STATE OF LOUISIANA	*	**NO. 2000-KA-1372**
VERSUS	*	**COURT OF APPEAL**
LAMONT SHAW	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 406-636, SECTION "B"
HONORABLE PATRICK G. QUINLAN, JUDGE
* * * * * *
JUDGE MICHAEL E. KIRBY
* * * * * *

(Court composed of Judge Michael E. Kirby, Judge Terri F. Love, Judge Max N. Tobias, Jr.)

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STATEMENT OF THE CASE:

On April 30, 1999, the State filed a bill of information charging the defendant-appellant, Lamont Shaw, with one count of violating La. R.S. 14:95(E) relative to possession of a firearm while in possession of narcotics. The defendant was arraigned and entered a not guilty plea on May 5, 1999. A motion hearing commenced on July 9, 1999 and was concluded on August 24, 1999 at which time the trial court denied the defendant's motion to suppress the evidence. A trial was held on October 7, 1999 at the conclusion of which a twelve-person jury returned a responsive verdict of guilty of attempted possession of a firearm while in possession of narcotics. On October 29, 1999 the State filed a multiple bill charging the defendant as a second offender. The defendant entered a not guilty plea to this bill on November 3, 1999. The multiple bill hearing occurred on November 18, 1999, and on December 1, 1999 the trial court found the defendant to be a second offender. The court sentenced him to seven years at hard labor, then denied the defendant's motion for reconsideration of sentence and oral motion for a post verdict judgment of acquittal. The court granted the defendant's motion for an appeal. The trial court subsequently amended the

defendant's sentence to deny eligibility for probation, parole, or the suspension of sentence.

STATEMENT OF THE FACTS

On April 22, 1999 at approximately 3:00 p.m., Officer Michael Montalbano, who was assigned to the A.T.F. Safe Home Task Force, set up a surveillance of the intersection of Constance and Melpomene Streets. The surveillance was in response to complaints phoned in to the A.T.F. hotline. Officer Montalbano positioned himself in an unmarked police vehicle from which he could observe the intersection with binoculars. Officers Randy Lewis and Calvin Brazley were in the area and standing by as the takedown team in the event illegal activity was observed. As Officer Montalbano was viewing the scene through binoculars, he observed the defendant walk to the rear of a gray Grand Prix which was parked near the intersection. The defendant looked around in a manner that the officer believed was suspicious; the defendant then lifted his shirt, removed a handgun from his waistband, placed it inside a white plastic bag, and then put the bag in the trunk of the vehicle. Officer Montalbano immediately notified the takedown team by radio that the defendant had been in possession of a concealed weapon and should be apprehended. As the officers approached the

intersection and the defendant observed the marked police vehicle, the defendant reached into his pocket, pulled out a clear plastic bag, and dropped it to the ground. This action was observed by Officer Montalbano.

Officer Randy Lewis testified at trial that he stopped the defendant upon the instructions of Officer Montalbano. As the defendant was being detained, Officer Lewis was in radio communication with Officer Montalbano. In accordance with the information being relayed to him, Officer Lewis walked to the rear of the car and retrieved the plastic bag which the defendant had dropped; it contained what was stipulated at trial to be crack cocaine. Officer Lewis also obtained the keys to the vehicle from the defendant. However, as he prepared to unlock the trunk of the car, Officer Lewis discovered that it was unlocked but the top was not tightly shut. Officer Lewis opened the trunk completely and observed the white plastic bag with the handgun inside. The gun was seized. The defendant was formally arrested for possessing the gun while in the possession of the narcotics. A further search of the defendant resulted in the seizure of thirty-six dollars in currency.

After the defendant had been formally arrested, he advised the officers that his children were inside his residence in the corner apartment and that there was no one inside to watch them. Officer Lewis entered the apartment

to allow neighbors to remove the children and obtain supplies so that they could baby-sit the children. Officer Lewis denied any search of the residence occurred. Officer Lewis also denied that any other persons were handcuffed with the defendant. However, he did admit that he ordered another person in the area to stop and stay at the scene until Officer Montalbano confirmed by radio that the defendant was the subject he had observed. At that point, the other person was allowed to leave the area. Officer Lewis never obtained the name of the second person.

During a lengthy cross-examination, Officer Lewis denied strip-searching the defendant. He did not recall previously stopping the defendant in the area. He also testified that he did not see the defendant drop anything because the defendant was on the sidewalk side of the car while Officer Lewis was approaching in his vehicle; thus the defendant's car blocked his view of the defendant's hands.

Officer Calvin Brazley also testified at trial. He stated that he was the member of the takedown team who actually handcuffed the defendant. He did not stop or handcuff anyone else. He recalled Officer Lewis speaking to another subject. Officer Brazley did not enter the defendant's house. During cross-examination, Officer Brazley explained that he initially detained the defendant; when Officer Lewis told him that he had found

narcotics, Officer Brazley handcuffed the defendant and advised him of his rights. The entire process took less than a minute.

The defense called Derrick Lewis as a witness at trial. Mr. Lewis stated that he, his brother, Cornell Mercier, and the defendant were sitting in front of the door to the defendant's apartment reading the newspaper when the police pulled up. The police grabbed everyone, handcuffed them, and placed them on the ground. According to Mr. Lewis, the police went into the defendant's house, came out and got the defendant, then went back into the house. When the police came back outside with the defendant, they used the defendant's keys to open his mailbox, but did not find anything. The police then went looking around the car and opened the trunk. Mr. Lewis insisted that the police used the key to open the trunk. The officers pulled a bag containing a gun out of the trunk. They then searched around the car and found crack cocaine by the back tire. The defendant was placed into the police car. According to Mr. Lewis the police allowed him to go after telling him that he could be made an accessory. Lewis's brother was also allowed to leave the scene.

Derrick Lewis admitted to a prior conviction for possession of cocaine with the intent to distribute. He also testified that Officer Lewis had previously stopped him and the defendant several times.

The defendant testified on his own behalf. He admitted to being on parole for possession of a stolen vehicle. According to the defendant, he usually hung out with friends right outside his house, which is on the corner of Constance and Melpomene. He was often stopped by the police who would frisk him and run his name. The police threatened to arrest him if they caught him on the corner. On the day of his arrest, the defendant was outside talking to Derrick Lewis and Cornell Mercier when the police pulled up. All three of them were handcuffed. Officer Lewis asked who lived in the residence to which the defendant replied that he did. Officer Lewis then made the defendant go in the apartment to his bedroom where Officer Lewis strip searched him. Officer Lewis then searched the defendant's apartment. Nothing was found. Officer Lewis then removed the defendant's mailbox key, but found nothing there. Finally, Officer Lewis searched outside all around the house and car until he found drugs on the ground. Officer Lewis then took the defendant's keys to the car, which the defendant testified actually belonged to his girlfriend, opened the trunk and found a gun. The defendant was then arrested.

ERRORS PATENT

A review of the record for errors patent reveals one possible error.

The minute entry of sentencing on December 1, 1999 indicates that the trial court denied the defendant's motion for post verdict judgment of acquittal after the defendant was sentenced. La. C.Cr.P. art. 821 provides that such a motion must be disposed of before sentencing. However, the transcript of the sentencing reflects that the defendant did not move for a post-verdict judgment of acquittal until after he had been sentenced. Furthermore, the written motion was not filed until December 7, 1999, almost a week after sentencing. Because La. C.Cr.P. art. 821 requires that a defendant move for a post verdict judgment of acquittal before sentencing, and the record clearly shows the defendant did not, no error is attributable to the court's failure to rule on the motion before sentencing.

No other errors patent exist.

DISCUSSION

ASSIGNMENT OF ERROR NUMBER 1

In his first assignment of error the appellant contends that the trial court erred when it denied his motion to suppress evidence as to the gun seized from the trunk of the car. The appellant argues that there was no exception to the warrant requirement that would permit the officers to go into the trunk without first obtaining a warrant. The appellant does not

argue that there was no probable cause to search the trunk; rather, his argument is strictly related to the fact that the search and seizure of the trunk was conducted without a warrant.

This Court addressed this issue in State v. Toca, 99-1871 (La. App. 4 Cir. 9/6/00), 769 So. 2d 665. There, a police officer was enroute to assist some other officers when he saw the defendant standing at an intersection next to a vehicle with its trunk open. The defendant was observed walking around the corner to look at the other police officers. At first, the defendant did not observe the approaching police car because it was in "blackout mode" which meant it had no lights or siren and was proceeding very slowly. When the police car was approximately ten feet from the defendant, he saw it and reacted by closing the trunk of his car, removing something from his pocket, and throwing down a white object which appeared to be crack cocaine. The police officer immediately detained the defendant and another person who was walking up at the time; he retrieved the discarded object which was a plastic bag with several rocks of crack cocaine. The officer then went over to the car and realized that the trunk was not completely closed. He opened the trunk and found a plastic bag containing small bags filled with what appeared to be more cocaine. Subsequently, more drugs were found after a drug dog alerted on a spot in the trunk. On

appeal from his conviction, the defendant complained that there was no justification for a warrantless search of the trunk of the car. In rejecting this argument, this Court stated:

> In Maryland v. Dyson, 527 U.S. 465, 119 S.Ct. 2013 (1999), the United States Supreme Court reversed the granting of a motion to suppress evidence that had been seized without a warrant from the trunk of the defendant's automobile. The court, in a per curiam opinion stated:
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> > The Fourth Amendment generally requires police to secure a warrant before conducting a search. California v. Carney, 471 U.S. 386, 390-391, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985). As we recognized nearly 75 years ago in Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), there is an exception to this requirement for searches of automobiles. And under our established precedent, the "automobile exception" has no separate exigency requirement. We made this clear in United States v. Ross, 456 U.S. 798, 809, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), when we said that in cases where there was probable cause to search a vehicle "a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained." (Emphasis added). In a case with virtually identical facts to this one (even down to the bag of cocaine in the trunk of the car), Pennsylvania v. Labron, 518 U.S. 938, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996) (per curiam), we repeated that the automobile exception does not have a separate exigency requirement: "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more." Id., at 940, 116 S.Ct. 2485.
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> Id., 527 U.S. at 466-67, 119 S.Ct. at 2014.

> Smothers had probable cause to search the trunk based on his seizure of the bag of cocaine discarded by defendant and defendant's hurriedly closing the lid of the trunk when he saw Smothers approaching in his police car. Therefore, pursuant to the automobile exception to the warrant requirement as discussed above, he could open the trunk, look inside it, and seize the bag of crack cocaine without first obtaining a search warrant. The trial court did not err in denying defendant's motion to suppress the evidence.

Toca, pp. 3-4, 769 So. 2d at 668.

As in Toca, the officers in this case had probable cause to believe that the trunk of the defendant's car contained contraband, in this case a weapon that had been concealed. The fact that the evidence was in the trunk of an automobile itself constitutes an exception to the warrant requirement pursuant to Maryland v. Dyson. The trial court obviously did not believe the testimony of the defendant or his witness, Derrick Lewis. Thus, the trial court did not err in denying the motion to suppress evidence.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER 2

In his second assignment of error, the appellant contends that the trial court patently erred when it failed to advise him of the time limits for filing an application for post conviction relief. Counsel for the appellant suggests that the district court should be ordered to inform the appellant of the

appropriate time limits as set forth in La. C.Cr.P. art. 930.8 in writing within ten days.

La. C.Cr.P. art. 930.8(C) states: "At the time of sentencing, the trial court shall inform the defendant of the prescriptive period for post conviction relief." However, relying upon State ex rel. Glover v. State, 93-2330 (La. 9/5/95), 660 So. 2d 1189, 1201, this Court holds that the language in La. C.Cr.P. art. 930.8(C) is supplicatory language and does not bestow an enforceable right upon an individual defendant. Accordingly, failure to comply with La. C.Cr.P. art. 930.8(C) is not an error patent and requires no action on the part of the appellate court. See State v. Guillard, 98-0504 (La. App. 4 Cir. 4/7/99), 736 So. 2d 273 and State v. Jones, 97-2217 (La. App. 4 Cir. 2/24/99), 731 So. 2d 389, writ denied, 99-1702 (La. 11/5/99), 751 So. 2d 234. This assignment of error does not entitle the appellant to any relief.

CONCLUSION

The appellant's conviction and sentence is affirmed.

AFFIRMED.