NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-1527**
VERSUS	*	**COURT OF APPEAL**
NICK SCOTT	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 390-781, SECTION "B"
Honorable Patrick G. Quinlan, Judge
* * * * * *
Judge Miriam G. Waltzer
* * * * * *

(Court composed of Judge Steven R. Plotkin, Judge Miriam G. Waltzer and Judge Patricia Rivet Murray)

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CONVICTION FOR POSSESSION OF COCAINE WITH INTENT TO DISTRIBUTE IS AFFIRMED. CONVICTION AS A THIRD FELONY HABITUAL OFFENDER AND SENTENCE VACATED. CASE REMANDED.

STATEMENT OF THE CASE

Defendant Nick Scott was charged by bill of information on 15 July 1997 with possession with intent to distribute cocaine, a violation of LSA-R.S. 40:967(A). Defendant pleaded not guilty at his 18 July 1997 arraignment. The trial court found probable cause and denied defendant's motion to suppress on 18 August 1997. On 20 January 1998, this court granted defendant's writ application for the sole purpose of transferring his motion for speedy trial to the trial court for filing and consideration. On 17 February 1998, this court granted defendant's writ application for the sole purpose of transferring attached motions to suppress the confession and evidence to the trial court for consideration before trial. On 9 March 1998, the trial court ruled that defendant's motions to suppress were moot, having been denied on 18 August 1997. On 12 June 1998, this court granted defendant's writ application for the sole purpose of transferring his motion for speedy trial to the trial court for determination of whether defendant

should be released. On 16 June 1998, the trial court denied defendant's motion for speedy trial release. On 15 July 1998, this court denied defendant's writ application, noting that the trial court had complied with its previous orders. On 17 December 1998, a mistrial was declared after the jury was unable to reach a verdict. On 12 August 1999, defendant was tried by a jury composed of twelve persons and found guilty as charged. On 21 October 1999, defendant was adjudicated a third-felony habitual offender and sentenced to life imprisonment at hard labor, with credit for time served, without benefit of probation, parole or suspension of sentence. The trial court denied defendant's motion to reconsider sentence, and granted defendant's motion for appeal.

We affirm the conviction for possession of cocaine with intent to distribute, vacate the conviction and sentence as a third felony habitual offender, and remand the case to the trial court.

STATEMENT OF FACTS

New Orleans Police Officer Roger Smith and his partner, Officer Kenneth Thomas, arrested defendant in March 1997 while on routine patrol in the St. Bernard Housing Development. Officer Smith said defendant first came to his attention when he observed him shooting dice on a porch. The officers later encountered defendant in the front passenger seat of a car, with

a small child sitting on his lap. The officers approached, intending to tell defendant to place the child in the back seat with a seat belt, whereupon defendant left the car and ran. Officer Smith confirmed that this action aroused his suspicions, and he gave chase, while Officer Thomas drove to another location in order to intercept defendant. Officer Smith apprehended defendant and, after a brief scuffle, handcuffed him. Officer Thomas patted down defendant and removed a large amount of money and crack cocaine from defendant's pocket. Officer Smith identified fifty-five pieces of crack cocaine recovered from defendant's pocket, as well as money, a beeper and a cellular telephone. The Officers placed defendant under arrest after having discovered the cocaine. Officer Smith identified a rights of arrestee form showing that defendant waived his rights, and read a statement by defendant in which he admitted possessing the crack cocaine. The statement was in question and answer form, with a police officer writing down defendant's answers. Officer Smith testified that after having apprehended defendant they asked him in which pocket the cocaine was located.

Officer Thomas testified similarly to Officer Smith concerning the child restraint violation. He performed a protective search of defendant for weapons, and felt an object in his pants pocket, which he said led him to believe the pocket contained a package of crack cocaine. Officer Thomas

identified the package containing fifty-five pieces of crack cocaine, which he had counted. He also said that as defendant removed a wad of currency from his pocket, it fell on the ground and the wind blew it around. The officers were not able to retrieve all of the money, as several of the neighbors picked up some of it.

New Orleans Police Officer William Giblin, qualified by stipulation as an expert in the field of the analysis of controlled dangerous substances, testified that four of the pieces of white rock-like substances tested positive for the presence of cocaine. Officer Giblin said the total weight of the cocaine and plastic was 19.7 grams, and estimated that the cocaine would weigh approximately 18 grams.

Defendant testified, admitting prior convictions for aggravated battery, possession of cocaine and aggravated assault. Defendant stated that on the date in question he was riding in a car being driven by his girlfriend. He claimed that when stopped by police he exited the car and placed his hands on the car. Defendant said that one officer put his gun to defendant's side and ordered him not to move. Defendant's girlfriend screamed, "don't shoot him." When the officer turned, defendant ran into the courtyard where there were people, and lay down. Defendant said he had been shot by police in 1989, and therefore was afraid of them. Defendant exhibited entrance and

exit wound scars on his right arm, shoulder and back, respectively, from the police gunshot wound. Defendant admitted having pled guilty to aggravated assault in connection with that incident. Defendant said the cocaine did not belong to him; he did not see it until he was at the Third District police station. Defendant claimed the money was his, and said he won it shooting dice. Defendant claimed that he signed a confession only because police threatened him. Defendant admitted on cross examination that he had turned himself in to police on an attempted murder charge in 1993. The prosecutor also confronted defendant with a 1993 arrest register for possession with intent to distribute a controlled dangerous substance. The prosecutor noted that both arrest registers reflected that defendant had not been abused by police.

ERRORS PATENT

A review of the record reveals no errors patent.

FIRST ASSIGNMENT OF ERROR: The trial court erred in denying defendant's motion to suppress the evidence and confession.

Warrantless searches and seizures fail to meet constitutional requisites unless they fall within one of the narrow exceptions to the warrant

requirement. State v. Edwards, 97-1797, p. 11 (La. 7/2/99), 750 So. 2d 893, 901, cert. denied, Edwards v. Louisiana, 528 U.S. 1026, 120 S.Ct. 542, 145 L.Ed.2d 421 (1999). On trial of a motion to suppress, the State has the burden of proving the admissibility of all evidence seized without a warrant. La. C.Cr.P. art. 703(D); State v. Jones, 97-2217, p. 10 (La. App. 4 Cir. 2/24/99), 731 So.2d 389, 395, writ denied, 99-1702 (La. 11/5/99), 751 So. 2d 234. A trial court's ruling on a motion to suppress the evidence is entitled to great weight, because the court has the opportunity to observe the witnesses and weigh the credibility of their testimony. State v. Mims, 98-2572, p.3 (La. App. 4 Cir. 9/22/99), 752 So. 2d 192, 193-194. In reviewing a trial court's ruling on a motion to suppress, an appellate court is not limited to evidence adduced at the hearing on the motion to suppress; it may also consider any pertinent evidence given at trial of the case. State v. Nogess, 98-0670, p. 11 (La. App. 4 Cir. 3/3/99), 729 So. 2d 132, 137.

La. C.Cr.P. art. 215.1(A) provides:

> 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.

"Reasonable suspicion" to stop is something less than the probable cause required for an arrest, and the reviewing court must look to the facts and circumstances of each case to determine whether a detaining officer had

sufficient facts within his knowledge to justify an infringement of the suspect's rights. State v. Jones, 99-0861, p. 10 (La. App. 4 Cir. 6/21/00), 769 So. 2d 28, 36-37. In assessing the reasonableness of an investigatory stop, the court must balance the need for the stop against the invasion of privacy that it entails. State v. Carter, 99-0779, p. 6 (La. App. 4 Cir. 11/15/00), 773 So. 2d 268, 274. The totality of the circumstances must be considered in determining whether reasonable suspicion exists. State v. Lipscomb, 99-2094, p. 11 (La. App. 4 Cir. 9/13/00), 770 So. 2d 29, 36. The detaining officers must have knowledge of specific, articulable facts, which, if taken together with rational inferences from those facts, reasonably warrant the stop. State v. Dennis, 98-1016, p. 5 (La. App. 4 Cir. 9/22/99), 753 So. 2d 296, 299. In reviewing the totality of the circumstances, the officer's past experience, training and common sense may be considered in determining if his inferences from the facts at hand were reasonable. State v. Cook, 99-0091, p. 6 (La. App. 4 Cir. 5/5/99), 733 So. 2d 1227, 1232. Deference should be given to the experience of the officers who were present at the time of the incident. State v. Ratliff, 98-0094, p. 3 (La. App. 4 Cir. 5/19/99), 737 So. 2d 252, 254, writ denied, 99-1523 (La. 10/29/99), 748 So. 2d 1160.

Both officers testified at trial, and Officer Thomas testified at the

motion to suppress hearing, that they stopped the vehicle in which defendant was riding because he was holding a child in his lap, a child who was not wearing a seat belt. LSA-R.S. 32:295 provided at the time of defendant's arrest that every resident of the state who transports a child under the age of five years in a passenger vehicle equipped with seat belts shall have the child properly secured in a child passenger restraint system. The evidence shows the officers stopped the vehicle because they observed what reasonably appeared to be a violation of LSA-R.S. 32:295. LSA-R.S. 32:295(G) provides, and provided at the time of defendant's arrest: "Any operator of a motor vehicle **stopped for a violation of this Section**. . ." [Emphasis added.] Thus, the statute contemplates a lawful stop for a violation. The violation of a traffic regulation provides reasonable suspicion to stop a vehicle. State v. Thomas, 99-2219, p. 14 (La. App. 4 Cir. 5/17/00), 764 So. 2d 1104, 1112. Therefore, the officers lawfully stopped the vehicle under the reasonable belief that the driver was committing an offense, a violation of LSA-R.S. 32:295.

Defendant cites State v. Barbier, 98-2923 (La. 9/8/99), 743 So. 2d 1236, where the court held that La. R.S. 32:295.1(F), as in effect prior to amendment by Acts 1999, No. 1344, barred police from stopping a vehicle solely for a violation of that statute, the "adult" seatbelt law. Barbier has no

application to the instant case, which involved a violation of the child passenger restraint law.

When the officers stopped the vehicle, defendant fled. In denying the motion to suppress, the trial court stated that defendant's bolting from the vehicle as soon as officers stopped it reasonably raised their suspicion that he might be involved in some type of illegal activity. Although flight from police officers, alone, will not provide justification for a stop, State v. Benjamin, 97-3065, p. 3 (La.12/1/98), 722 So.2d 988, 989, flight from police officers is highly suspicious and, therefore, may be one of the factors leading to a finding of reasonable suspicion to stop. State v. Fortier, 99-0244, p. 7, (La. App. 4 Cir. 1/26/00), 756 So. 2d 455, 459-460, writ denied, 2000-0631 (La. 9/22/00), 768 So. 2d 1285, citing Benjamin. These cases also hold that given the highly suspicious nature of flight from a police officer, the amount of additional information required in order to provide officers reasonable suspicion that an individual is engaged in criminal behavior is greatly lessened.

In the instant case, Officer Thomas testified that the area was "a high crime area, drugs, stolen cars, a lot of armed robberies . . ." In Illinois v. Wardlow, 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000), the U.S. Supreme Court held that police officers were justified in suspecting that a

defendant was involved in criminal activity, based solely on flight in a known drug area. Thus, the stop in the instant case was lawful, as it was based on defendant's sudden flight in a known drug area.

Defendant argues that even if the facts justified an investigatory stop, the circumstances amounted to an arrest without lawful probable cause. Defendant points out that he was chased, knocked down, handcuffed, and placed against the police car. There is no merit to this argument. La. C.Cr.P. art. 201 defines arrest as the taking of one person into custody by another. While the general rule is that the distinguishing factor between an arrest and the lesser intrusive investigatory stop is that in the former, a reasonable person would not feel that he is free to leave, while in the latter, a reasonable person would feel free to leave after identifying himself and accounting for his suspicious actions, "it is the circumstances indicating intent to effect an extended restraint on the liberty of the accused" that is determinative of when an arrest occurs. State v. Allen, 95-1754, p. 6 (La. 9/5/96), 682 So. 2d 713, 719.

Defendant fled and resisted a lawful investigatory stop. Once the officers had reasonable suspicion to believe that he was engaging in criminal activity, they had the authority to effectuate a stop. It is unclear whether defendant had been handcuffed at the time he was searched. Officer Smith

testified at the motion to suppress hearing that he could not remember whether defendant had been cuffed at that time, but testified at trial that defendant was handcuffed while still on the ground. Regardless, there was no evidence of an intent to effect an extended restraint on defendant's liberty, and thus no arrest, prior to the discovery of the cocaine. Defendant fled and physically resisted a lawful investigatory stop, and the handcuffing of defendant was a reasonable safety precaution for all parties and bystanders.

Defendant next argues that police did not have reason to conduct a protective search of his person. If a police officer stops a person whom he reasonably suspects is committing, has committed, or is about to commit a crime, pursuant to La. C.Cr.P. art. 215.1(A), and reasonably suspects he is in danger, the officer may frisk the outer clothing of such person for a dangerous weapon, or, if he reasonably suspects that the person possesses a dangerous weapon, he may search the person. La. C.Cr.P. art. 215.1(B); State v. Curtis, 96-1408, pp. 2-3 (La. App. 4 Cir. 10/2/96), 681 So. 2d 1287, 1289. "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. Williams, 98-3059, p. 4 (La. App. 4 Cir. 3/3/99), 729 So. 2d 142, 144. 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, quoting State v. Hunter, 375 So.2d 99, 101-02 (La. 1979):

> 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.

Officer Thomas testified that he checked defendant for weapons, "since the neighborhood does have that type of reputation." As previously stated, Officer Thomas said the location was in a high crime area, specifically mentioning drugs and armed robberies. While it true that the officers had not observed defendant engaged in any specific activity indicating involvement with drugs, one factor justifying the stop was that defendant's suspicious flight occurred in a known drug area. If an officer has knowledge of that fact, he cannot ignore it when making a determination whether it is necessary to conduct a protective pat-down search of the suspect's outer

clothing for weapons. Louisiana courts recognize a close association between narcotics traffickers and weapons. State v. Wilson, 2000-0178, p. 3 (La. 12/8/00), 775 So. 2d 1051, 1053, citing United States v. Trullo, 809 F.2d 108, 113-114 (1 Cir. 1987), cert. denied, Trullo v. United States, 482 U.S. 916, 107 S.Ct. 3191, 96 L.Ed.2d 679 (1987).

It is implicit in Wardlow that a protective weapons frisk is justified upon the investigatory stop of an individual on the grounds of flight in a known drug area, and nothing more. However, defendant argues that because he was handcuffed before the pat-down search was conducted, there was no danger that he would reach for a weapon. This is a dangerous and untenable situation. If police officers reasonably believe that an individual stopped for suspicion of criminal activity might be armed, as in the instant case, it cannot be said with any certainty that such danger is completely mooted upon the handcuffing of defendant. The frisk was justified.

Defendant's final argument is that the seizure of the cocaine did not meet the requisites of the "plain feel" exception to the search warrant requirement. Evidence discovered during a lawful investigatory frisk may be seized under the "plain feel" exception to the search warrant requirement, as explained in Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). The object's identity as contraband must be

immediately apparent. Id. Officer Thomas testified at the motion to suppress hearing that he felt something in a plastic bag, and indicated that based on his experience it was immediately apparent to him that it was narcotics. As defense counsel elicited an admission from Officer Smith on cross examination that after apprehending defendant "they" asked him what pocket the cocaine was in, it can be concluded that when Officer Thomas said it was apparent to him that the object he felt was "narcotics," he meant cocaine. Thus, the cocaine was lawfully seized under the "plain feel" exception.

SECOND ASSIGNMENT OF ERROR: The trial court erred in allowing the State to question defendant as to the details of his prior convictions because the facts elicited during that line of questioning constituted inadmissible evidence of other crimes.

During defendant's direct examination, he testified that he ran from the officers out of fear, because one pointed a gun at him, and he had been shot by police in connection with an earlier incident for which he had been arrested and convicted of aggravated assault. On cross examination, the State sought to elicit the details of his two convictions since the shooting, focusing on whether defendant fled from police on those occasions. The

prosecutor also noted the charges for which defendant had originally been arrested in those cases. Defense counsel objected a number of times to this line of questioning. The trial court overruled the objections, stating that defendant had opened the door by presenting the defense that he ran solely out of fear of police.

Generally, evidence of other crimes is inadmissible at trial because of the danger that the trier of fact will convict the defendant of the immediate charge based on his/her prior criminal acts. State v. Jones, 99-0861, p. 17, (La.App. 4 Cir. 6/21/00), 769 So.2d 28, 40. Evidence of convictions is admissible in some circumstances under La. C.E. art. 609.1.

The trial court found the line of questioning relevant to the issue of whether or not defendant fled in connection with the two previous arrests. Evidence that defendant was not arrested for flight from an officer on those two occasions was relevant to his defense that he fled because he was afraid of police, as was evidence that the booking sheets from those arrests reflected that he had not been abused by police. The trial court implicitly found that the probative value of such evidence outweighed the danger of unfair prejudice, confusion of the issues or misleading the jury. It cannot be said that such a determination was an abuse of discretion.

However, it does not appear that evidence as to the original charges in

those arrests was relevant to the issue of whether defendant was telling the truth as to why he fled in the instant case. In State v. Johnson, 94-1379 (La. 11/27/95), 664 So. 2d 94, the Louisiana Supreme Court held that the erroneous admission of other crimes evidence was subject to the harmless error analysis—whether the verdict actually rendered in the case was surely not attributable to the error. The court found that, considering the strength of the evidence against the defendant, the error was harmless.

In the instant case, both arresting officers testified that one of them, Officer Thomas, recovered a bag of crack cocaine from defendant's front pants pocket. Defendant testified simply that the cocaine did not belong to him. The jury obviously found the officers' testimony credible as to the seizure of the cocaine, and that of defendant unworthy of belief. Officer Thomas testified that he counted fifty-five pieces of cocaine. Officer Smith testified that it was a "large amount" of crack cocaine, "approximately fifty-five pieces." The evidence envelope reflected that it was fifty-five pieces. Crime Lab Officer Giblin testified that the cocaine weighed approximately eighteen grams, or nearly two-thirds of an ounce. In addition, both Officers Smith and Thomas testified that a "large amount" of money was recovered from defendant. Not all of the money was recovered, as the wad fell to the ground as defendant removed it, and bystanders snatched some of the bills

when they blew away. Defendant also had a pager and cellular telephone on his person. The jury viewed the evidence, and made a common-sense determination that defendant possessed the cocaine with the intent to distribute it, as opposed to possession for personal use. One of the arrests allowed into evidence was for possession with intent to distribute cocaine, while the conviction was for simple possession. However, considering the evidence presented in the case, the verdict of guilty of possession with intent to distribute cocaine rendered in this case was surely not attributable to any error in admitting evidence of the previous arrests.

There is no merit to this assignment of error.

THIRD ASSIGNMENT OF ERROR: The evidence is insufficient to support defendant's conviction for possession with intent to distribute, as there was no admissible evidence that defendant possessed the cocaine with such intent.

This court set out the well-settled standard for reviewing convictions for sufficiency of the evidence in State v. Ragas, 98-0011 pp. 13-14 (La. App. 4 Cir. 7/28/99), 744 So.2d 99, 106-107:

> In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of act could have found the defendant guilty beyond a reasonable doubt. Jackson

> v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 588 So.2d 757 (La. App. 4 Cir.1991). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. State v. Mussall, 523 So.2d 1305 (La.1988). The reviewing court must consider the record as a whole since that is what a rational trier of fact would do. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. Mussall; Green; supra.
>
> In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. State v. Shapiro, 431 So.2d 372 (La.1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438.

Defendant was convicted of possession with intent to distribute cocaine, in violation of La. R.S. 40:967(A). There is no question but that the evidence is such that any rational trier of fact could have found beyond a reasonable doubt that defendant possessed the cocaine; two police officers testified that one of them recovered it from defendant's pants pocket. However, to support defendant's conviction for possession with intent to distribute, the State must prove that the defendant knowingly and intentionally possessed the drug with the intent to distribute. State v. Crowell, 99-2238, p. 14 (La. App. 4 Cir. 11/21/00), 773 So. 2d 871, 881.

Intent to distribute may be established by proving circumstances surrounding defendant's possession which give rise to a reasonable inference of such intent. State v. Johnson, 99-1053, p. 5 (La. App. 4 Cir. 6/14/00), 766 So. 2d 572, 577. In State v. Hearold, 603 So. 2d 731 (La. 1992), the Louisiana Supreme Court discussed certain factors useful in determining whether circumstantial evidence is sufficient to prove the intent to distribute a controlled dangerous substance such as cocaine, stating:

> These factors include (1) whether the defendant ever distributed or attempted to distribute the drug; (2) whether the drug was in a form usually associated with possession for distribution to others; (3) whether the amount of drug created an inference of an intent to distribute; (4) whether expert or other testimony established that the amount of drug found in the defendant's possession is inconsistent with personal use only; and (5) whether there was any paraphernalia, such as baggies or scales, evidencing an intent to distribute.

603 So. 2d at 735.

The Hearold court also held that in the absence of circumstances inferring an intent to distribute, mere possession of a drug is not evidence of intent to distribute, unless the quantity is so large that no other inference is possible. Evidence need not fall squarely within the Hearold factors to be sufficient for the jury to infer the requisite intent to distribute. State v. Johnson, 99-1053 at p. 6, 766 So. 2d at 577. Possession of large sums of cash may also be considered circumstantial evidence of intent. State v.

Johnson, 2000-1528, p. 6 (La. App. 4 Cir. 2/14/01), 780 So. 2d 1140, 1144.

In the instant case, the jury heard testimony that defendant was found in possession of fifty-five pieces of crack cocaine, along with a large sum of cash, a pager and a cellular telephone. While many people carry pagers and cellular telephones, these items could have been used by defendant to facilitate drug sales.

Viewing all of the evidence in a light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that defendant did not possess the fifty-five rocks of crack cocaine for his personal use, but possessed them with the intent to distribute.

There is no merit to this assignment of error.

FOURTH ASSIGNMENT OF ERROR: The trial court erred in adjudicating defendant a third-felony habitual offender, as his 1994 prior conviction was pursuant to now repealed LSA-R.S. 40:983, and therefore it could not be used as a predicate offense for habitual offender adjudication.

Defendant's 16 May 1994 felony conviction for possession of cocaine was one of the two prior felonies the State used to prove that he was a third-felony habitual offender. Following defendant's 1994 conviction, he was

adjudicated a second-felony habitual offender. The trial court sentenced defendant under LSA-R.S. 40:983 to five years at hard labor, suspended, with five years active probation with special conditions. A plea of guilty or conviction pursuant to LSA-R.S. 40:983 is not an adjudication of guilt, and ordinarily cannot serve as a predicate conviction for sentence enhancement under the Habitual Offender Law, La. R.S. 15:529.1. See State v. Jones, 99-0861 (La.App. 4 Cir. 6/21/00), 769 So.2d 28.

The record reflects that, although procedurally improper, defendant had been sentenced in case #368-042(D) under the provisions of former LSA-R.S. 40-983, a deferral statute. The statute deferred "convictions" pending a probationary period. Upon successful completion of the probationary period, the conviction became null.

The State notes in its appellate brief:

> In appellant's prior case, the state noted an intent to challenge the trial court's imposition of sentence under LSA-R.S. 40:983, however, the state failed to file any writs. Consequently, it appears that appellant's contention has merit, in that at the time he was arrested on the present charges he had not yet had his conviction under LSA-R.S. 40-983 in case number 368-042(D) revoked and converted to a "Regular" conviction.
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> If this court concludes that case number 368-042(D) was not a conviction for habitual offender purposes at the time appellant was charged with the instant offense, then the state submits that the proper remedy is to remand this

matter for re-sentencing before the trial court.

This assignment of error has merit.

CONCLUSION AND DECREE

For the foregoing reasons, defendant's conviction as a third felony habitual offender and sentence are vacated and the case is remanded to the trial court for further proceedings consistent with this opinion.

CONVICTION FOR POSSESSION OF COCAINE WITH INTENT TO DISTRIBUTE IS AFFIRMED. CONVICTION AS A THIRD FELONY HABITUAL OFFENDER AND SENTENCE VACATED. CASE REMANDED.