STATE OF LOUISIANA	*	**NO. 2000-KA-1899**
VERSUS	*	**COURT OF APPEAL**
ANTHONY J. HURST	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 411-194, SECTION "F"
HONORABLE DENNIS J. WALDRON, JUDGE
* * * * * *
JAMES F. MCKAY, III
JUDGE
* * * * * *

(Court composed of Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr., Judge David S. Gorbaty)

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AFFIRMED

STATEMENT OF THE CASE:

The defendant, Anthony J. Hurst, was charged by bill of information with possession of cocaine, a violation of La.R.S. 40:967. The defendant was arraigned on December 9, 1999, and entered a plea of not guilty. On December 16, 1999, the trial court denied the defendant's motion to suppress the evidence. On January 20, 2000, the defendant was found guilty as charged by a six-member jury. On April 28, 2000, the defendant was sentenced as a third felony offender to serve ten years at hard labor with credit for time served but without benefit of probation or suspension of sentence.

STATEMENT OF THE FACTS:

The following testimony was adduced at the defendant's trial, which was held on January 20, 2000.

Officer Hilal Rohli testified that on November 20, 1999, she and her partner, Officer Meich, turned onto Monroe Street and observed the defendant staggering down Monroe Street in the direction of the police vehicle. They pulled over and requested that defendant speak to them. As he leaned against the police vehicle to steady himself, he told Officer Rohli

that he had attended a party and had been drinking since 7:00 p.m. The officer noted that the defendant's speech was very slurred, and he could not stand up without holding onto the police vehicle. Defendant had no identification on his person. Because of the lack of identification, no summons could be issued for public intoxication and for carrying an open container. For these reasons, and because the defendant was a real danger to himself, he was placed under arrest. Incident to that arrest, Officer Meich searched the defendant. The search revealed an aluminum crack pipe and crack cocaine in the defendant's right pant's pocket. Officer Rohli stated that a municipal affidavit was completed and issued to the defendant charging him with public intoxication and carrying an open container.

On cross-examination, Officer Rohli testified that after the defendant was arrested the defendant's mother came outside. She corroborated the identity of defendant. She told the defendant to calm down and stop "cutting up" inside the police vehicle. Officer Rohli stated that the defendant never requested a Breathalyzer test and that no field sobriety test was conducted.

Officer Joseph Meich, testified that on November 20, 1999, he was assigned to the second district narcotics task force and that he and his partner, Officer Rohli were patrolling the area known as "Pigeon Town", between Carrolton Avenue and Jefferson Parish. As they turned from

Willow Street onto Monroe Street, they observed the defendant in the center of the street drinking from an open container. Because the defendant was carrying an open container he was in violation of the Municipal Open Container Law. The officers requested that the defendant to come over to the police vehicle so that they could speak with him. The defendant complied. As the defendant stumbled towards the vehicle, while leaning on the police vehicle, the officers noted that his speech was slurred and a strong odor of alcohol emanated from his breath. Based on the defendant's behavior and his admission that he had been consuming alcohol, the officers arrested him for public intoxication and carrying an open container of alcohol. He was placed in handcuffs and searched as an incident to the arrest. Recovered from the defendants right front pants pocket was a plastic wrapper containing a piece of crack cocaine and a foil pipe used to smoke crack cocaine. He told the officers that he resided at 1421 Monroe Street.

On cross-examination, Officer Meich, testified that generally only a summons is issued for a violation of the Municipal Open Container Law. However, because the defendant did not possess any identification, a summons could not be written because the officers had no proof of identity or residency. It was 2:30 a.m. and no one else was on the street. Officer Meich stated that no field sobriety test was conducted because the defendant

was not operating a motor vehicle. After the defendant was arrested and placed in the police vehicle, he began to holler for his mother, who lived nearby. His mother came outside.

The State and the defense stipulated that if Officer O'Neal testified that he would testify that he is an expert in the testing and identification of cocaine and that both the crack pipe and the piece of rock-like substance found on the defendant tested positive for cocaine.

Gwnell Thomas, sister of the defendant, testified for the defense. She stated that at the time of the defendant's arrest she was seated inside her friend's car, which was parked, in her mother's driveway. She testified that she, the defendant and Mr. Watson, her friend, had attended a party in honor of her birthday. She testified that the defendant was arrested two miles from where she and Mr. Watson were seated in Mr. Watson's car. She stated that they stopped in her mother's driveway because the defendant had to use the bathroom. While waiting for the defendant she exited the car to smoke a cigarette. She then observed police lights. The police stopped. The male police officer asked the defendant if he had been drinking and the defendant responded in the affirmative. The female police officer then handcuffed the defendant and placed him in the police vehicle. The male police officer used a flashlight and shined it near "the shed". The male

police officer then told the female police officer that he had found what he was looking for. The object appeared to be silver object, which they placed inside a plastic bag. The witness stated that she believed the police found the silver item beside her grandfather's blue car, which was parked in the street. She stated that when the defendant exited the car to use the bathroom, that she did not see him holding a bottle of beer. When she observed the police about to drive away with the defendant, she asked her friend to knock on her mother's window and inform her of what was happening. Her mother exited her home and asked the police why they were taking the defendant to jail. The police showed the defendant's mother the plastic bag containing the evidence they had confiscated from the defendant. She stated that she never observed the police search the defendant.

On cross-examination, Ms. Thomas testified that she and the defendant had been at the party from about midnight and that he had been drinking beer at the party. The party was held at the H & H Barroom at the corner from her mother's home where she and the defendant reside and when they left the bar they were driving toward her mother's home because the defendant had to use the bathroom. However, they stopped instead in front of her grandfather's house because the defendant had to "go bad". She testified that her grandfather's house is two houses from her mother's house

on the same side of the street. Her grandfather lives at 1421/1419 Monroe Street. She stated that because her mother was asleep and neither of them had a key to their mother's house, the defendant did not want to knock on the door and disturb her. After the police left with the defendant, she and Mr. Watson told her mother what they had observed. First, she stated that she was only two or three feet from the defendant when the police stopped him. Later, she stated that she was about twenty or twenty-five feet from the defendant when the police stopped him. She told Mr. Watson that the police had the defendant up against the car and to knock on her mother's window and tell her mother that the police were arresting the defendant. Neither she nor Mr. Watson spoke to the police officers. She testified that she did not see the police search the defendant. She stated that the only thing she knew the defendant had in his possession was a pack of Newport cigarettes, which was purchased that night. She admitted, however, that the defendant dressed himself and that she could not be sure if he put anything else in his pocket.

Mr. Charles Watson testified for the defense. Mr. Watson stated that he knows the defendant and Gwnell Thomas but is not a blood relative. He stated that on the night of the defendant's arrest he, Ms. Thomas and the defendant were at a party at the H&H bar. It was Ms. Thomas's birthday. He stated that he had a few drinks. He testified that on the way to taking the

defendant and Ms. Thomas home he stopped to let the defendant use the bathroom. He testified that he pulled into the driveway under the carport. Ms. Thomas told him that the police had arrested the defendant. He stated that Gwen exited the car because she also had to use the bathroom. She "peeped" and then told him," they got Anthony". When he exited the car and walked to the front he observed the officers handcuff the defendant. The officers had the defendant against the car. One of the officers was looking towards the ground. At this point, Mr. Watson stated he went to the window of the house and informed the defendant's mother that the defendant was being arrested. He testified that the police were looking at the ground with a flashlight as if they were looking for something. He was unable to state whether the police found anything on the ground. He stated that at no time did he see the police search the defendant.

On cross-examination, Mr. Watson testified that both he and the defendant were drinking alcohol that night. He stated that he consumed about three beers. He stated that just before he drove into the driveway at the defendant's mother's house, the defendant stated that he had to use the "bathroom quick" and jumped out of the car in front of his mother's house and not further up the block at his grandfather's house. He stated that he was approximately two double houses away from the defendant and the

police officers when the defendant was handcuffed. Ms. Thomas was standing next to him (Watson). When the defendant was placed in handcuffs, he went to the defendant's mother's window to inform her that the defendant had been arrested. He admitted that it could have been at this time that the police searched the defendant and that is why he did not observe the search. He stated that he heard the defendant hollering for his mother. He observed the police show "something" to the defendant's mother.

ERRORS PATENT:

A review for errors patent reveals an error in the defendant's sentence. The defendant was adjudicated a third felony offender. The trial court found the defendant had prior convictions for distribution of cocaine and possession of marijuana. La. R.S. 40: 967 A (4)(b) requires that a person convicted of distribution of cocaine receive a sentence of not less than five years and not more than thirty years with the first five years being without benefit of parole, probation or suspension of sentence may be sentenced to a fine of not more than $50,000.00. La. R.S. 15:529.1(A)(1)(b)(ii) provides:

> If the third felony or either of the two prior felonies is a felony described as a crime of violence under R.S. 14:2(13) or as a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for more than five years or any other crime punishable by imprisonment for more than twelve years, the

> person shall be imprisoned for the remainder of his natural life, without benefit of parole, probation, or suspension of sentence.

Because one of the defendant's prior felonies was for distribution of cocaine, a violation of the Uniform Controlled Dangerous Substances Law that was punishable by imprisonment for more than five years, the defendant should have received the mandatory life sentence. In the instant case, the trial court cited State v. Dorthey, 623 So.2d 1276 (La. 1993) and referred to the case as a "crack pipe case". For these reasons, the trial court found the mandatory life sentence inappropriate. The court sentenced the defendant to serve ten years at hard labor with credit for time served but without benefit of probation or suspension of sentence. Therefore, the trial court illegally sentenced the defendant to less than the mandatory life sentence required for a third felony offender with a prior felony conviction in violation of the Uniform Controlled Dangerous Substances Law. Nevertheless, the sentence is an error favorable to the defendant and will not be corrected on appeal absent a request for review by the state. State v. Fraser, 484 So. 2d 122 (La. 1986).

DISCUSSION:

By his sole assignment of error, the defendant asserts that the arresting officers acted unreasonably in arresting him in front of his home for the

municipal violations of public intoxication and carrying an open container. As such, the subsequent search of the defendant, which yielded the cocaine, was not a search incident to a lawful arrest. Specifically, the defendant asserts that the facts of his arrest do not support an investigatory stop.

The authorization for an investigatory stop by a police officer is set forth in C.Cr.P.art. 215.1, which provides in part:

> A. 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.
> (emphasis added).

See also Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968); State v. Guy, 89-1234, (La.App.4 Cir. 01/31/91); 575 So.2d 429, writ den. 578 So.2d 930 (1991); State v. Smith, 89-2048 (La.App. 4 Cir. 11/7/91), 573 So.2d 1233, writ den. 577 So.2d 48 (1991); State v. Johnson, 88-1905, (La.App. 4 Cir. 02/15/90), 557 So.2d 1030; State v. Jones, 483 So.2d 1207 (La.App. 4 Cir. 1986), writ den. 488 So.2d 197 (1986). As this court noted in Johnson;

> "Reasonable suspicion" 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 the detaining officer had sufficient facts within his knowledge to justify an infringement of the suspect's rights. State v. Jones, Id. Mere suspicion of activity is not a sufficient basis for police interference with an individual's freedom. State v. Williams, 421 So.2d 874 (La. 1982).

Johnson, at 1033. See also Guy; Smith; supra.

The detaining officer must have articulable knowledge of particular facts to justify the infringement on the individual's right to be free from government interference. State v. Williams, 421 So.2d 874 (La. 1982). Based upon the totality of the circumstances, the detaining officers must have a particularized and objective basis for suspecting the individual of criminal activity. U. S. v. Cortez, 449 U.S. 411, 101 S.Ct. 690 (1981).

It is well settled that a search conducted without a warrant is per se unreasonable, subject only to a few specifically established and well delineated exceptions. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973); State v. Tomasetti, 381 So.2d. 420 (La. 1980). One of those exceptions is a search incident to a lawful arrest made of a person and the area in his immediate control. Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034 (1969); Tomasetti, at 423.

In support of his argument that the arresting officers were unreasonable in stopping, arresting and searching him, the defendant cites this court's holding in State v. Lackings, 2000-0423 (La. App. 4 Cir. 4/5/00), 759 So.2d 918. In Lackings, the arresting officers stopped the defendant because he was standing on a street corner with an open metal container of beer in his hand. The officers intended to issue a summons to the defendant;

however, when he could not produce any identification, he was placed under arrest for violation of the open container ordinance and for public intoxication. In a search incidental to the arrest, the officer found crack cocaine in a matchbox in the defendant's pocket and residue in a burned glass pipe.

The trial court granted the motion to suppress evidence on the grounds that the officers had no right to approach the defendant solely for an open container violation. The trial court based its ruling on State v. Hoye, 94-0445 (La. App. 4 Cir. 4/14/94), 635 So.2d 1289. In Hoye, the trial court granted the defendant's motion to suppress the evidence finding that the stop was not justified pursuant to La. C.Cr.P. art. 215.1, stating: "[P]eople have a constitutional right to stand on the corner in that type of area with a beer can and not have to be subjected to police intrusion." Hoye, p. 2, 635 So. 2d at 1290. This Court agreed with the trial court's ruling "[u]nder these facts." Id.

In State v. Tyler, 98-1667 (La. App. 4 Cir. 11/24/99), 749 So.2d 767, this Court acknowledged the existence of Hoye in a footnote but stated that it should be strictly limited to its facts. In Hoye, the defendant was apparently subjected to police intrusion **solely** because he was holding a beer can, although after the stop, the officers apparently also determined that the

defendant should be given a citation for intoxication.

In another factually similar case, State v. Williams, unpub., 97-2613 (La. App. 4 Cir. 10/21/98), this court affirmed the district court's denial of the motion to suppress the evidence. In Williams, the arresting officers observed Williams standing on the corner of Villere Street and St. Roch Avenue. Williams drank from a beer can. The officers stopped, exited their car, and questioned Williams about the open container, intending to issue Williams a citation for violation of the city ordinance. While talking with Williams relative to the open container violation, one of the officers noticed Williams holding his right arm to his right side as if to conceal something. The officer searched Williams for weapons. The search revealed a nine-millimeter handgun hidden on the right side of Williams's waistband. The officers arrested Williams, charging him with carrying a concealed weapon and issued him a citation for violation of the open container law. An affidavit was completed for a violation of the open container law. In addition to the gun, the officers seized the beer can, a magazine and cartridges for the gun. The officers checked Williams's name with NCIC records and discovered an outstanding warrant for his arrest from St. Charles Parish. The officers learned after the arrest that Williams had a prior felony conviction, hence he was charged with a violation of LSA-R.S.14:95.1,

relative to possession of a firearm by a person convicted of certain felonies. In affirming the trial court's denial of the motion to suppress the evidence, this court distinguished Williams from Hoye based on the fact that in Williams the arresting officers observed Williams drink from the open container of beer on a public street. Thus, the officers observed Williams commit an offense.

In the instant case, the officers observed the defendant staggering down the middle of Monroe Street. The officers testified that the defendant could barely stand up and had to use the police vehicle to keep from falling down. The defendant admitted that he had been drinking and was holding an open container of beer. A strong odor of alcohol could be detected on the defendant's breath. The defendant had no identification on his person and no one was on the street at the time the officers stopped the defendant to corroborate his identity. In fact, the defendant's two witnesses testified that they did not speak to the police officers before or after the defendant's arrest. The defendant's mother corroborated his identity and address only after he had been arrested and had been searched incident to that arrest. The officers had already discovered the crack pipe and cocaine in the defendant's pocket. It appears from these facts that the officers were justified in stopping and arresting the defendant. Unlike the defendants in Hoye and

Lackings, the officers, in the instant case, observed the defendant commit two municipal violations before the initial stop. Thus, the officers had a reasonable suspicion to conduct the investigatory stop of the defendant. The defendant admitted that he had been drinking for an extended period of time, was staggering down the middle of a public street, spoke with slurred speech and emitted a strong smell of alcohol from his breath. The defendant had no identification on his person to establish his identity for the issuance of a summons. The officers stated that they felt that the defendant was in danger if left on the street. Section 54-405 of the Municipal Code of New Orleans provides:

> It is unlawful for any person to appear in a public place manifestly under the influence of alcohol, narcotics or other drugs, not therapeutically administered, to the degree that he may endanger himself or other persons or property.

The defendant was staggering in the street and could hardly stand. The officers had probable cause to arrest him especially as he had no identification on his person. Therefore, the arrest of the defendant for the municipal violation of public intoxication was lawful as was the search of defendant which was incidental to a lawful arrest. The cocaine was legally seized.

CONCLUSION

For the reasons stated above, we find no error in the district court's denial of the defendant's motion to suppress the evidence. Accordingly, the defendant's conviction and sentence are affirmed.

AFFIRMED