NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-KA-2734**
VERSUS	*	**COURT OF APPEAL**
THOMAS SYLVAN	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 402-083, SECTION "I"
Honorable Raymond C. Bigelow, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, and Judge Dennis R. Bagneris, Sr.)

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CONVICTION AFFIRMED; SENTENCE AMENDED, AND AFFIRMED AS AMENDED

Defendant Thomas Sylvan was charged by bill of information on October 7, 1998 with possession of cocaine with intent to distribute, a violation of La. R.S. 40:976(A). Defendant pleaded not guilty at his October 13, 1998 arraignment. On October 23, 1998, the trial court denied defendant's motion to suppress the evidence. Defendant was found guilty as charged on November 12, 1998, at the conclusion of a trial by a twelve-person jury. On March 31, 1998, defendant pleaded guilty to being a second-felony habitual offender, and was sentenced to fifteen years at hard labor without benefit of parole, probation or suspension of sentence. On October 29, 1999, this court granted defendant's writ application for the purposes of transferring it to the trial court for consideration. On February 15, 2000, this court denied defendant's writ application as to defendant's attempt to obtain copies of his transcripts. Defendant's motion for appeal was granted on October 4, 2002.

FACTS

Prior to trial, it was stipulated that the white powder seized from defendant, as well as the residue on a metal strainer, metal spoon and one small plastic bag seized from defendant's hotel room, tested positive for cocaine.

New Orleans Police Department Sergeant Steven Gaudet testified that he and Officer Cedric Gray stopped defendant on October 4, 1998, at approximately 9:15 p.m., and found nineteen bags of powdered cocaine in his right front pants pocket. Sgt. Gaudet was working on a narcotics investigation with Officer Belisle and Officer Gray. Officer Belisle established a surveillance at Terpsichore and South Liberty Streets. Sgt. Gaudet and Officer Gray stopped defendant based on Officer Joe Belisle's instruction. Sgt. Gaudet identified the cocaine and some currency seized from defendant. Sgt. Gaudet advised defendant of his rights, but defendant did not respond when asked whether he understood them because he appeared stunned at being arrested. Defendant later made a statement at the police station. A search warrant was obtained for defendant's dwelling place, Room 207 of the Rochambeau Hotel. Sgt. Gaudet identified drug paraphernalia seized from the room, including plastic bags with purple unicorns on them commonly used in packaging narcotics. These bags matched some of the nineteen bags seized from defendant's person at the

time of his arrest, all of which had some kind of design on them, and bags found on top of defendant's bedroom dresser.

Officer Joe Belisle set up his surveillance at Felicity and South Liberty Streets, approximately one to one and one-half blocks away from Terpsichore and South Liberty. Some five to ten minutes after he began observing defendant through binoculars, an individual rode up on a bicycle and engaged defendant in a brief conversation. The individual tendered currency to defendant, whereupon, defendant reached into his right front pants, pulled out a small object, and handed the object to the individual. The individual put the object into his pants pocket, and rode off on his bicycle. Defendant put the currency in a little bag, which he then put into his right front pants pocket. At that time Officer Belisle radioed Sgt. Gaudet and Officer Gray and informed them of what he had observed. While doing paperwork at the Sixth District police station, defendant volunteered that he was not a drug dealer, that he was just selling a few bags, and that the rest was for himself.

Officer Belisle was confronted with a police report written in connection with the case, which stated that he had set up his surveillance five blocks from the intersection of Terpsichore and South Liberty Streets, not one to one and one-half blocks as he had testified. Officer Belisle

replied that Officer Gray had written the police report.

ERRORS PATENT & ASSIGNMENT OF ERROR NO. 2

A review of the record reveals one error patent that is also the subject of defendant's second assignment of error. The trial court imposed defendant's fifteen-year sentence as a second-felony habitual offender without benefit of parole, probation or suspension of sentence. Pursuant to La. R.S. 40:967(B)(4)(b), as in effect at the time of defendant's October 1998 arrest, only the first five years of a sentence for possession with intent to distribute cocaine shall be without the benefit of parole. La. R.S. 15:529.1(G) provides that any sentence imposed under the Habitual Offender Law shall be without benefit of probation or suspension of sentence. Accordingly, defendant's sentence must be amended as to the parole restriction, to provide that only the first five years of his sentence is to be without the benefit of parole.

ASSIGNMENT OF ERROR NO. 1

In this assignment of error, defendant argues that the trial court erred in denying his motion to suppress the evidence.

Defendant first attacks the seizure of the cocaine from his person. 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.

Defendant contends that the officers immediately arrested defendant. Sgt. Gaudet testified at the hearing on the motion to suppress that after Officer Belisle observed what he believed to be a transaction, he and Officer Gray moved in and advised defendant that he was under investigation for narcotics activity. Defendant attempted to shield his right side from Sgt. Gaudet by placing his forearm over the right pants pocket, and raised his voice, asking the officers what they were doing. Sgt. Gaudet said he patted

defendant down and located a plastic bag in his right front pants pocket containing nineteen bags of cocaine. Only then, Sgt. Gaudet said, was defendant placed under arrest.

The State does not dispute that defendant was under arrest before the search. Based on Officer Gaudet's testimony at the motion hearing, it appears that Sgt. Gaudet and Officer Gray made a legitimate investigatory stop of defendant. However, even assuming that Sgt. Gaudet lawfully patted down defendant for his and Officer Gray's safety because of the well-recognized illegal drug trade-weapons connection, or because defendant's actions suggested that he was concealing a weapon or contraband in his right front pants pocket, Sgt. Gaudet did not justify removing the bag from defendant's pocket. That is, he failed to testify that upon feeling the object he immediately recognized it as contraband, in order to render its seizure legitimate under the "plain feel" exception to the search warrant requirement. Therefore, the seizure of the bag cannot be justified under the investigative stop theory. However, it can be justified under the theory that defendant was lawfully arrested, and the bag was seized pursuant to a search incidental to that arrest.

La. C.C.P. art. 213 authorizes a peace officer to make an arrest without a warrant when the person to be arrested has committed an offense

in his presence; has committed a felony, although not in the presence of the officer; or where the officer has reasonable cause to believe that the person to be arrested has committed an offense, although not in the presence of the officer. This court set forth the applicable law on probable cause for an arrest in State v. Pham, 2001-2199 (La. App. 4 Cir. 1/22/03), 839 So. 2d 214, as follows:

> It is not a prerequisite for the existence of probable cause to make an arrest that the police officers know at the time of the arrest that the particular crime has definitely been committed; it is sufficient that it is reasonably probable that the crime has been committed under the totality of the known circumstances. An arresting officer need only have a reasonable basis for believing that his information and conclusions are correct. For an arrest, the law does not require that "reasonable cause to believe" be established by evidence sufficient to convict; the arresting officer need not be convinced beyond a reasonable doubt of the arrested person's guilt. The standard of reasonable cause to believe is a lesser degree of proof than beyond a reasonable doubt, determined by the setting in which the arrest took place, together with the facts and circumstances known to the arresting officer from which he might draw conclusions warranted by his training and experience.
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> Probable cause for an arrest must be judged by the probabilities and practical considerations of everyday life in which average people, and particularly average police officers, can be expected to act. The reputation of the area is an articulable fact upon which a police officer may legitimately rely. The determination of probable cause, unlike the determination of guilt at trial, does not require the fine resolution of conflicting evidence that a reasonable doubt or a preponderance standard demands. Deference should be given to the experience of the police who were present at the time of the incident. The fundamental philosophy behind the probable cause requirement of the Fourth Amendment is that common rumor or report is not an adequate basis for the arrest of a

> person. Police are not required to arrest an individual at the point at which probable cause for arrest arises.
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> Pursuant to a lawful arrest, the officer may lawfully conduct a full search of the arrestee and the area within his immediate control for weapons and for evidence of a crime. (Citations omitted).

2001-2199, pp. 5-6, 839 So. 2d at 219-220.

In the instant case, Sgt. Gaudet testified at the hearing on the motion to suppress that he received information from a reliable confidential informant who had provided him with information in the past leading to arrests and convictions of numerous people involved in narcotics trafficking in the city of New Orleans. The informant stated that a person named "Chinee," described as a heavy set black male, wearing a light blue jersey and blue jeans, and confined to wheelchair, was then at a bar located at Terpsichore and Liberty Streets selling ten-dollar bags of powdered cocaine. Sgt. Gaudet knew defendant from past investigations, and knew his nickname to be 'Chinee." He said they had arrested him in the past, and had conduced investigations on him in the past at Josephine and Liberty Streets. Within a couple of days prior to the date of the arrest, another confidential informant who had given information leading to arrests and convictions told Sgt. Gaudet that he had been inside of defendant's hotel room and had seen narcotics, and that defendant sold narcotics every morning at Josephine and Liberty Streets.

Joe Belisle testified at the motion to suppress hearing that he observed the described individual through his binoculars. When the individual on the bicycle pulled out currency, defendant reached into his right front pocket and removed a small bag. Defendant opened the bag, removed a small object, and handed it to the individual on the bicycle. Defendant placed the currency the individual had given him, and the bag, into his right front pocket.

In State v. Robertson, 2002-0156 (La. App. 4 Cir. 2/12/03), 840 So. 2d 631, 2003 WL 356302, cited by the State, police received information from a confidential informant that an individual known as "Red," who walked with a limp and drove a gray Chevy Corsica, sold cocaine while sitting in front of an abandoned house at the corner of LaSalle and Josephine Streets. The informant also told the officers that Red kept more narcotics inside his residence at 3025 Toledano Street. The next day, one officer went to 3025 Toledano Street, where he observed the gray Chevy Corsica parked in front. He then drove to LaSalle and Josephine Streets and parked nearby. Within ten minutes of Red's arrival, the gray Chevy Corsica pulled up and parked nearby. Red exited and walked, with a limp, to the rear of an abandoned residence. The officer observed, through binoculars, Red remove a plastic bag from his pants pocket and place it on the sidewalk at the rear of

a back shed, then walk over and sit on the steps of the abandoned residence. The officer observed two separate narcotics transactions with two unknown males. In each transaction, unknown males approached Red, engaged him in a brief conversation, and handed the defendant currency. Red walked to the back shed area, retrieved a small object, and returned to give the object to the male. A third male subsequently approached. He and Red walked to the back shed area and retrieved the plastic bag. Red showed the bag to the third male, and removed a small object and gave it to him. This third male placed the object in his sock and sat on a milk crate next to the steps where Red had been sitting. The officer observed this third male conduct a drug transaction as the defendant had done. A female joined this third male, sitting on the steps.

Subsequently, the surveilling officer contacted two other officers, who approached Red, the male and the female, conducted pat-down searches, and informed them they were under investigation for drug violations. This court held that the corroboration of the informant's information by the first officer's surveillance gave the detaining officers not only reasonable suspicion to stop Red, but probable cause to arrest him.

In State v. Julian, 2000-1238 (La. App. 4 Cir. 3/14/01), 785 So. 2d 872, also cited by the State, police received a telephone complaint,

presumably anonymous, regarding drug activity at a residence. Police had received numerous complaints concerning that residence. Police set up surveillance, and had been on the scene less than a minute when they observed an individual matching a description given by the caller come out of an alleyway of the residence and speak to another individual, who was holding currency in his hand. After a brief conversation, the first individual removed a plastic object from his right pants pocket, opened it, removed something from it, and handed it to the second individual. The first individual then took currency from the second individual, who walked off. The observing officers radioed other officers, who arrested the first individual and recovered a film container with crack cocaine inside from that individual's right front pants pocket. On reviewing the seizure, this court stated that the officers not only had reasonable cause to stop the individual, but that the observation of a narcotics transaction also provided probable cause to arrest him.

In the instant case, Officer Belisle confirmed the information the officers received from the reliable confidential informant, and observed the described individual, defendant, engage in a narcotics transaction. In addition, defendant was already known to these officers at the time they received the tip; they had previously arrested him. Further, they had

received information only a couple of days earlier from another reliable confidential informant that defendant was selling narcotics in the mornings on the same street where he was ultimately arrested. Under these circumstances, when Sgt. Gaudet and Officer Gray approached defendant, they had probable cause to arrest him. Accordingly, the cocaine was lawfully seized from defendant's right front pants pocket incidental to his arrest.

Defendant next argues that the trial court erred in denying the motion to suppress the evidence seized from defendant's hotel room, even though the evidence was seized pursuant to a search warrant, because the officers entered the hotel room prior to obtaining the warrant. Defendant claims there was no exigency to enter the hotel room, and the entry tainted the later search, as the search warrant application "included information gained in the prior illegal stop … and the initial illegal entry" of the room.

As previously discussed, defendant's arrest and the seizure of the nineteen bags of cocaine from his person were lawful. Further, the search warrant application contains no information obtained from the officers' entry into defendant's hotel room to secure it prior to obtaining the search warrant. The warrant merely recites that the officers verified with the desk clerk that defendant resided in Room 207, and that the officers entered the room

accompanied by that desk clerk. Sgt. Gaudet testified at trial that the officers entered the room and made sure no one was inside, then closed the door and locked it. They returned the key to the desk clerk. After securing the search warrant, the officers got the key from the desk clerk and executed the warrant. Sgt. Gaudet testified at trial that he, another officer and a narcotics detection dog and its handler searched the room after obtaining the search warrant. The record establishes that no evidence was seized from the room prior to the execution of the search warrant.

Defendant cites this court's decision in State v. Kirk, 2000-0190 (La. App. 4 Cir. 11/13/02), 833 So. 2d 418. In Kirk, officers went to a location in response to a citizen complaint. Once there, the officers observed a person approach the defendant's apartment and exchange currency for a small object. The officers continued watching the apartment, and saw a total of four apparent narcotics transactions. The officers stopped the fourth buyer. Because this stop occurred within one block of the apartment, officers feared evidence would be destroyed and ordered that the apartment be entered. Upon entering, the defendant sat on a gun. Another weapon was on a table to the defendant's left. Officers obtained a search warrant, and a search of the defendant revealed fifty-eight pieces of crack cocaine, and a cooking tube was seized from the apartment. The defendant was arrested, tried and

convicted of possession of cocaine with intent to distribute. He appealed the denial of his motion to suppress the evidence.

In State v. Kirk, 2000-0190 (La. App. 4 Cir. 11/15/00), 773 So. 2d 259, this court stated that the officers knocked on the door of the apartment, arrested the defendant, and searched him incidental to that arrest, discovering money and cocaine. This court held the officers had probable cause to arrest the defendant, and discovered the cocaine during a legal search incidental to that arrest. This court rejected the defendant's argument that no exigent circumstances were present to justify entering the apartment without a warrant, noting that the evidence was not found in the apartment but on the defendant's person. The Louisiana Supreme Court denied writs. State v. Kirk, 2000-3395 (La. 11/9/01), 801 So. 2d 1063.

In Kirk v. Louisiana, 536 U.S. 635, 122 S.Ct. 2458, 153 L.Ed.2d 599 (2002), the U.S. Supreme Court reversed this court, relying on the fact that the officers entered the defendant's home, arrested him, frisked him, and discovered the cocaine on his person before obtaining the search warrant. The court cited a single case in disposing of the case, Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). Payton, involved the issue of whether police officers, having probable cause to arrest an individual, could enter that individual's home to arrest him without an arrest

warrant or a search warrant. The court held that an arrest warrant would suffice. Otherwise, probable cause to arrest would not be sufficient, absent exigent circumstances.

In reviewing this court's decision in Kirk, the U.S. Supreme Court appeared to have relied on a mistaken set of facts, i.e., that the officers recovered the narcotics not after obtaining a search warrant, but after entering the defendant's home, arresting him without an arrest warrant, and searching him incidental to that arrest. Relying on Payton, the U.S. Supreme Court reversed this court's judgment that exigent circumstances were not required to justify the officers' conduct, and remanded the case to this court. On remand, this court found that the record evidence did not reflect sufficient exigent circumstances to justify the warrantless entry into the defendant's apartment—there was no evidence to conclude that the occupants of the apartment were aware of the police surveillance; that anyone else discovered the police presence who could notify the occupants of the buyer's arrest outside; or that a crowd was gathering as a result of the police activities. State v. Kirk, 2000-0190, pp. 4-5 (La. App. 4 Cir. 11/13/02), 833 So. 2d 418, 420.

In State v. Jones, 2002-1931 (La. App. 4 Cir. 11/6/02), 832 So. 2d 382, writ denied, 2002-2895 (La. 12/4/02), 831 So. 2d 973, the trial court

cited the U.S. Supreme Court's decision in Kirk as the basis for granting the defendant's motion to suppress the evidence, finding that the State failed to show exigent circumstances which would have justified police entry into a residence without an arrest or search warrant. While the police officers in Jones ostensibly entered the residence to "secure" it prior to the issuance of a search warrant, as in the instant case, unlike in the instant case the officers in Jones searched the residence and seized the narcotics before the issuance of the search warrant. Thus, just as the U.S. Supreme Court's decision in Kirk was decided on a set of facts involving the seizure of drugs before a search warrant was issued, so was Jones. This court affirmed the suppression of the evidence in Jones, noting that under Kirk, the subsequent issuance of the search warrant could not be applied retroactively to the prior search to remove the taint of the illegal entry. 2002-1931, p. 8, 832 So. 2d at 388.

Neither the U.S. Supreme Court's decision in Kirk, either of this court's decisions in Kirk, nor this court's decision in Jones presented facts such as those present in the instant case. Nevertheless, even if it is assumed that the officers' initial entry into defendant's hotel room after defendant's arrest was not justified by Sgt. Gaudet's stated need to secure it so no one could dispose of evidence pending the issuance of the search warrant, the evidence subsequently discovered during the execution of the search warrant

was still admissible pursuant to the "inevitable discovery" doctrine.

> The inevitable discovery doctrine "is in reality an extrapolation from the independent source doctrine: Since the tainted evidence would be admissible if, in fact, it was discovered through an independent source, it should be admissible if it inevitably would have been discovered." Murray v. United States, 487 U.S. 533, 539, 108 S.Ct. 2529, 2534, 101 L.Ed.2d 472 (1988) (emphasis in original). A functional similarity exists between the independent source and inevitable discovery doctrines because they both seek to avoid excluding evidence the police "would have obtained ... if no misconduct had taken place." Nix v. Williams, 467 U.S. 431, 444, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377 (1984) [evidence found as a result of a violation of a defendant's constitutional rights is admissible if the prosecution can establish by a preponderance of the evidence that the evidence ultimately or inevitably would have been discovered].

State v. Vigne, 2001-2940, p. 9 (La. App. 4 Cir. 6/21/02), 820 So. 2d 533, 539.

The U.S. Supreme Court in Kirk specifically noted that it was not expressing an opinion on the State's argument that any Fourth Amendment violation was cured because police had an "independent source" for the recovered evidence, i.e., the "inevitable discovery" doctrine. 122 S.Ct. at 2459.

In the instant case, all the evidence recovered from defendant's hotel room was seized after the issuance of, and pursuant to the execution of, the search warrant. Probable cause for the issuance of the search warrant was not established by anything viewed by officers in the hotel room. There was

nothing to suggest that the officers entered defendant's hotel room for any purpose other than to insure that no one inside would dispose of evidence before the officers could obtain a search warrant. A preponderance of the evidence shows that the items seized from defendant's hotel room ultimately or inevitably would have been discovered pursuant to the execution of the search warrant. Accordingly, the evidence was admissible, and the trial court properly denied the motion to suppress it.

For the foregoing reasons, we affirm defendant's conviction. Further, we amend defendant's sentence to stipulate that it be served without the benefit of parole for the first five years only, and we affirm the sentence as amended.

CONVICTION AFFIRMED; SENTENCE AMENDED, AND AFFIRMED AS AMENDED