NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2001-KA-0138**
VERSUS	*	**COURT OF APPEAL**
CLYDE E. HAYNES	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 410-904, SECTION "K"
Honorable Arthur Hunter, Judge
* * * * * *
Judge Terri F. Love
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Terri F. Love, Judge Max N. Tobias, Jr.)

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AFFIRMED

STATEMENT OF THE CASE

On November 24, 1999, the State filed a bill of information charging the defendant-appellant, Clyde Haynes, with one count of simple possession of cocaine, a violation of La. R.S. 40:967(C). The defendant was arraigned and entered a not guilty plea on December 16, 1999. A Motion to Suppress hearing was held on January 21, 2000, at the conclusion of which the court denied the motion. On March 28, 2000, the State amended the bill of information to charge the defendant with violating La. R.S. 40:967(A) relative to possession of cocaine with the intent to distribute. Trial proceeded before a twelve-person jury on April 10, 2000. The defendant was found guilty as charged. On October 17, 2000, the trial court sentenced the defendant to five years at hard labor. His motion for new trial and motion for reconsideration of sentence was denied.

STATEMENT OF THE FACTS

On October 27, 1999 at approximately 10:15 p.m., Officer Joseph

Williams was investigating information of narcotics activity received from a confidential informant. This information described the defendant, who goes by the nickname “Nine”, and the white Chrysler Fifth Avenue he was in, which was parked outside a residential complex in the 7800 block of Chef Menteur Highway. Officer Williams testified that he knew “Nine” to be the defendant, Clyde Haynes, from a previous encounter in which the defendant was suspected of selling crack. Officer Williams also testified that he received information, prior to this incident, from Officer Steve Villere of the Desire COPS Unit, that the defendant was wanted on a municipal offense.

Officer Williams observed the targeted vehicle in a parking lot of a small residential complex; the driver’s side door was open. The officer set up a surveillance of the car from approximately one hundred fifty yards away. Using binoculars, Officer Williams watched as a woman approached the car after speaking to a man at the front of the lot. He saw the defendant exit the driver’s side and meet the woman in front of the car. She handed him what appeared to Officer Williams to be currency. The defendant placed the currency in his front pocket and then reached inside the vehicle, at which point the trunk popped up. The defendant walked to the back, did something inside the trunk, closed it, walked back to the woman, and handed her a small object.

Believing he had witnessed a narcotics transaction, Officer Williams, who was alone, called for back-up and left his surveillance position. He drove into the parking lot; as he entered, the female walked quickly out of the area onto Chef Menteur Highway, as did the male who had been standing in the lot. Officer Williams placed the defendant into the police vehicle, then opened the trunk by popping the switch in the glove box. He saw a medicine bottle in the trunk; inside the bottle he found twenty-six pieces of a substance which appeared to be crack cocaine. The bottle had the name "Selina" on it, and the car proved to be registered to Selina Davis. From the defendant's pocket, in which he had placed what he had received from the female, Officer Williams seized sixteen dollars.

The back-up unit that arrived to assist Officer Williams was unable to locate the female whom the officer had seen in the apparent transaction with the defendant.

William Giblin testified at trial that he is a criminalist with the New Orleans Police Department. He identified a plastic medicine bottle containing twenty-six pieces of individually wrapped pieces of a white rock-like material. He stated that he tested four of the twenty-six pieces, and they were positive for cocaine.

ERRORS PATENT

A review of the record reflects two errors patent. First, there is nothing in the record to indicate that the defendant was arraigned on the amended bill of information. "However, '[a] failure to arraign the defendant or the fact that he did not plead, is waived if the defendant enters upon the trial without objecting thereto, and it shall be considered as if he had pleaded not guilty.' La. C.Cr.P. art. 555; State v. Scott, 97-0028, p. 6 (La. App. 4 Cir. 3/18/98), 709 So. 2d 339, 342." State v. Martin, 98-1507, p. 4 (La. App. 4 Cir. 4/5/00), 788 So. 2d 1, 5. Here, the record fails to show that any objection was made to the failure to arraign the defendant on the amended bill, and the issue is waived.

Secondly, the record reflects that the trial court imposed an illegally lenient sentence. The defendant was convicted of possession with the intent to distribute cocaine. At the time of the defendant's offense, the penalty for that offense was a sentence of not less than five years nor more than thirty years, with the first five years to be served without the benefit of probation, parole, or suspension of sentence. La. R.S. 40:967(B)(4)(b). Here, the trial court failed to state that the sentence was to be served without benefits, including parole. However, this error patent is favorable to the defendant and as such is not to be corrected by this court on review where, as here, it is not raised by the State. See State v. Fraser, 484 So. 2d 122 (La. 1986); State

v. King, 2000-0618 (La. App. 4 Cir. 3/7/01), 782 So. 2d 654.

DISCUSSION

In his first assignment of error the appellant contends that the trial court erred when it denied the motion to suppress evidence. He argues that he was arrested without probable cause, because the reliability of the confidential informant was not sufficiently established, and the illegal arrest tainted the seizure of the evidence from the trunk of his car. He further argues that the allegation that he was wanted for a municipal violation and arrested for said violation was simply a pretext. Moreover, he argues that the officers lacked probable cause for a search of the trunk of the car.

In State v. Julian, 2000-1238 (La. App. 4 Cir. 3/14/01), 785 So. 2d 872, this Court affirmed the denial of a motion to suppress evidence in circumstances similar to those found in the instant case. In Julian, complaints about drug activity at a certain residence were received on the ATF hotline; the callers also gave a description of the alleged seller. Members of the ATF and the New Orleans Police Department set up a surveillance at the address given, but were present for less than a minute when a person matching the description of the alleged seller walked out of the alleyway on the side of the residence. He met with a man who was holding currency. The alleged seller removed a plastic object from his

pocket, opened it, removed something, and handed it to the apparent buyer. The seller received the currency in return. The buyer walked off and was not able to be located later. However, the officers conducting the surveillance did follow the seller, who was later identified as William Whitley, down the alleyway to the backyard. He was detained and frisked. The officer conducting the frisk felt a plastic container in Whitley's pocket, removed and opened it, finding six pieces of crack cocaine. Members of the back-up team who entered the backyard of the residence found additional cocaine on top of a washing machine. Four people were arrested, including the defendant Julian who was observed throwing down marijuana and was found to be in possession of heroin. On appeal, the defendants argued that the search of Whitley exceeded the permissible scope of a frisk and that the officers exceeded their authority when they entered the backyard of the residence. This Court disagreed, noting that the observation of a narcotics transaction provided probable cause to arrest Whitley, and thus any search was valid as incidental to arrest. The Court further found that the observation of a narcotics transaction in front of the residence, coupled with the complaints of narcotics activity at the residence, gave the officers probable cause to believe that contraband was located in the backyard or down the alleyway from which Whitley had come just prior to the narcotics

sale.

In the instant case, at the January 21, 2000 motion hearing, Officer Joseph Williams testified that the information he received came "from an established, confidential, incredible [sic] informant" whose credibility had been proven in past investigations which resulted in the arrests and convictions of persons for narcotic violations. The C.I. stated that a person known as "Nine" was selling retail amounts of crack cocaine from a vehicle parked in a residential complex parking lot in the 7800 block of Chef Menteur Highway. The C.I.'s basis of knowledge, according to Officer Williams' testimony, was "from personal observation." Officer Williams further testified at the motion hearing that the person who was described as "Nine" was already known to him to be the defendant Clyde Haynes. The officer stated that he had previously encountered the defendant "as a suspected narcotics marketer of crack cocaine" on Flake Street. During that encounter, Officer Williams had identified the defendant as a person with a conviction for cocaine. Moreover, Officer Williams had earlier learned from an officer at the Desire COPS Unit that the defendant had an outstanding warrant for a municipal violation. Finally, the C.I. gave a specific description of the defendant's car.

As in Julian, in addition to the information received and corroborated,

the police set up surveillance and observed the targeted subject engaging in an apparent narcotics transaction. In the instant case, the defendant was observed going to the trunk of his car, which matched the description given by the C.I., during the transaction. Even though the buyer was not stopped, this omission does not negate the probability that the officer witnessed a drug transaction and that additional contraband would be located in the trunk of the defendant's car. Thus, Officer Williams had probable cause to search the trunk.

Furthermore, although the appellant contends that the arrest for a municipal violation was a pretext, at the motion hearing Officer Williams identified the warrant for the defendant's arrest for disturbing the peace. Even if a stop is pretextual, it can still be valid according to the court in Whren v. U. S., 517 U.S. 806, 116 S.Ct. 1769 (1996). This Court discussed Whren and pretext stops in State v. Shapiro, 98-1949, pp. 6-7 (La. App. 4 Cir. 12/29/99), 751 So. 2d 337, 340-41:

> In Whren, officers observed a car sitting at an intersection containing two youths, both of whom were looking at something in the passenger's lap. The officers passed the car, made a U-turn, and drove back towards the car. The car turned right at the intersection without signaling and sped off, and the officers stopped the car for the traffic violations. As the officers approached the car, they observed bags of crack cocaine sitting in the passenger's hands. On review of the passenger's conviction, the defense asserted that the evidence should have been suppressed because the traffic stop was merely a pretext for a stop based upon the officers' suspicion

> that the youths were involved in criminal activity. The Supreme Court rejected this claim, finding that any subjective underlying motive was irrelevant because the officers had probable cause to stop the car for the traffic violations.
>
> Likewise, in Kalie [96-2650 (La. 9/19/97), 699 So. 2d 879], an officer saw a car weaving between lanes. The officer stopped the car, and the driver as well as the passenger (the defendant) appeared nervous. The occupants told the officer they were returning to Birmingham from Houston, where they had spent a few days visiting a friend. The officer determined the car had been rented by a third person, and the date of the rental indicated the occupants could not have been in Houston for longer than a day. The officer wrote a citation for the improper lane usage and asked the occupants to consent to a search of the car. He also called for canine back-up. When the defendant refused to consent to the search, the officer told them they could go, but the car must remain. At that point, the canine unit arrived, and the detection dog "alerted" on the trunk of the car. The officer searched the trunk and found marijuana. On review of his conviction, the defendant argued the evidence should have been suppressed because the initial stop was merely a pretext in that the officer had been conducting a "drug interdiction patrol" at the time he stopped the car in which the defendant was riding. The Court rejected this argument, citing Whren and noting that the officer was justified in stopping the car for the traffic violation.

In Shapiro, this Court found that a trooper patrolling the I-10 in Jefferson Parish with a Customs agent could lawfully stop a vehicle for following too closely in violation of La. R.S. 32:81, even though the trooper only issued a warning citation. After the stop, the trooper obtained consent to search the vehicle. Drugs were found, and the occupants arrested. One of them subsequently gave information that led to the defendant's arrest in Orleans

Parish. This Court upheld the original stop even though it may have been pretextual.

Even assuming that Officer Williams initially detained the defendant because of the municipal warrant only as a pretext, the officer still had probable cause to search the trunk of the defendant's vehicle. Because an automobile was involved, exigent circumstances existed to allow Officer Williams to dispense with the warrant requirement. 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:

> 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.

Id., 527 U.S. at 466-67, 119 S.Ct. at 2014.

The trial court in this case correctly denied the motion to suppress the evidence, as the tip from the reliable confidential informant together with Officer Williams' observation of the defendant (engaged in an apparent narcotics transaction) gave him probable cause to believe additional contraband was located in the trunk of the automobile.

In his second assignment of error, the appellant argues that there was insufficient evidence to support the conviction for possession of cocaine with the intent to distribute. The appellant notes that the car was not registered to him and that the medicine bottle in which the crack cocaine was found was in the name of the owner of the car. He also notes that nothing seized from his person, such as a beeper, cell phone, or large amount of currency, could be considered indicative of drug sales.

The standard of review for the sufficiency of the evidence is whether, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the State proved the essential elements beyond a reasonable doubt. State v. Jacobs, 504 So. 2d 817 (La. 1987).

The defendant was convicted of violating La. R.S. 40:967(C). To

support defendant's conviction, the State must prove that the defendant knowingly and intentionally possessed the cocaine with the intent to distribute. State v. Williams, 594 So. 2d 476, 478 (La. App. 4 Cir. 1992).

The State did not need to prove that the defendant was in actual possession of the narcotics found; constructive possession is sufficient to support conviction. State v. Robinson, 99-2236, p. 5 (La. App. 4 Cir. 11/29/00), 772 So. 2d 966, 970. However, mere presence in an area where drugs are found is insufficient to establish constructive possession. State v. Walker, 99-1957, p. 3 (La. App. 4 Cir. 5/17/00), 764 So. 2d 1130, 1134. Factors to be considered in determining whether a defendant exercised dominion and control over drugs are: the defendant's knowledge that illegal drugs were present in the area; the defendant's relationship with the person in actual possession; the defendant's access to the area where the drugs were found; evidence of recent drug use; the defendant's proximity to the drugs; and evidence that the area was being frequented by drug users. State v. Mitchell, 97-2774, 98-1128, 98-1129, p. 12 (La. App. 4 Cir. 2/3/99), 731 So. 2d 319, 328.

Here, the defendant was the sole occupant of the vehicle. He was in possession of the keys. Officer Williams observed the defendant opening the trunk and searching for something inside during an apparent narcotics

transaction. The defendant was clearly exercising dominion and control over the trunk of the vehicle and its contents. This is not a case where the defendant just happened to be an occupant of the vehicle at the time narcotics were found inside.

The State was required to prove specific intent in addition to possession. Specific intent to distribute may be established by proving circumstances surrounding defendant's possession, which give rise to a reasonable inference of intent to distribute. See State v. Dickerson, 538 So. 2d 1063 (La. App. 4 Cir. 1989).

In State v. Hearold, 603 So. 2d 731, 735 (La. 1992), the Louisiana Supreme Court identified five factors which are useful in determining whether circumstantial evidence is sufficient to prove the intent to distribute a controlled dangerous substance as follows:

> (1) [W]hether 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.

In State v. Cushenberry, 94-1206, p. 6 (La. App. 4 Cir. 1/31/95), 650 So. 2d 783, 786, this Court noted that the Hearold factors were “enunciated

as ‘useful’ in determining whether circumstantial evidence is sufficient to prove intent to distribute,” but this Court held that the evidence need not “fall squarely within the factors enunciated to be sufficient for the jury to find that the requisite intent to distribute.”

In the instant matter, although there was no expert testimony that the amount of cocaine seized (twenty-six pieces), or how it was packaged, individually, was indicative of narcotics trafficking, Officer Williams did testify that he observed the defendant in an apparent narcotics sale to the unidentified female. Viewing that evidence in a light most favorable to the State, a reasonable trier of fact could have concluded beyond a reasonable doubt that the defendant possessed cocaine with the intent to distribute it.

CONCLUSION

The appellant’s assignments of error have no merit; therefore, the conviction and sentence are affirmed.

AFFIRMED.