizens and police officers because there was no coercion or detention. The second tier consisted of the investigatory stop where 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. The court stated that an officer's reasonable suspicion allows a limited investigation of a person, but it was insufficient to justify custodial interrogation even though the interrogation was investigative. The third tier consisted of custodial arrest

which required probable cause to believe that the person has committed a crime. An arrest was the taking of one person into custody by another through actual restraint that imposed by force or from submission of the person arrested to the custody of the one arresting him. The court stated that a prime characteristic of any Fourth Amendment seizure of a person is whether, under the totality of the circumstances, a reasonable person would not consider himself free to leave. The court further stated that, ultimately, whether a person has been arrested depends on circumstances indicating an intent to impose an extended restraint on the person's liberty.

In State v. Watkins, 526 So.2d 357 (La. App. 4 Cir. 1988), the police went to an apartment to execute a search warrant; the five occupants of the apartment were advised of their Miranda rights. The police officers executing the warrant asked the five occupants if they had any valuables, contraband, or weapons to declare. The defendant told the officer that he had a gun and money under a sofa cushion, and the officers lifted the cushion where they found a gun and bound wad of money. The officers opened the wad of money and found a folded envelope; when they opened the envelope; the officers found ten tablets of valium. The defendant denied that the valium was his, and the owner of the apartment stated that the tablets belonged to him. The defendant's motion to suppress the statement was

denied by the trial court, but this court reversed, finding that the defendant was not adequately advised of his Miranda rights before he made the inculpatory statement. The court stated:

> In the present case there is no direct evidence as to whether the officer intended to detain the defendant. However, his action in ordering all occupants of the apartment into one location and reading them his version of the Miranda rights is at least consistent with an intent to detain. Likewise there is no direct evidence as to whether the defendant or the other occupants felt they were in custody or otherwise detained. However, their actions are also consistent with a belief that they were not free to go. No one tried to leave or appeared to consider it possible to do so. There was no probable cause to arrest defendant before he was questioned. As far as we can tell, he was unknown to the officers before the warrant was executed. However, it seems clear that the questions the officer asked focused the investigation on the defendant and his companions. The officer did not merely ask for general information such as their names and addresses, or even an explanation of their presence in the apartment. He specifically asked if anyone had any contraband to declare. This is asking a person to tell you if they have committed a crime – contraband by its very definition is illegal. Admitting you have contraband is admitting you have broken the law. This type of questioning goes far beyond a general investigation. Given the totality of the circumstances in this case there is no doubt that Miranda warnings were required before asking such a question of the defendant. La. Const. Art. 1, Sec. 13; C.Cr.P. art. 218.1.

Id. at 360.

Watkins was distinguished from the situation in State v. Nguyen, because the absence of a Miranda warning to the defendant in Nguyen could have been one indication that the defendant was not under significant restraint as set forth in Watkins. The court in Nguyen noted that the suspect who was arrested was the focus of the investigation, not the defendant or the other adult occupants of the apartment.

In State v. Alford, 29,343 (La. App. 2 Cir. 5/9/97), 694 So.2d 1162, the police were conducting surveillance of a marijuana patch and heard someone approach. One of the officers revealed himself to the defendant and his wife, and told them that he had been watching a marijuana patch. According to the officer, the defendant was not a suspect at that time; but he asked the defendant and his wife what they were doing in the area. They told the officer that they were just walking on their property. The officer told them that he knew the property belonged to someone else, and they told him that they were looking for one of their cows. The officer then asked the defendant if the marijuana was his, and the defendant did not respond. They continued talking for several more minutes, and the defendant told the officer that it was his marijuana and that his wife did not know anything about it. The officer then read the defendant his Miranda rights. The trial court granted the defendant's motion to suppress his statement, but the

Second Circuit reversed. The court concluded that the situation was more analogous to a stop under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968) than to a formal arrest. The court, citing Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138 (1984), stated that Terry stops were not subject to the dictates of Miranda. The court further stated that the police may ask a detainee moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions.

In State v. Cowan, 99-2888 (La. 6/16/00), 763 So. 2d 583, in a per curiam decision, the Supreme Court stated that Article 215.1 did not preclude a police officer, who may lack reasonable suspicion, from engaging a motorist in conversation while investigating a routine traffic violation. The court stated that the conversation, coupled with the subsequent alert by a drug dog on the closed and locked toolbox in the bed of the defendant's truck, provided the police with probable cause to search for contraband. But the police were not obligated to end their investigation at that point and formally arrest the defendant before determining the contents of the toolbox to confirm or discount the drug dog's alert. The court noted that the investigation had not yet passed its preliminary stages when the officers asked the defendant if he had a key to the toolbox and elicited the admission that he had the key but would not give it to them. The court stated that the

absence of Miranda warnings did not taint the defendant's response.

In the present case, Amos had ordered the defendant to place his hands on the police car at the time he asked the defendant if he had any contraband or weapons; however, it does not appear that Amos intended to impose an extended restraint on the defendant's liberty when he ordered the defendant to place his hands on the police car. In other words, the defendant was not under arrest when Amos asked him if he had any weapons or contraband. As in Alford, the stop in this case was a Terry stop that did not require the giving of Miranda warnings. Therefore, the trial court did not err in denying the defendant's motion to suppress the evidence. This assignment of error is without merit.

RECOMMENDATION

For the foregoing reasons the defendant's conviction and sentence are affirmed.

AFFIRMED.