NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2003-KA-2031**
VERSUS	*	**COURT OF APPEAL**
GARY R. JEFFERSON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 415-627, SECTION "A"
Honorable Charles L. Elloie, Judge
* * * * * *
Judge Roland L. Belsome
* * * * * *

(Court composed of Judge David S. Gorbaty, Judge Leon A. Cannizzaro Jr., Judge Roland L. Belsome)

Eddie J. Jordan, Jr.
District Attorney
Claire Adriana White
Assistant District Attorney
619 South White Street
New Orleans, LA 70119
COUNSEL FOR PLAINTIFF/APPELLEE, STATE OF LOUISIANA

SEPTEMBER 22, 2004

William R. Campbell, Jr.
LOUISIANA APPELLATE PROJECT
700 Camp Street
New Orleans, LA 70130
COUNSEL FOR DEFENDANT/APPELLANT, GARY JEFFERSON

AFFIRMED

STATEMENT OF THE CASE

Gary Jefferson was charged by grand jury indictment, July 13, 2000, with possession of heroin with intent to distribute, a violation of La. R.S. 40:966(A). Defendant pleaded not guilty during his August 7, 2000 arraignment. The trial court denied defendant's motion to suppress the evidence on April 11, 2001. A mistrial was granted on June 18, 2001, when the jury was unable to reach a verdict.

The case was set for trial again on July 24, 2001. On this date the defendant filed a pro se motion to quash the indictment, which the trial court denied. This second trial resulted in a mistrial on the defendant's motion. Mr. Jefferson elected to waive his right to a jury trial. The trial court found the defendant guilty of possession of heroin on March 15, 2002. On that date defendant admitted to being a second-felony offender. The trial judge sentenced defendant to four years at hard labor on the possession conviction, vacated that sentence, and resentenced defendant as a second-felony offender to five years at hard labor, to run concurrent with any and all other sentences. Defendant was also fined $1,000. The trial court granted the defendant an out-of-time appeal on October 2, 2003.

FACTS

New Orleans police Detective Robert Ferrier began surveillance of alleged narcotics sales in the 2600 block of Toledano Street on June 24, 2000. While on duty, Ferrier observed defendant Gary Jefferson walk empty handed to the rear driveway of 2610 Toledano Street and return with a pair of tennis shoes. Ferrier lost sight of Jefferson on his way toward the courtyard. A short time later this routine was repeated. On this occasion, Detective Ferrier witnessed an exchange of money and packages, taken from the tennis shoes, between Jefferson and four unknown males.

Mr. Jefferson was detained and an officer located a pair of shoes nearby in a common hallway. Cash ($347.00) and packages, later identified as heroin, were found inside the shoes. Mr. Jefferson was arrested and charged with a single count of possession with intent to distribute heroin.

ERRORS PATENT

A review of the record reveals no patent errors.

ASSIGNMENT OF ERROR NO. 1

Did the trial court err in denying his motion to quash the indictment because the Orleans Parish grand jury was empanelled under unconstitutional statutes invalidated by the Louisiana Supreme Court in *Dilosa*?

This very issue was addressed in *State v. Newman*, where the defendant was not entitled to reversal of conviction based on the fact that the grand jury was selected pursuant to impermissible local law. The pertinent part of the holding states:

> In State v. Williams, 2003-0091 (La.App. 4 Cir. 1/514/04), 866 So.2d 296, this Court considered the effect of an indictment made by an Orleans Parish grand jury impaneled pursuant to the statutes that were declared unconstitutional in Dilosa. In the Williams case this Court cited La.C.Cr.P. art. 921, which states that "[a] judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which **does not affect substantial rights of the accused**." (emphasis added) This Court in the *Williams* case determined that "the substantial rights of a criminal defendant are not affected *per se* solely because he is indicted by a grand jury selected pursuant to local laws passed by the Louisiana State legislature." 2003-0091, p. 3, 866 So.2d 298. This Court held that "although the trial court erred in denying defendant's motion to quash his grand jury indictment based on the unconstitutionality of the local laws at issue, there is **no showing that the error affected his substantial rights**." *Id.* (footnote omitted). (emphasis added). Therefore, this Court held that the defendant's indictment, conviction, and sentence were not required to be reversed.

State v. Newman, 2002-2222 (La. 6/27/03), 848 So. 2d 546.

In this case, no factual or evidentiary support was offered in connection with the claim that the system of grand jury selection in Orleans

Parish was susceptible to racial and gender bias. In fact, defense counsel admitted to being unaware as to the racial or gender composition of the grand jury, which issued the indictment against the defendant.

The denial of the defendant's motion to quash did not violate his fundamental right to due process. Thus, the trial court properly denied the defendant's motion.

There is no merit to this assignment of error.

PRO SE ASSIGNMENT OF ERROR NO. 1

The defendant contends that his right against double jeopardy was violated after he was brought to trial a third time, following the grant of his motion for mistrial in the second trial, a motion he contends was caused, provoked or intended by the State.

La. C.Cr.P. art. 592 states that there is no double jeopardy when there has been a mistrial ordered with the express consent of the defendant, or, as in the instant case, on the defendant's own motion. However, a defendant may invoke the bar of double jeopardy in a second effort to try him in cases in which the conduct giving rise to the successful defense motion for a mistrial was intended to provoke the defendant into moving for a mistrial. State v. Lee, 2002-1793, (La. App. 4 Cir. 4/2/03), 844 So. 2d 970.

In the instant case, both the State and the defense presented their

opening statements, and the court called for the State to present its first witness. One prosecutor informed the court that co-counsel had gone to locate the first witness, whom the State had allegedly notified at the end of voir dire. The trial court stated that it wanted a witness or it would entertain motions. At that point defense counsel moved for a mistrial which was granted by the trial court.

Defendant has failed to establish that the State's failure to have a witness ready to testify was intended to provoke the defendant into moving for a mistrial. Accordingly, defendant has failed to establish that there was a double jeopardy bar to his third trial, and the trial court properly denied defendant's motion to quash. La. C.Cr.P. art. 775(1) states that a mistrial may be ordered and in a jury case the jury dismissed when "[t]he defendant consents thereto; …" Defendant moved for the mistrial, thereby consenting thereto. There is no merit to this claim.

There is no merit to this assignment of error.

PRO SE ASSIGNMENT OF ERROR NO. 2

Did the trial court err in denying the defense's motion to suppress the evidence based upon an unconstitutional search and seizure?

The applicable jurisprudence on probable cause to arrest and constitutional search and seizure can be found in State v. Lawrence, 2002-

0363, pp. 2-3 (La. App. 4 Cir. 5/8/02), 817 So. 2d 1216, 1220, 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. State v. Gates, 24,995 (La. App. 2 Cir. 1/19/94), 630 So.2d 1345, writ denied sub nom. Gates v. Jones, 94-0640 (La. 6/17/94), 638 So.2d 1091. An arresting officer need only have a reasonable basis for believing that his information and conclusions are correct. Rodriguez v. Deen, 33,308 (La. App. 2 Cir. 5/10/00), 759 So.2d 1032, writ denied, 2000-1414 (La. 6/23/00), 765 So.2d 1049. 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. La. C.Cr.P. art. 213; State v. Weinberg, 364 So.2d 964 (La.1978). 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. Id.

The court further stated:

> In *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984), the United States Supreme Court adopted the "inevitable discovery" doctrine, holding that evidence found as a result of a violation of a defendant's constitutional rights, would be admissible "[I]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered." The so-called "inevitable discovery doctrine" has been followed by Louisiana courts. *State v. Nelson,* 459 So.2d 510 (La. 1984), *cert. Den, Nelson v. Louisiana*, 471 U.S. 1030, 105 S.Ct. 2050, 85 L.Ed.2d 322 (1985); *State v. Clark*, 499 So.2d

332 (La.App. 4 Cir. 1986).

2002-0363, p. 6, 817 So.2d at 1222.

The events and behavior witnessed by Detective Ferrier substantiates that he had reasonable cause to believe defendant had committed an offense in his presence; thus, he had probable cause to arrest the defendent. Further, the trial court properly denied defendant's motion to suppress the evidence because the police had probable cause to arrest the defendant, to search the common hallway in which the tennis shoes were located, and to search the tennis shoes themselves. Thus, the contraband, heroin and currency, inside of the tennis shoes inevitably would have been discovered.

For the foregoing reasons, the trial court properly denied the defendant's motion to suppress the evidence.

There is no merit to this assignment of error.

CONCLUSION

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

AFFIRMED