NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-KA-1214**
VERSUS	*	**COURT OF APPEAL**
SEAN LEWIS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 426-421, SECTION "I"
Honorable Raymond C. Bigelow, Judge
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Judge David S. Gorbaty
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(Court composed of Chief Judge William H. Byrnes III, Judge Dennis R. Bagneris, Sr., Judge David S. Gorbaty)

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AFFIRMED

Defendant Sean Lewis was charged by bill of information on November 29, 2001 with possession of cocaine, a violation of La. R.S. 40:967(C). Defendant pleaded not guilty at his December 20, 2001 arraignment. Defendant filed a motion to suppress, which the trial court denied on January 4, 2002. On February 20, 2002, at the conclusion of a trial by a six-person jury, defendant was found guilty as charged. On March 26, 2002, the trial court adjudicated defendant a second-felony habitual offender and sentenced him to thirty months at hard labor. The trial court denied defendant's motions to quash the habitual offender bill of information and to reconsider sentence. Defendant subsequently filed this appeal.

FACTS

New Orleans Police Officer Matthew McCleary testified that on November 14, 2001, he and his partner were patrolling in the Fifth Police District in response to narcotics complaints. They approached the intersection of Allen and N. Tonti Streets, where they detected the smell of

burning marijuana. It was approximately 12:00 p.m., and they observed defendant standing on a porch at 2240 Allen Street, apparently smoking what appeared to be a hand-rolled cigarette. Upon observing the officers, defendant went to a fence alongside of the residence, placed his cigarette on it, and turned back around. The officers suspected that defendant's cigarette had been the source of the burning marijuana odor, and that they had witnessed him discarding it. The officers exited the vehicle and Officer McCleary's partner retrieved the marijuana cigarette. Defendant was subsequently advised of his rights and placed under arrest. A search incidental to the arrest uncovered another marijuana cigarette and one piece of crack cocaine.

Officer McCleary stated on cross-examination that the officers were approximately twenty-five feet away from defendant when they detected the smell. The windows of the patrol car were rolled down. The officer was shown the partially burned marijuana cigarette by defense counsel, which counsel described as "skinny." When asked how it was that he could know or assume that it was a marijuana cigarette from twenty-five feet away, Officer McCleary explained that they smelled the marijuana and defendant was the only person out there smoking what appeared to be a cigarette. The officer conceded that they did not know at that time whether the cigarette

contained marijuana.

Officer James Foucha, Officer Lewis' partner on November 14, 2001, testified at the motion to suppress hearing similarly to Officer Lewis. Officer Foucha said the officers were on proactive patrol when both he and Officer Lewis smelled the strong odor of burning marijuana. Defendant was observed smoking what appeared to be a hand-rolled cigarette. When defendant noticed the police, he turned away and placed the burning cigarette on a wooden gate next to his residence. Officer Foucha retrieved the marijuana cigarette, which was still burning. A search incidental to defendant's arrest uncovered a cigarette pack containing another marijuana cigarette and a rock of crack cocaine. Officer Foucha estimated that he and his partner were about twenty to twenty-five feet away from defendant when they first saw him. He believed defendant was smoking marijuana because of the odor of marijuana coupled with the fact that no one else was out at that time.

The trial testimony of Officers McCleary and Foucha essentially tracked their motion hearing testimony. Officer Foucha testified at trial that he believed defendant was smoking a marijuana cigarette because both officers smelled burning marijuana, defendant was smoking something, and when defendant saw the officers he immediately turned and placed the

cigarette on the fence. Officer McCleary testified at trial that both he and Officer Foucha detected the smell of burning marijuana.

It was stipulated that if Officer Harry O'Neal were called to testify, he would be qualified as an expert in the analysis, testing and classification of controlled dangerous substances, and would testify that the piece of cocaine introduced in evidence tested positive for cocaine.

ERRORS PATENT

A review of the record for errors patent reveals none.

ASSIGNMENT OF ERROR

In his sole assignment of error, defendant claims that the trial court erred in denying his motion to suppress the evidence. Specifically, defendant argues that the officers did not have the requisite reasonable suspicion to stop him.

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. 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. 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. Devore, 2000-0201, p. 6 (La. App. 4 Cir. 12/13/00), 776 So. 2d 597, 600-601; 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) codifies the U.S. Supreme Court's authorization of protective searches for weapons in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and 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; State v. Littles, 98-2517, p. 3 (La. App. 4 Cir. 9/15/99), 742 So. 2d 735, 737. Evidence derived from an unreasonable stop,

i.e., seizure, will be excluded from trial. State v. Benjamin, 97-3065, p. 3 (La.12/1/98), 722 So.2d 988, 989; State v. Tyler, 98-1667, p 4 (La. App. 4 Cir. 11/24/99), 749 So. 2d 767, 770. 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, writ denied, 2001-0029 (La. 11/21/01), 801 So. 2d 1085. The totality of the circumstances must be considered in determining whether reasonable suspicion exists. State v. Oliver, 99-1585, p. 4 (La. App. 4 Cir. 9/22/99), 752 So. 2d 911, 914. 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. Hall, 99-2887, p. 4 (La. App. 4 Cir. 10/4/00), 775 So. 2d 52, 57; State v. Cook, 99-0091, p. 6 (La. App. 4 Cir. 5/5/99), 733 So. 2d 1227, 1231. 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.

Defendant argues that Officers Foucha and McCleary had nothing

more than a generalized suspicion about him "based upon the odor of marijuana in the air." There is no merit to this argument. The officers' testimony established that they did not exit their car and stop defendant until after they smelled the odor of burning marijuana, observed defendant, the only person in the area, smoking a cigarette in front of his residence, and saw defendant discard the cigarette upon seeing the officers, by placing it on a fence next to his residence. Thus, the officers had knowledge of specific, articulable facts, which, when taken together with rational inferences from those facts, reasonably warranted a belief that defendant had been smoking a marijuana cigarette. Accordingly, the officers reasonably suspected that defendant was committing a crime. The officers lawfully stopped defendant and placed him under arrest after confirming that the abandoned cigarette was marijuana. The officers lawfully searched defendant incidental to his arrest, discovering the piece of crack cocaine.

CONCLUSION

Accordingly, for the foregoing reasons, the defendant's conviction and sentence are affirmed.

AFFIRMED

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