NOT DESIGNATGED FOR PUBLICAITON

STATE OF LOUISIANA	*	**NO. 2003-KA-0044**
VERSUS	*	**COURT OF APPEAL**
DARRIN HUBBARD	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 426-944, SECTION "J"
Honorable Leon Cannizzaro, Judge
* * * * * *
Chief Judge William H. Byrnes III
* * * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge Patricia Rivet Murray, and Judge David S. Gorbaty)

Eddie J. Jordan, Jr., District Attorney
Leslie Parker Tullier. Assistant District Attorney
619 South White Street
New Orleans, LA 70119
COUNSEL FOR PLAINTIFF/APPELLEE

Karen G. Arena
LOUISIANA APPELLATE PROJECT
110 Veterans Memorial Boulevard
Suite 222

Metairie, LA 70005

COUNSEL FOR DEFENDANT/APPELLANT

CONVICTION AND SENTENCE AFFIRMED.

STATEMENT OF THE CASE

Defendant Darrin Hubbard was charged by bill of information on December 21, 2001 with possession of cocaine in an amount twenty-eight grams or more, but less than two hundred grams, or a mixture containing a detectable amount of cocaine or of its analogues, a violation of La. R.S. 40:967(C). Defendant pleaded not guilty at his January 16, 2002 arraignment through appointed counsel Eric Hessler of OIDP. The trial court denied defendant's motions to suppress the evidence and statement and found probable cause on January 23, 2002. On March 11, 2002, the State amended the bill of information to charge defendant with possession of cocaine with the intent to distribute, a violation of La. R.S. 40:967(A). On that date defendant, attended by counsel, withdrew his prior plea of not guilty and pleaded guilty as charged in the amended information, reserving his rights under State v. Crosby, 338 So. 2d 584 (1976).

According to the trial court's minute entry, the trial judge interrogated defendant as to his understanding of and waiver of his right to trial by judge or jury, to confront and cross-examine witnesses who accuse him of this

offense, to compulsory process or to call witnesses on his own behalf at trial, his privilege against self-incrimination or his right not to testify should he go to trial. The court having explained these rights, defendant answered that he understood the waiver and, under oath, told the court that he wanted to plead guilty to the crime because he was in fact, guilty of the crime.

The trial court ordered a pre-sentence investigation. Defendant was sentenced on June 11, 2002 to seven years at hard labor, under the "About Face Program," La. R.S. 15:574.5, with credit for time served. The first two years are to be served without the benefit of parole, probation or suspension of sentence. The sentence is to run concurrent with the sentence imposed on defendant in case number 426-932. The trial court imposed a special condition that defendant receive substance abuse counseling while in the About Face Program. On July 2, 2002, defendant filed a motion for reconsideration of sentence and a motion for appeal. In support of his motion for reconsideration of sentence, defendant contended his sentence was constitutionally excessive, unlawfully considered factors either not proven by the State or not allowed to be part of sentencing considerations, was imposed without consideration of mitigating factors that would have been more fully revealed had a pre-sentence investigation been ordered, and that the statute either calls for an unconstitutional mandatory sentence or an

unconstitutional mandatory minimum sentence. On July 3, 2002, the trial court denied the motion to reconsider sentence and granted the motion for appeal.

STATEMENT OF FACTS

Bureau of Alcohol, Tobacco and Firearms (ATF) Agent Charles Hustmyre testified at the motion hearing on January 23, 2001 that he participated in the investigation and arrest of defendant on the night of November 15, 2000, as a member of the ATF Safe Home Task Force. The agent received information from a reliable confidential informant, one who had provided information in the past leading to narcotics arrests, that a black male named "Darrin" was going to deliver a quantity of cocaine to a Shell gas station located on Canal Street near City Park Avenue on that date. The informant described "Darrin" as being of average height, with short hair, and described the car "Darrin" would be driving as a red Ford Explorer. The informant also gave the agent an approximate time for the delivery.

Agent Hustmyre and other law enforcement officers set up surveillance. A black male of average height with a "low haircut" pulled into the Shell station at the approximate time given by the informant. He stopped his red Ford Explorer at a gas pump, but did not exit. The officers

waited a few minutes, then moved to box in defendant between two police units. Agent Hustmyre and New Orleans Police detective Jeff Sandoz walked up to the driver's-side door of the car and found defendant sitting with a clear bag in his lap containing what appeared to be cocaine. Agent Hustmyre said he had a clear and unobstructed view of the cocaine in defendant's lap. Defendant was advised of his rights and told the officers that he was selling cocaine because he had an employment problem and was trying to support his family. He admitted that he had cocaine at two other locations, his home in eastern New Orleans and a location on the Westbank.

Agent Hustmyre and other officers accompanied defendant to his home in eastern New Orleans. There, a female executed a consent-to-search form. Defendant showed officers where the cocaine was located. Agent Hustmyre did not go to the Westbank location, but other officers did. Defendant said the cocaine there was secreted behind a picture frame on the wall as one walked in the door.

Rhonda Fisher, testifying on behalf of defendant, stated that police came to her home on the night in question at approximately 11:00 p.m. Ms. Fisher was not married to defendant, but she and defendant apparently resided together at the residence, and had a three-year old child. Ms. Fisher signed the consent-to-search form after officers told her that she needed to

cooperate because if she did not they would thoroughly search her home, take her to jail if drugs were found, and place her children in the custody of the state. Ms. Fisher said officers were searching her home before she executed the consent form. She never heard anything mentioned about a search warrant. She did not know she had the right to refuse entry or to give consent to the search.

Ms. Fisher said during examination by the court that a police officer told her that they stopped defendant because he robbed a store, and then found him in possession of cocaine. She said the officer told her they needed to search the house. She said that was fine, because she did not know of anything in her home.

Agent Hustmyre was recalled as witness in rebuttal. He denied most all of the accusations made by Ms. Fisher as to officers searching her home before she gave consent, as to the pressure being exerted on her to sign the consent-to-search form, etc. Agent Hustmyre also said defendant had given officers consent to search the residence, and that they could have obtained a search warrant.

ASSIGNMENT OF ERROR: The trial court erred in denying defendant's motion to suppress the evidence and statement because the

officers lacked reasonable suspicion to stop or probable cause to arrest at the time they first approached 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.

The first issue is whether defendant was under arrest at the time police boxed him in. The officers would have needed probable cause to believe defendant had committed a crime to arrest him, but to make to an investigatory stop they would have needed only reasonable suspicion to believe he was committing, had committed, or was about to commit a crime.

La. C.Cr.P. art. 201 defines an arrest as the taking of one person into custody by another. To constitute arrest there must be an actual restraint of the person. The restraint may be imposed by force or may result from the

submission of the person arrested to the custody of the one arresting him. It is the circumstances indicating the intent to effect an extended restraint on the liberty of the accused, rather than the precise timing of an officer's informing a person that he is under arrest, that are determinative of when an arrest actually occurs. State v. Allen, 95-1754, p. 6 (La. 9/5/96), 682 So. 2d 713, 719.

La. C.Cr.P. art. 215.1 (A), provides that 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.

In State v. Smith, 99-2129 (La. App. 4 Cir. 4/26/00), 761 So. 2d 642, police followed a suspect for six blocks before stopping him by boxing-in his truck using one police car in front of Smith's truck and one in back, so Smith could not escape. This court held that this constituted an arrest, because defendant was not free to leave when the police cars boxed him in, and the officer who testified admitted that Smith was under arrest because he was not free to leave.

In State v. Broussard, 99-2848 (La. App. 4 Cir. 10/4/00), 769 So. 2d 1257, officers conducting an undercover narcotics purchase decided to detain an individual driving a Jeep who may have been involved in the sale.

One police unit turned across the Jeep's path. When the driver of the Jeep attempted to back up, another police unit pulled behind him, boxing him in. This court analogized the facts and circumstances to those in Smith, and held that the officers had arrested the Jeep's driver by stopping him in that manner. In State v. Broussard, 2000-3230 (La. 5/24/02), 816 So. 2d 1284, the Louisiana Supreme Court reversed that decision, agreeing with the dissent that inherent in an officer's right to make an investigatory stop of an individual and to demand his name, address, and explanation of his actions is the right to detain the subject temporarily to verify information given or to obtain information independently of his cooperation. Broussard, 99-2848 at 4, 769 So.2d at 1263. The definition of arrest in La.C.Cr.P. art. 201 keyed to "an actual restraint of the person" does not provide a bright-line rule for distinguishing arrests from investigatory stops because Louisiana adopted that definition, see 1928 La. Acts 2, § 1, art. 58, well before constitutional and statutory authority existed for detaining persons on less than probable cause to arrest. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); La.C.Cr.P. art. 215.1.

The use of actual restraint does not alone transform a street encounter between the police and a citizen into an arrest because an investigatory stop necessarily involves an element of force or duress, temporary restraint of a

person's freedom to walk away. State v. Salazar, 389 So.2d 1295, 1298 (La.1980); see 4 Wayne R. LaFave, Search and Seizure, § 9.2(d), p. 35 (3rd ed. 1996)("A stopping for investigation is not a lesser intrusion, as compared to arrest, because the restriction on movement is incomplete, but rather because it is brief when compared with arrest...."); United States v. Jones, 759 F.2d 633, 637 (8th Cir.1985)("The test is not ... whether a reasonable person would have felt free to leave under the circumstances: That concern marks the line between a fourth amendment seizure of any degree and a consensual encounter which does not require any minimal objective justification."); see also Terry, 392 U.S. at 21, n. 16, 88 S.Ct. at 1879 ("Obviously, not all personal [encounters] between policemen and citizens involve 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.").

In the instant case, although the officers boxed-in defendant, and he was not free to leave at that moment, there is nothing to suggest that the officers intended an extended restraint upon his liberty at that time. Defendant in the instant case was not free to leave because police needed to investigate their suspicion that he was committing, had committed, or was about to commit a crime. This is the quintessential “investigatory stop” as to

which reasonable suspicion is sufficient cause. Defendant was stopped in a gas station, and boxing him in required nothing more than the officers stopping their vehicles one in front of defendant and one in back of him. This action was less intrusive than that in Smith or Broussard, and served to protect not only the officers but also members of the public and defendant himself. This was not an arrest.

It must now be determined whether police had the requisite reasonable suspicion to make an investigatory stop of defendant pursuant to La. C.Cr.P. art. 215.1(A). 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. Evidence derived from or seized pursuant to an unreasonable stop will be excluded. State v. Benjamin, 97-3065, p. 3 (La.12/1/98), 722 So.2d 988, 989. 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. 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.

Defendant does not dispute Agent Hustmyre's testimony that the informant was reliable. Thus, the case presents one of a reliable informant advising officers that a black male with short hair, of average height, would be making a drug delivery at a specified public location at approximately 10:00 p.m., on a certain date, and that he would be driving a red Ford Explorer. At approximately 10:00 p.m., the officers observed the described male driving the described sports utility vehicle pull into the gas station and stop next to a gas pump, and remain in his vehicle for a few minutes.

Certainly, viewed alone, defendant's actions in pulling into a gas station and sitting in his vehicle for several minutes did not suggest criminal activity. Defendant speculates that several hundred people living in the New Orleans area would fit defendant's description and drive that popular model and color of vehicle. However, the most important factor here was the reliable informant's prediction that the described individual driving the described vehicle would drive into this particular gas station at

approximately 10:00 p.m. Even an anonymous tip may provide reasonable suspicion for an investigatory stop if it accurately predicts future conduct in sufficient detail to support a reasonable belief that the anonymous informant had reliable information regarding the suspect's illegal activity. State v. Smith, 2000-1838, p. 1 (La. 5/25/01), 785 So. 2d 815, 816, citing Alabama v. White, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). This is because it demonstrates inside information—a special familiarity with the defendant's affairs. Id.

In the instant case, defendant's argument rests on his speculative assertion that hundreds of black males of average height with short hair drive red Ford Explorers. The record contains no evidence to support this position. Even recognizing that there may be some measure of truth to this suggestion, the officers observed defendant pull into the predicted gas station, at the predicted time, driving the predicted vehicle. Thus, the reliable informant demonstrated the requisite "special familiarity" with the defendant's affairs to justify an investigatory stop. In addition, after having confirmed these aspects of the informant's tip, police reasonably viewed with suspicion defendant's action of sitting in his vehicle for several minutes at the gas pump. Such activity was consistent with defendant's awaiting a buyer for the narcotics believed to be in his possession.

The officers lawfully stopped defendant. Agent Hustmyre observed the cocaine in plain view on defendant's lap through the window of defendant's vehicle or when the vehicle door was opened. Defendant does not attack the method by which the contraband was seized.

The trial court properly denied defendant's motion to suppress the evidence and his inculpatory statements.

There is no merit to this assignment of error.

CONCLUSION AND DECREE

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

CONVICTION AND SENTENCE AFFIRMED