

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2002-K-1787**
VERSUS * **COURT OF APPEAL**
DONALD HAYES * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
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**ON APPLICATION FOR WRITS DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 429-665, SECTION "G"
Honorable Julian A. Parker, Judge
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Judge Max N. Tobias, Jr.
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(Court composed of Chief Judge William H. Byrnes III, Judge Terri F. Love,
Judge Max N. Tobias, Jr.)

Harry F. Connick
District Attorney
Shannon K. Swaim
Assistant District Attorney
619 S. White Street
New Orleans, Louisiana 70119
COUNSEL FOR STATE OF LOUISIANA/RELATOR

Gregory K. Voigt
James C. Lawrence, Jr.
LAWRENCE & OLINDE, L.L.C.

303 South Broad Street
New Orleans, Louisiana 70119
COUNSEL FOR DEFENDANT/RESPONDENT

**SUPERVISORY WRIT GRANTED; JUDGMENT REVERSED;
REMANDED.**

On 19 April 2002, the State filed a bill of information charging the defendant, Donald Hayes (“Hayes”), with distribution of marijuana, a violation of La. R.S. 40:966(A)(2). On 24 April 2002, he pleaded not guilty. On 31 May 2002, a hearing on a motion to suppress began; it was continued until 5 June 2002. On both 5 and 21 June 2002, the hearing was continued. On 1 July 2002, the witnesses had not been subpoenaed, and the hearing was again continued to 12 July 2002. On that date the trial court withheld its ruling until it had read the 31 May 2002 transcript. On 20 August 2002, the trial court granted the defendant’s motion to suppress the evidence. The trial court set a return date for 4 September 2002 and granted the State’s motion for a stay pending this court’s review.

At the 31 May 2002 hearing, Detective Dennis Bush testified that on 17 January 2002 he was conducting a surveillance near the intersection of Bienville and Crozat Streets. He had “responded to information from a first district COPS unit relative to street level narcotics distribution at that intersection.” He concealed himself and set up the surveillance at about 1:00

p.m. or 1:30 p.m. Almost immediately (about five minutes later), the defendant, who was wearing a black visor, a black jacket, and a red vest, arrived at the intersection. Within a couple of minutes an individual in a green shirt and blue pants (later identified as Leon Matthews) approached the defendant. A brief conversation ensued. Matthews handed Hayes an undetermined amount of currency. Hayes, who visually scanned the area, reached into his waistband, removed a small object, and handed it to Matthews. Matthews had the object in his right hand as he walked toward Basin Street on Bienville Street. Detective Bush relayed Matthews' description to a take-down team and asked Officers Kitchens and Berryhill to make an investigatory stop. The officers stopped Matthews in the 400 block of Bienville Street. The officers informed Detective Bush that Matthews still had a small bag of marijuana in his right hand when they stopped him, and they arrested him.

Detective Bush also said that he was positioned about one-half block from the defendant's location at the intersection, and he was using binoculars. The detective continued the surveillance for 1.5 hours during which he observed what he believed to be three additional transactions. Each of the three additional buyers was stopped by a take-down team. At about 3:10 p.m. Detective Bush had a support unit consisting of Detectives

Jeffrey Keating, Raymond Veit, and Cedric Gray stop the defendant and place him under arrest. In a search incident to that arrest, the officers found a plastic bag with 24 small plastic bags of vegetable matter, some empty plastic bags, and \$107.00 in currency. Detective Bush stated that the defendant had put the currency in his right front pants pocket during each transaction. The officers found the currency in that pocket. The detective said that he never lost sight of the defendant, not even when he momentarily went inside a store at Bienville and Basin Streets. Detective Bush watched as the take-down team members arrested the defendant.

On cross-examination Detective Bush stated that he saw the exchanges, but he could not determine the amount of the currency or exactly what the exchanged object was. He said that he told Officers Berryhill and Kitchens to conduct an investigatory stop of the defendant. However, he understood that “they secured his [defendant’s] – the individual’s wrist which was clinched and they located narcotics immediately upon stopping him.” He conceded that the officers did not ask the defendant anything. Detective Bush said that he believed that “he [Hayes] had – in his hand, it wasn’t a search of his person.” When asked whether the defendant was “merely stopped and searched,” he first said that he did not know.

Detective Jeff Keating testified that on 17 January 2002 he was

assigned as part of Detective Bush's take-down unit. Detective Bush had said that he saw the defendant make three or four drug transactions.

Detective Keating stated that the take-down teams were able to stop the three or four buyers and arrest them for possession of marijuana. Then Detective Bush informed Detective Keating's team of the defendant's location and a description of his clothing. Detective Bush told the team to arrest the defendant for distribution. According to Detective Keating, he and Detectives Veit and Gray "exited the police vehicle, approached.... Hayes, [and] advised him he was under arrest." Detective Keating advised the defendant of his rights, and "began to conduct a pat-down on him [the defendant], a search incidental to arrest to make sure he didn't have any weapons or any more contraband on him at which time I removed a clear plastic bag...." The detective removed the clear bag containing 24 individually packaged bags of marijuana from the defendant's waistband and \$107.00 in currency from the right front pocket of his jeans. The detective also found numerous empty bags in the defendant's pocket.

On cross-examination Detective Keating said that he was part of the investigation from the beginning to the end and was in contact with Detective Bush the entire time. His unit was not the only take-down team. His team stopped a male and a female in a car. The detective said that he

was then ordered to take-down the defendant at about 3:00 p.m., and they stopped the defendant at the corner of Basin and Bienville Streets by the store. Another individual was with the defendant at that point in time. Although the officers detained the other man, he was released when the officers discovered that he was not involved. Detective Keating said that he found the marijuana in the defendant's waistband (not in the trash can as suggested by defense counsel). The detective conceded that he did not see the defendant distribute marijuana.

The State argues that the trial court erred by suppressing the evidence seized from Hayes. It contends that the officers had probable cause to arrest the defendant; therefore, the search incident to that arrest was proper. La. C.Cr.P. art. 213 authorizes a police officer to arrest a person who has committed an offense in his presence. The search of a defendant is legal if probable cause exists for the arrest. *State v. Daniel*, 2001-1736, p. 3 (La. App. 4 Cir. 2/13/02), 811 So.2d 84, 87. Probable cause to arrest without a warrant exists when the facts and circumstances known to the arresting officer or of which he has trustworthy information are sufficient to justify a man of ordinary caution in believing that the person to be arrested has committed or was committing a crime. La.C.Cr.P. art. 213; *State v. Brisban*, 2000-3437 (La. 2/26/02), 809 So.2d 923.

The standard for assessing probable cause is an objective standard that must withstand the "detached, neutral scrutiny of a judge." *State v. Flowers*, 441 So.2d 707, 712 (La.1983). The determination of probable cause must take into account the "practical considerations of everyday life on which ... average police officers can be expected to act." *State v. Raheem*, 464 So.2d 293, 296 (La.1985). See also *Miller v. East Baton Rouge Par. Sheriff's Dep't*, 511 So.2d 446, 454 (La.1987) .

The trial court is vested with great discretion when ruling on a motion to suppress. *State v. Scull*, 93-2360 (La. App. 4 Cir. 6/30/94), 639 So.2d 1239.

In *State v. Davis*, 612 So.2d 1052, 1053 (La. App. 4 Cir. 1993), the police officers on patrol in an area known for drug trafficking saw the defendant (on a corner with a number of persons walking up and down the sidewalk), who was apparently selling drugs to pedestrians and automobile occupants. The officer testified that the defendant approached several cars, leaned into the cars, and went back and forth between cars and the sidewalk; the defendant constantly went in and out his pockets with small objects. The defendant pulled out a matchbox, which was customarily used for cocaine, from his pocket. The officer concluded that the defendant was selling drugs and arrested him. The officer found one small rock of cocaine inside the

matchbox. This court held that the legal search and seizure of the cocaine was incidental to the defendant's valid arrest and reversed the trial court's decision to grant the motion to suppress the evidence. *Id.* at 1053-54.

In *State v. Thornton*, 621 So.2d 173 (La. App. 4 Cir. 1993), the officers witnessed an exchange of currency for an unknown object wrapped in white paper between the defendant and another man in an area known for drug trafficking. Neither suspect tried to elude the police or acted in a suspicious manner. Both officers testified that they approached the defendant and the other man to investigate for a narcotics violation. Neither man was familiar to the officers. This court concluded that “under these circumstances there was no probable cause for an arrest of the defendant in that the officers were not justified in concluding that a crime had been committed. Thus, the search is not justified on this basis.” *Id.* at 175. This court reversed the conviction. *Id.* at 176.

In contrast to *Thornton*, this Court found probable cause in *State v. Young*, 93-0414 (La. App. 4 Cir. 8/17/94), 642 So.2d 255. In *Young*, police officers, who were on routine patrol in an unmarked police car in the Desire Housing Project, observed the defendant and another man engage in a hand-to-hand transaction. The defendant passed an object to the other man and received paper currency from him in return. The officers drove up adjacent

to the men, then exited the police car and yelled at the men to freeze. Both the defendant and the other man fled. The officers chased and caught the defendant and ordered him to the ground. No weapon was found during a frisk. The officers then handcuffed the defendant and conducted a full search; cocaine was seized from the defendant's pocket. Two-\$5.00 bills were found in his left hand. On appeal this court found that the defendant had been arrested prior to the search, and probable cause existed for the arrest. This court distinguished *Thornton* because in that case no attempt was made to flee from the police. This court affirmed the trial court's decision to deny the motion to suppress. *Id.* at pp. 4-6, 642 So.2d 258-59.

In *State v. Bryant*, 98-1115 (La. App. 4 Cir. 8/4/99), 744 So.2d 108, 109, the officer testified that, based on information obtained from a confidential informant, he and two other officers set up a surveillance. The informant provided the officers with a description of a person and with information that the person would be selling drugs from a dark green Oldsmobile Cutlass. Another officer saw what he believed was a narcotics transaction and radioed to the testifying officer to arrest the defendant. When the defendant denied owning the Cutlass, the officer removed the keys to the vehicle from the defendant's pocket. The officer then retrieved a black bag containing crack cocaine from under the driver's seat of the car. This

court distinguished *Thornton* because in *Bryant* the officer saw what he believed to be a drug transaction after receiving a tip from a confidential informant and setting up a surveillance. We held that based on the corroboration of the informant's tip, it appeared that the officers had probable cause to believe that the pouch inside the vehicle contained contraband, and the warrantless search of the vehicle was justified. That is, once the crack cocaine was found, the officers had probable cause to arrest the defendant. *Id.* at pp. 4-5, 744 So.2d at 110-111.

In *State v. Daniel, supra* at pp. 3-4, 811 So.2d at 87-88, an officer saw the defendants (Holmes and Daniel) acting as a team. Daniel was actively waving cars to stop while gesturing (a display known to the officer to indicate that a \$20.00 rock of cocaine was for sale). The officer observed the driver of a car stop; he saw Daniel accept a \$20.00 bill from the driver. Daniel waved the currency to Holmes, who went over to the car and displayed objects in his hand for the driver to examine and choose. The driver took an object and drove away. When the arresting officers appeared, the defendants were the only two people on the corner. Daniel had his hands in his pockets and took one hand out. Holmes attempted to swallow something (consistent with the destruction of narcotics). This court held that at that point, the officers had probable cause to arrest. This court upheld

the trial court's decision to deny the motion to suppress. *Id.*

In the case at bar, Detective Bush testified that he received information from the First District COPS unit relating to street trafficking at the intersection where he set up the surveillance. The detective testified that he observed what he believed to be three or four drug transactions involving the defendant. Each time he saw the defendant remove a small object from his waistband and hand it to another individual, who had already given the defendant currency. He stated that Matthews, one of the buyers, was stopped; a small bag of marijuana was still in his hand, and he was arrested. Detective Bush testified that the buyers in the other three transactions were also stopped; however, he did not state what contraband, if any, was seized from the other buyers. The information (provided by the First District COPS unit) relating to street level trafficking at the specific intersection, in addition to an officer's surveillance observations of three or four exchanges of currency for small objects (believed to be drug transactions) and the seizure of a small bag of marijuana from the hand of one of the buyers stopped right after the exchange, provided the officers with probable cause to arrest the defendant. The trial court therefore erred by granting Hayes' motion to suppress.

For the foregoing reasons, we grant the State's application for

