STATE OF LOUISIANA	*	**NO. 2005-K-1386**
VERSUS	*	**COURT OF APPEAL**
GLYNN FRANCOIS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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ON APPLICATION FOR WRITS DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 452-997, SECTION "MAG-3"
HONORABLE HARRY CANTRELL, COMMISSIONER
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JUDGE MICHAEL E. KIRBY
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(Court composed of Judge Patricia Rivet Murray, Judge Michael E. Kirby, Judge Roland L. Belsome)

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STATEMENT OF THE CASE

On October 21, 2004 the State filed a bill of information charging the defendant with possession of marijuana, first offense, a violation of La. R.S. 40:966(D). On May 24, 2005 he pleaded not guilty. On July 26, 2005 a hearing on the motions was held, and the trial court suppressed the evidence.

STATEMENT OF THE FACTS

At the July 26, 2005 bench trial/hearing Officer Allen Maurice testified that on September 30, 2004 he and his partner, Officer John Barbetti, were patrolling down Edinburgh Street and then turned left onto Audubon Street. As they traveled southbound on Audubon Street, the officers observed a subject, later identified as the defendant, "standing in the 3500 block of Audubon Street…in front of 3520 Audubon Street." Officer Maurice stated: "When Mr. Francois observed the police vehicle, he turned around and began to walk towards the front door, up a walkway to 3520 Audubon Street. Just before he walked up the steps which lead [sic] to the front porch of that residence, we observed him discard an object to the ground, and in the same movement, sweeping the object with his foot in an attempt to destroy the object that was discarded." The officer said that "based on the area, the high narcotics trafficking that occurs in that particular block, and the nervous and suspicious actions of Mr. Francois, we

elected to get out of the vehicle and see exactly what he dropped on the ground."

Officer Maurice testified that he and his partner exited their vehicle, and he walked up the walkway. The officer said that he observed "a marijuana filled cigar" on the walkway just before the steps of the residence. The cigar had been damaged because the defendant had rubbed his feet and ground it into the concrete. According to Officer Maurice, Officer Barbetti detained the defendant and placed him into handcuffs. He said that he retrieved the cigar, which was placed into evidence.

On cross-examination Officer Maurice admitted that he knew the defendant and had arrested him once before, but not at that location. The defendant did not say that he lived at that address, and gave a Gretna address. The officer said that he did not know who lived at 3520 Audubon Street. When asked what crime the defendant was committing, the officer answered: "He didn't commit a crime at first."

On redirect the officer stated that upon initially observing the defendant, he was not committing a crime. However, when he saw the police vehicle, he turned around and discarded an object, which turned out to be a marijuana cigar. At that point the defendant had committed the crime of possession of marijuana.

Officer Barbetti corroborated Officer Maurice's testimony that the defendant was standing in the middle of the block on Audubon Street when he saw the police vehicle and "moved out of the street towards [sic] sidewalk, basically kept [sic] keeping an eye, looking over his shoulder watching us." The officer said that he observed the defendant "throw something down to the ground." Because of the area with its high violent crime and narcotics trafficking, he stated that they decided to investigate. The officers stopped the police car and exited. Officer Barbetti said that he went to talk to the defendant, and Officer Maurice went to retrieve the discarded object. He admitted that he did not see what object had been thrown down, and his partner retrieved it.

On cross-examination Officer Barbetti admitted that there was more than one car on proactive patrol on September 30, 2004. When asked if there were four or five police cars on Audubon Street, he said that he could not recall. He stated that he and Officer Maurice exited their car; he had no idea what other officers were doing. The officer testified that he did not know the defendant, but conceded that he was not breaking the law by standing in front of 3520 Audubon Street.

On redirect Officer Barbetti said that he saw the defendant drop something. When asked what the defendant was doing to justify an

investigatory stop, the officer explained: "Just due to his actions upon sighting the police unit and discarding an object when he got over the sidewalk. When we elected to stop and investigate what was discarded to the ground, my partner and I got out, went up to talk to him. We looked in the area. Actually my partner looked in the area. You could smell an odor of marijuana in the air. I went to talk to him [the defendant]. He was fumbling around with some keys trying to get into the house."

Defense counsel argued that both officers testified that the defendant was standing in front of 3520 Audubon Street, and he was breaking no laws. Counsel argued: "It wasn't until five or six cop cars show up on the street that they allege Mr. Francois turned and moved and threw something to the ground…." Counsel contended that the officers had no probable cause to detain the defendant, to talk to him, and even to approach him. The State argued that based on the area, the defendant's actions of looking over his shoulder and throwing something down, as well as trying to walk away once he spotted the police car, gave the officers reasonable cause for an investigatory stop. Defense counsel countered that the defendant was standing in front of his grandmother's house doing nothing wrong until four or five police cars turned onto the street. Counsel said that the defendant had been stopped at least twenty-five times, and he had never been

convicted; however, Officer Maurice was involved in most of the those stops.

The magistrate court then stated: "Okay. Let me ask you this then. This concerns me. Both of those officers said he wasn't doing anything wrong. They both testified that he wasn't doing anything wrong; right? What gave them a right to go ahead and search him?" The court added: "Or to investigate him." The State clarified that the officers had said that they could not visually see that the defendant had broken any laws, but they observed his suspicious behavior. The court said: "I have a concern." The magistrate court continued:

> State, I have a concern that he's standing there and they didn't have any reason. He hasn't done anything illegal, [sic] he was just standing there.
>
> And then, based upon what I've heard, that five police cars come up and at that point he's being investigate [sic] for what crime? What was he being investigated for? He hasn't committed a crime; right? Wasn't that the testimony? He hasn't done anything. So why would they investigate?

The State answered: "Because the law allows them to." At that point the magistrate suppressed the evidence.

Trial courts are vested with great discretion when ruling on a motion to suppress. Consequently, the ruling of a trial court on a motion to suppress

will not be disturbed absent an abuse of that discretion. State v. Long, 2003-2592, p. 5 (La. 9/9/04), 884 So.2d 1176, 1179. See also State v. Gray, 2004-1197, pp. 6-7 (La. 1/19/05), 891 So.2d 1260, 1264. The trial court's factual findings during a hearing to suppress evidence are entitled to great weight and should not be disturbed unless they are clearly erroneous. State v. Robertson, 2003-0116 (La. App. 4 Cir. 5/5/03), 843 So.2d 672, 673.

In State v. Sykes, 2004-1199, pp. 3-4 (La. App. 4 Cir. 3/9/05), 900 So.2d 156, 159-60, this Court discussed the relevant law:

> The Fourth Amendment of the U.S. Constitution and Article 1, Section 5 of the Louisiana Constitution protect persons from unreasonable searches and seizures. In order to discourage police misconduct, evidence recovered as a result of an unconstitutional search or seizure is inadmissible. If, however, property is abandoned prior to any unlawful intrusion into a citizen's right to be free from governmental interference, then the property may be lawfully seized and used in the resulting prosecution. State v. Tucker, 626 So.2d 707, 710 (La.1993). "[T]he police do not need probable cause to arrest or reasonable suspicion for an investigatory stop every time they approach a citizen in a public place." State v. Britton, 93-1990, p. 2 (La.1/27/94) 633 So.2d 1208, 1209 (mere communications between officers and citizens implicate no Fourth Amendment concerns where there is no coercion or detention; police have the same right as any citizen to approach an individual in public and to engage him in conversation under circumstances that do not signal official detention).

An "actual stop" occurs when an individual submits to a police show of authority or is physically contacted by the police. An "imminent actual stop" occurs when the police come upon an individual with such force that, regardless of the individual's attempts to flee or elude the encounter, an actual stop of the individual is virtually certain. Id. at p. 12, 900 So.2d at 164, fn. 1, citing State v. Tucker, 626 So.2d at 712.

> An individual is not "seized" within the meaning of the Fourth Amendment until that individual either submits to a police showing of authority or is physically contacted by the police. California v. Hodari D., 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). The Louisiana Supreme Court adopted the Hodari D. definition of an actual stop in State v. Tucker, 626 So.2d 707, 712 (La.1993), opinion reinstated on reh'g, 626 So.2d 720 (La.1993). An imminent actual stop occurs when the police come upon an individual with such force that, regardless of the individual's attempts to flee or elude the encounter, an actual stop of the individual is virtually certain. Tucker, 626 So.2d 707, 712.
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> The Supreme Court in Tucker listed the following factors to be considered in assessing the extent of police force employed in determining whether that force was "virtually certain" to result in an actual stop of the individual: (1) the proximity of the police in relation to the defendant at the outset of the encounter; (2) whether the individual has been surrounded by the police; (3) whether the police approached the individual with their weapons drawn; (4) whether the police and/or the individual are on foot or in motorized vehicles during the encounter; (5) the location and characteristics of the area where the encounter

> takes place; and (6) the number of police officers involved in the encounter. Id., at 712.

State v. Wilson, 2002-0776, p. 7 (La. App. 4 Cir. 1/22/03), 839 So.2d 206, 211.

In Wilson, 839 So.2d at 206, the police officers assigned to the COPS unit at the St. Bernard housing development testified that they were executing a plan to catch possible trespassers who might be dealing in narcotics at the housing development. The officers were patrolling in response to numerous complaints about illegal narcotics in certain parts of the housing development. They planned to go into one of the suspected narcotics areas in the 1400 block of St. Denis Street and approach anyone they found, regardless of whether they were residents. An apartment building in the 1400 block of St. Denis was selected, and one of the officers parked his marked patrol unit in the rear driveway of St. Denis and went around the front on foot. Two other officers drove into the St. Denis courtyard in their marked patrol unit. After observing someone on the front porch of the building, they stopped their car fifteen to twenty feet away, and illuminated the area with their spotlight while Officer Robinson approached the porch from the side. The defendant was alone on the porch. The officer approaching from the side testified that he was ten or thirteen feet away

when the spotlight hit the defendant, who looked nervous, walked about three feet toward the front of the porch, and discarded something from his hand over the edge. One of the officers in the police car in front also saw the defendant make a motion with his hand. One officer retrieved the discarded alleged narcotics, and the other two arrested the defendant for possession of narcotics and cited him for criminal trespass. The defense presented an entirely different version of the facts through the testimony of a witness, who was allegedly on the porch. Id. at pp. 2-4, 839 So.2d at 209.

This Court noted that the trial court had properly distinguished State v. Chopin, 372 So.2d 1222 (La. 1979), a case where the police did not have reasonable suspicion to stop the man who was walking down the service road of a highway carrying a brown paper bag. This Court noted that in Chopin the officer drove past the man, turned around, and came back toward him as he turned on their bright lights and stopped three to four feet in front of him before he dropped his bag, which was later found to contain marijuana, and began to run. This Court focused on the fact that the defendant in Chopin was walking in a well-lit and well-traveled area as he carried a brown paper bag, and the officers had received no reports of suspicious or illegal activity in the area. This Court noted that the defendant was on a porch in a poorly lit area where the three officers were patrolling in

response to numerous complaints about illegal narcotics as well as trespassing. The officers initially approached the defendant from two directions, but the two officers in front parked their vehicle fifteen to twenty feet from him. The defendant walked toward the vehicle, and he was ten to thirteen feet away when the officers turned on their spotlight. The officer approaching from the side saw the defendant drop a ziploc bag, a known container for drugs. The officers did not brandish weapons or approach the defendant with a show of force. This Court concluded that at the time the defendant dropped the ziploc bag, he was not seized and a stop was not imminent; therefore, the ziploc bag was lawfully seized. State v. Wilson, at pp. 8-10, 839 So.2d at 212.

In State v. Jackson, 2001-1062 (La. App. 4 Cir. 2/13/02), 812 So.2d 139, three officers, who were driving in one vehicle, approached a group of men loitering on the steps of an abandoned building at approximately 11:00 p.m. As they approached, the officers observed the defendant separate himself from the group of young men loitering in front of an abandoned house and then throw something over a fence before returning to the group. The officers secured Jackson and the other men, and one officer retrieved the object discarded by Jackson. The object was a plastic bag, which contained white rock-like objects believed to be crack cocaine. This Court found that

the defendant discarded the object without police interference; therefore, the officers could legally retrieve it. Id. at pp. 4-6, 812 So.2d at 143-44.

In State v. Johnson, 2001-2436, pp. pp. 2-4 (La. 1/25/02), 806 So.2d 647, 647-648, the trial court granted the defendant's motion to suppress the evidence in the case involving a charge of possession of heroin. This Court denied the State's writ application, and the Louisiana Supreme Court granted writs and reversed. Acting on a tip from an anonymous informant, detectives drove to the targeted location in an unmarked car. When the officers arrived, they noticed the defendant who matched the informant's description, standing by himself in a courtyard of the Lafitte Housing Project and holding a paper bag in his hand. The officers pulled into a driveway and parked their vehicle no more than four or five feet from the defendant. According to the detective, as the officers exited the vehicle and the defendant observed that they were police officers, he threw down an object. One of the detectives retrieved the bag, which contained heroin, and the other detective stopped the defendant. The detective testifying freely conceded that he did not observe the defendant engage in any conduct more suspicious than pacing back and forth in the courtyard. The detective testified that when he and his partner arrived at the location, they did not turn on their siren or blue light and did not otherwise identify themselves.

The officer stated that as soon as he and his partner pulled up, the defendant threw the package down to the ground. The Supreme Court noted that the detective's uncontested testimony indicated that the officers had not yet physically restrained the defendant when he panicked and discarded his paper bag, and they had not attempted to assert any official authority over him by ordering or signaling him to stop. The Supreme Court concluded that the officers had not yet indicated by word or action that an actual stop or seizure of the person was about to take place; the officers lawfully seized and searched the bag discarded by the defendant before any unlawful intrusion on respondent's right to privacy occurred. Id.

Likewise, in State v. Jackson, 00-3083 (La. 3/15/02), 824 So.2d 1124, the Louisiana Supreme Court held that an actual stop was not imminent when the defendant dropped crack cocaine as two officers exited their unmarked police car, approached the defendant, and identified themselves as the police. The Court recognized that, even though the officers had positioned themselves in such a manner that "intentionally left respondent with no easy route of escape," the officers had not chased the defendant or otherwise communicated their intent to stop him. Id. at pp. 2-3 824 So.2d at 1125-26.

In State v. Allen, 2001-0939, pp. 6-7 (La. App. 4 Cir. 7/18/01), 792

So.2d 93, 97-98, the police officer testified that he was parked for about five minutes in a high crime area, where a number of armed robberies and car burglaries had occurred, when he saw the defendant slowly walking on the street very close to the vehicles that were parked diagonally in spaces by an apartment complex. The officer, who was driving an unmarked car, observed the defendant for about thirty seconds. Then the officer moved in, turned on the blue strobe light, and stopped the defendant. When the officer hit the blue light, the defendant discarded a white towel and took three or four steps backward rapidly. Although the defendant had not been physically seized prior to abandoning the towel containing the cocaine pipe, one had to consider whether an imminent stop occurred prior to the abandonment of the property. This Court considered the Tucker factors and noted that there was only one police officer, and the defendant was not surrounded. The officer did not indicate his distance from the defendant when he first saw the defendant or when he exited his car. The defendant was on foot while the officer was driving a vehicle. The officer turned on the blue light and had it flashing on his dashboard. This Court stated that unlike Wilson, 657 So.2d at 549, the officer had his blue light flashing on the dashboard of his unmarked car, and he clearly testified that he intended to stop the defendant. Although the officer did not yell to the defendant,

there was no other reason for turning on the blue light placed on the dashboard other than the officer's attempt to identify himself as a police officer and to detain the defendant. This Court concluded that under the circumstances, it appeared that the stop was imminent or virtually certain, and the officer needed reasonable cause to justify the detention.

In State v. Wilson, 95-0619 (La. App. 4 Cir. 6/7/95), 657 So.2d 549, three uniformed police officers were patrolling in a marked unit when they saw a group of men in a courtyard in the Desire Housing Project. They drove the car about two car lengths up onto the grass toward the men, but the lights and siren were not turned on. Wilson left the group and began walking away. When the car stopped about five feet away, Wilson dropped a pill bottle and ran away. The officers were not out of the car and had not approached with weapons drawn at the time that Wilson dropped the bottle. Two officers chased Wilson and one retrieved the pill bottle that contained crack cocaine. This Court considered the Tucker factors, found that there had been no imminent stop, and concluded that the pill bottle was lawfully seized. Id. at pp. 2-4, 657 So.2d at 551.

Here Officer Maurice testified that he and his partner were patrolling in a marked unit when they saw the defendant standing in front of a residence in a high crime and drug trafficking area. According to the officer,

when the defendant spotted the police car, he turned and walked toward the steps leading to the porch of the residence. Officer Maurice stated that just before walking up the steps, the defendant discarded an object. At that point the officers had not stopped the defendant, and it was not virtually certain that a stop was imminent. The officers had not turned on the siren or the blue light, and they had not yet exited their police vehicle when the defendant discarded the object. We conclude, therefore, that the officers lawfully seized the abandoned property.

However, the magistrate court heard Officer Maurice's testimony on cross-examination that he knew the defendant and had arrested him before. The court also heard Officer Barbetti's testimony on cross-examination that there was more than one police car on proactive patrol that night although he could not recall how many (when asked if there were four or five cars), and he had no idea how many officers exited those police cars. The magistrate court also heard defense counsel's argument that there were five or six police cars on the street that night. According to the court's statements on the record, it apparently believed that there were five police cars on the street as the defendant stood in front of a residence; therefore, the court apparently concluded that there had been a stop or an imminent stop without reasonable cause before the defendant discarded the object.

In State v. Tucker, 626 So.2d at 707, state troopers were conducting a drug sweep, and approximately ten to twelve marked police vehicles carrying 20 to 30 officers converged on a targeted arcade. Two officers in the lead vehicle saw Tucker, who had been arrested three days before, and another man in the arcade's parking lot. When the two men noticed the approaching police cars, they separated and began to leave the area. One of the officers ordered the two to "halt" and to "to prone out." The second man complied, but Tucker moved several steps toward the rear of the arcade and tossed away a plastic bag before complying. The officers retrieved the bag Tucker had thrown down and found 47 rolled marijuana cigarettes. The Supreme Court discussed a number of factors before deciding whether the stop was imminent. The Court noted that the police officers were several feet away from Tucker at the outset of the encounter, possibly separated by a parked car. The Court said that because Tucker had a lead of several feet and was traveling toward the rear of the arcade, the stop was far from "virtually certain" to occur. Tucker's flight was camouflaged by the darkness of the night, and the commercial urban area provided numerous locations where Tucker could hide. No weapons were drawn. The Court noted that there were several other officers in and around the arcade, but it did not appear that Tucker had been surrounded by police officers. The

Supreme Court noted that the number of police officers did not substantially increase the certainty that Tucker would be actually stopped because the additional officers were focusing their attention on other individuals. The Court stated: "Based on these facts, we cannot conclude an actual stop of Tucker was 'virtually certain' to occur at the time he abandoned the evidence. Thus, at the time Tucker abandoned the marijuana he had not been unconstitutionally seized." Id. at 713.

In State v. Stan, 97-2195 (La. App. 4 Cir. 10/29/97), 703 So.2d 83, four officers in two police cars were patrolling and observed a red truck parked in a river-bound direction. The officers recognized the driver of the truck and a second man standing near the truck from previous narcotics arrests, and they believed that a narcotics transaction was occurring. The officers positioned the police cars so that the defendant's parked truck could not move and asked the occupants to exit the truck. When the driver/defendant exited the truck, the officers saw a silver tinfoil packet, which allegedly contained heroin. This Court noted that the officers did not see a narcotics transaction in progress, and there was no reasonable cause for an investigatory stop, which occurred when the officers blocked in the truck. Id. See also State v. Smith, 1999-2129 (La. App. 4 Cir. 4/26/00), 761 So.2d 642, where this Court found that the defendant had been arrested without

probable cause when deputies boxed–in the vehicle the defendant was driving by using a police car in front and another one behind the defendant's vehicle.

Here there was no testimony that the police cars, whether two or five in number, surrounded the defendant or in any way blocked his movements. The officers did not testify to the distance between their police vehicle and the defendant when they stopped the car, exited, and approached him. However, Officer Maurice stated that the defendant turned around and walked toward the residence when he first observed the police vehicle. There was no testimony that the officers turned on the siren or lights or drew their weapons. According to the testimony of Officers Maurice and Barbetti, they approached the defendant.

Thus, even if we were to defer to the magistrate court's factual conclusion that there were five police cars, his conclusion that a stop occurred or was imminent is a non sequitur because there is no evidence that stop had actually occurred or was about to occur. We therefore find the trial court judgment suppressing the evidence under these circumstances is an abuse of discretion for which we must grant this writ, reverse the judgment below and remand for further proceedings.

WRIT GRANTED; JUDGMENT SUPPRESSING EVIDENCE

REVERSED; REMANDED.