STATE OF LOUISIANA	*	**NO. 2000-KA-2663**
VERSUS	*	**COURT OF APPEAL**
RONALD BURTON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 415-460, SECTION "F"
HONORABLE DENNIS J. WALDRON, JUDGE
* * * * * *
JAMES F. MC KAY, III
JUDGE
* * * * * *

(Court composed of Chief Judge William H. Byrnes, III, Judge Miriam G. Waltzer, Judge James F. McKay, III)

HARRY F. CONNICK
DISTRICT ATTORNEY OF ORLEANS PARISH
JULIE C. TIZZARD
ASSISTANT DISTRICT ATTORNEY OF ORLEANS PARISH
New Orleans, Louisiana
Attorneys for Plaintiff/Appellee

RUDY W. GORRELL
New Orleans, Louisiana
Attorney for Defendant/Appellant

AFFIRMED

STATEMENT OF THE CASE

On July 7, 2000 the State filed a bill of information charging the defendant-appellant Ronald Burton with one count of violating La. R.S. 40:967 relative to possession of cocaine. The defendant appeared and entered a not guilty plea on July 17, 2000. On August 3, 2000 he reappeared with private counsel and again entered a not guilty plea. The defendant subsequently filed a motion to suppress evidence, and hearings were conducted over several days, specifically August 17, 2000, August 28, 2000, September 7, 2000, and September 20, 2000. On the last date, the trial court denied the motion to suppress. A trial commenced on October 18, 2000, but a mistrial was declared after the jury was unable to agree on a verdict. On November 8, 2000, the defendant withdrew his former plea of not guilty and entered a plea of guilty as charged while reserving his right to appeal from the adverse ruling on his motion to suppress evidence. The trial court sentenced the defendant to serve two years at hard labor, then suspended that sentence, and placed the defendant on probation for two years with the special conditions that he obtain drug counseling, perform community service, and pay a fine of $600.00 to the Judicial Expense Fund and court

costs.

STATEMENT OF THE FACTS

According to the testimony of Detective Kevin Collins, who testified on the first day of the motion hearing, on June 1, 2000, police officers were conducting an insurance checkpoint at the intersection of Dublin and Dixon Streets, behind the Carrollton Shopping Center, where vehicles were exiting the interstate. At that time, Sergeant Scheuermann directed a vehicle being operated by the defendant to pull over. As Detective Collins approached, he could see the defendant look over his left shoulder, then reach toward his waistband, at which time Detective Collins drew his weapon and began to run toward the car. Detective Collins used his flashlight to look into the vehicle while Sergeant Scheuermann removed the defendant from the car. Sergeant Scheuermann also did an immediate protective frisk of the defendant's exterior clothing for weapons, but apparently none was found. The officers also detected an odor of burning marijuana coming from the vehicle. Detective Collins then moved the defendant toward the front of the car and stayed with him while the vehicle was searched. The defendant appeared nervous and was rocking back and forth. According to Detective Collins, he saw several pieces of crack cocaine fall to the ground from the defendant's shorts. After the defendant was handcuffed and formally

arrested, more cocaine was found in the crotch area of his pants. At that time, another officer informed Detective Collins that twelve more pieces of crack cocaine were found in the door well, "where Sergeant Scheuermann first conducted the pat down". The defendant was also issued a citation for following too closely, and Detective Collins confirmed that "the basis for the stop of Mr. Burton was both the insurance check and following too closely".

During cross-examination of Detective Collins stated that during the insurance checkpoint, the officers were stopping every vehicle until traffic would build up on the interstate. At that point, cars would be allowed to flow through until Sergeant Scheuermann felt that the back-up on the interstate had eased sufficiently. Detective Collins testified that the defendant's vehicle would have been stopped for the insurance check, except that at the time he was actually ordered to stop, traffic was being allowed to flow off of the interstate. Detective Collins stated that the defendant was thus stopped for traveling at a high rate of speed and following too closely, although he did not receive a ticket for speeding. Detective Collins also stated that no marijuana was found, although a burnt odor had been detected.

Two witnesses testified on the second day of the motion hearing. The first was Sergeant Dwayne Scheuermann, who testified that the insurance checkpoint had been discontinued at the time the defendant was stopped.

The sergeant stated that, although some of the officers were completing paperwork and finishing with a few cars, no more cars were being pulled over. Sergeant Scheuermann observed the defendant's vehicle coming off of the interstate exit ramp too closely behind another vehicle; he could not say how fast the defendant was traveling although he believed it was excessive. Sergeant Scheuermann testified that what drew his attention to the defendant's car was the sound of a tire squealing. He looked up and saw the defendant's car only several feet from the rear bumper of the car in front. The sergeant admitted that there had been no flares or other warnings of the checkpoint. He also stated that there was a camera crew present which was filming some type of documentary.

In further testimony, Detective Scheuermann stated that he asked the defendant to step out of his vehicle and patted him down briefly because Detective Collins saw him reach for something. However, Detective Scheuermann did not feel anything which appeared to be a weapon. In fact, he allowed the defendant to stand near the front of the car and talk to him for a few minutes during which time the defendant was not required to keep his hands on the car. Although the defendant's demeanor could be described as nervous, it was not "crazy or anything". However, the sergeant did detect a faint odor of marijuana and searched the vehicle. He also asked the

defendant if he had been smoking marijuana earlier, and the defendant replied that he had. The search of the car was negative for marijuana and weapons. The defendant was not free to leave during the search of his vehicle because he had not yet been issued a traffic citation. Sergeant Scheuermann was searching the car during the time that Detective Collins handcuffed the defendant and thus did not see the cocaine fall from the defendant's clothing. Notably, Sergeant Scheuermann never testified to finding any cocaine in the defendant's car, although Detective Collins had testified that the sergeant ultimately had found drugs in the car.

At the time of the defendant's arrest, the police department was not following any guidelines for insurance checkpoints.

Officer Harry Stovall was the second witness called at the August 28th hearing. He confirmed the testimony of the other officers that they were at the location for an insurance checkpoint. He saw the defendant during the investigation, but could not give any testimony as to the circumstances of the stop of the defendant's vehicle except to say that the defendant was "pretty quick off the off ramp, and he was pretty close to the vehicle that was in front of him." Officer Stovall gave no testimony relative to the seizure of any drugs from the defendant.

During both the August 17th and August 28th hearings, the parties

discussed the videotape which had been made during the insurance checkpoint. The trial court indicated that the tape should be produced for the defense. On September 7, 2000, the tape was produced and viewed in chambers by all the parties and the judge; that tape has been made an exhibit to the record in this Court. The videotape shows the defendant standing near the front of a vehicle. A police officer is seen standing with him, asking him why he was traveling so close to another car; the officer is then seen frisking the defendant. The defendant is not handcuffed. The police officer with him is asking him generalized questions, such as why is he so nervous. The officer can also be seen to lift the defendant's pants and underwear up once or twice (the defendant's pants are very baggy and worn low on the hips in the current style). At one point, the officer also runs his hands inside the waistband of the defendant's underwear. During this time, the camera also cuts to the inside of the defendant's vehicle which is being searched, apparently with negative results. The tape then shows a female officer standing at the rear of the vehicle with what appears to be a citation book inside a metal case. The officer who was apparently the subject of the documentary walks over to her. The angle of the camera is such that only their backs are visible at first, then the male officer has something in his hand which he appears to be giving to the female officer. It is possible to

see the defendant standing at the front of the car; he is not restrained in any way and gestures upward with his hand. The next image on the tape is the defendant flat on his stomach with a police officer kneeling on his back handcuffing him. Several officers stand around while one says something to the effect that this is why he was so nervous. The camera focuses on the ground under the front of the vehicle. By aid of a flashlight, several small white objects can be seen in front of and under the bumper of the car.

Because of the presence of the female officer on the tape, defense counsel called Officer Catherine Beckett to testify on September 20, 2000. Officer Beckett stated that she was not involved in the defendant's arrest; however she was involved in the insurance checkpoint. She testified that she did make an arrest for crack cocaine that night, but it was not Ronald Burton. During questioning by the prosecutor, Officer Beckett stated that she did walk over to Sergeant Scheuermann to have the gist of the report signed.

Following Officer Beckett's testimony, defense counsel argued that the videotape showed Officer Beckett holding up crack cocaine and the next thing is the defendant on the ground. Counsel suggested that the evidence against the defendant was tainted. The prosecutor countered that the videotape showed the defendant standing in front of the car, "rocking back and forth when the crack cocaine, numerous pieces began falling from his

pants." Defense counsel noted that the police report stated that the cocaine fell from the defendant's pockets, yet the tape showed the cocaine underneath the car; furthermore, the tape showed the police officer "numerous times" "shaking his pants, going into his – his back part". The court, after hearing the argument, denied the motion to suppress evidence.

ERRORS PATENT

A review of the record for errors patent reveals none.

ASSIGNMENT OF ERROR NUMBER 1

In his first assignment of error, the appellant avers that the trial court erred in finding probable cause for the stop and search of his vehicle. The appellant breaks down this assignment of error into three arguments: there was no legitimate basis for the stop of the defendant and his vehicle; the officers had no probable cause to search the defendant's car; and the conflicts in the officers' testimony were such that the trial court should have rejected their testimony and granted the motion to suppress evidence.

The testimony of both Detective Collins and Sergeant Scheuermann indicated that the defendant was stopped solely for a traffic violation; neither indicated that they based the stop on any other suspicion of criminal activity. However, even if the officer had another, subjective motive to approach the

vehicle, the constitutionality of the stop "turns on a completely objective evaluation of **all** circumstances known to the officer at the time of his challenged action. Whren v. United States, [517] U.S. [806], 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996); State v. Wilkens, 364 So. 2d 934, 937 (La. 1978)." State v. Kalie, 96-2650, pp. 1-2, (La. 9/19/97), 699 So. 2d 879, 880 (emphasis in original).

The trial court in this matter apparently found the officers' testimony credible. Such a decision by the trial court at a motion to suppress hearing should not be reversed unless it is clearly an abuse of discretion. State v. Goodman, 99-2352, pp. 3-4 (La. App. 4 Cir. 10/13/99), 746 So. 2d 693, 695. Here, although there were some inconsistencies in the testimony of the detective and sergeant regarding the status of the insurance checkpoint at the time the defendant was stopped, there was no conflict regarding the fact that the defendant was actually stopped for a traffic violation. There was no contradiction to Detective Collins' testimony that he observed the defendant reaching toward his waistband at the time he was ordered to pull over, and both officers testified that they smelled marijuana.

This Court was faced with a case with similar facts last year, State v. Wyatt, 99-2221 (La. App. 4 Cir. 9/27/00), 775 So. 2d 481. There, the police saw a vehicle with windows which were so dark that they appeared to

violate the standard for tinting. The police stopped the vehicle, and the defendant opened his door. An odor of marijuana was immediately detected, and the defendant was removed from the vehicle after he was observed making a motion toward the floorboard of the vehicle. The police officer returned to the car and immediately saw a cigar containing green vegetable matter. In upholding the seizure of the contraband, this Court discussed the pertinent jurisprudence:

> In State v. Garcia, 519 So. 2d 788 (La. App. 1 Cir. 1987), writ denied 629 So. 2d 1126 (1993), officers stopped the defendant's truck for a traffic violation and detected a strong odor of marijuana coming from the back of the truck. The court upheld the officers' warrantless search of the truck bed, finding the strong smell of marijuana gave the officers probable cause to believe the truck contained contraband, while the movable nature of the truck supplied the exigent circumstances to search the truck without a warrant. The court stated:
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> > In State v. Coleman, 412 So. 2d 532, 535, n. 4 (La.1982), the Louisiana Supreme Court recognized that detecting marijuana by means of smell does not constitute a search. Thus, there is no reasonable expectation of privacy from lawfully positioned officers with inquisitive nostrils.
> >
> > In Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948), the United States Supreme Court suggested that the distinctive odor of a substance, perceived by an individual qualified to know the odor, might well be evidence of a persuasive character in determining probable cause for a search.

> In this instance, the trial court credited the officers' testimony that they perceived an overwhelming odor of marijuana coming from the bed of defendant's truck. The search itself revealed five hundred pounds of marijuana stuffed into garbage bags. Lieutenant Thomason, a qualified expert, stated that quantity of marijuana would produce a pronounced odor.

Id. at 793-794.

In this case, the officer smelled marijuana immediately upon the defendant opening his door. The officer saw the defendant apparently trying to hide something in his hand. Under these facts, the officer had probable cause to believe the defendant was smoking marijuana and therefore had probable cause to arrest him. Under the above cases, the officer then had probable cause to search the car.

The officer also had probable cause to seize the marijuana under the plain view exception. In State v. Smith, 96-2161 p. 3 (La. App. 4 Cir. 6/3/98), 715 So. 2d 547, 549, this court discussed this exception:

> In order for an object to be lawfully seized pursuant to the "plain view" exception to the Fourth Amendment, "(1) there must be a prior justification for the intrusion into a protected area; (2) in the course of which the evidence is inadvertently discovered; and (3) where it is immediately apparent without close inspection that the items are evidence or contraband." State v. Hernandez, 410 So. 2d 1381, 1383 (La. 1982); State v. Tate, 623 So. 2d 908, 917 (La. App. 4 Cir.), writ denied 629 So. 2d 1126 and 1140 (La. 1993). In Tate, this court further noted: "In Horton v. California, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990), the Court held that evidence found in plain view need not have been found "inadvertently" in order to fall within this

> exception to the warrant requirement, although in most cases evidence seized pursuant to this exception will have been discovered inadvertently." Tate at 917.

State v. Wyatt, pp. 2-3, 775 So. 2d at 483.

Additionally, the right of the police to search a vehicle for weapons during a traffic stop, after a defendant is observed making furtive motions in response to the police order to stop, has been repeatedly affirmed. See Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469 (1983); State v. Davis, 612 So. 2d 256 (La. App. 4 Cir. 1992); and State v. Archie, 477 So. 2d 864 (La. App. 4 Cir. 1985).

An interesting aspect of this case is that no drugs or weapons were found in the initial search of the vehicle or the frisk of the defendant. Therefore, although both were permissible police intrusions, neither was the cause of the seizure of the drugs which were on the defendant's person nor the cause of defendant's arrest. Instead, those occurred after the crack cocaine fell from the defendant's clothing into plain view. Once the cocaine fell from the defendant's person, his arrest and another search of the car was clearly justified.

In light of Wyatt, the defendant's furtive movement and the smell of marijuana, there was probable cause for a search of the defendant just as there was probable cause for a search of his vehicle.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER 2

In his second assignment of error, the appellant argues that the insurance checkpoint was not valid because there was no evidence that it was conducted in conformity with administrative guidelines, a necessary prerequisite under State v. Jackson, 00-0015 (La. 7/6/00), 764 So. 2d 64. In its brief, the State argues that the appellant has no standing to attack the insurance checkpoint because he was not stopped pursuant to this police activity.

Art. I, § 5 of the La. Const. of 1974 provides as follows:

> Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

As stated in State v. Garner, 621 So. 2d 1203, 1208, (La. App. 4 Cir. 1993):

> This provision expands the scope of protection afforded Louisiana citizens by granting standing to contest the illegality of a search or seizure to "any person adversely affected." Under Louisiana jurisprudence, any defendant against whom evidence is acquired as a result of an allegedly unreasonable search and seizure, whether or not it was obtained in violation of his rights, has standing to challenge the constitutionality of the search or seizure. State v. Gibson, 391 So. 2d 421 (La.

1980); State v. Walker, 430 So. 2d 1327 (La. App. 3rd Cir. 1983). State v. Williams, 489 So. 2d 286 (La. App. 4th Cir. 1986); State v. Dakin, 495 So. 2d 344 (La. App. 4th Cir. 1986), writ den. 498 So. 2d 752 (La. 1986).

Here, as noted by the State, the defendant was stopped pursuant to a traffic violation and not because of the insurance checkpoint which may or may not have been fully concluded at the time of the stop. Although the appellant argues that he was actually stopped pursuant to the checkpoint, and that the police denied this later because the checkpoint did not comply with the requirements later set forth in Jackson, there simply is no evidence to show that the defendant was stopped pursuant to the checkpoint. Therefore, the defendant was not adversely affected by the insurance checkpoint and thus has no standing to attack it.

CONCLUSION

Accordingly, we affirm the defendant's conviction and sentence.

AFFIRMED