NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2007-KA-1339**
VERSUS	*	**COURT OF APPEAL**
MALCOLM WINN	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 456-755, SECTION "F"
HONORABLE DENNIS J. WALDRON, JUDGE
* * * * * *
JAMES F. MCKAY III
JUDGE
* * * * * *

(Court composed of Judge Charles R. Jones, Judge James F. McKay III, Judge David S. Gorbaty)

KEVA LANDRUM-JOHNSON
DISTRICT ATTORNEY OF ORLEANS PARISH
ALYSON GRAUGNARD
ASSISTANT DISTRICT ATTORNEY OF ORLEANS PARISH
New Orleans, Louisiana 70112-1221
Counsel for Plaintiff/Appellee

SHERRY WATTERS
LOUISIANA APPELLATE PROJECT
New Orleans, Louisiana 70158-8769
Counsel for Defendant/Appellant

AFFIRMED

STATEMENT OF CASE

On March 1, 2005, the State charged the defendant with possession of cocaine, a violation of La. R.S. 40:967(C)(2). He entered a plea of not guilty on March 3, 2005. The trial court found probable cause and denied the defendant's Motion to Suppress the Evidence on May 24, 2005. On June 28, 2005, the jury found the defendant guilty as charged. On July 13, 2005, the State multiple billed the defendant. On April 9, 2007, the court adjudged the defendant a multiple offender and sentenced him pursuant to La. R.S. 15:529, as a fourth offender, to twenty years hard labor, without benefit of probation or suspension of sentence with credit for time served.

STATEMENT OF FACT

On February 14, 2005, at approximately 11:30 a.m., NOPD Officers Patrick Dees and Valentine Emery, III, were on proactive patrol in the Fifth Police District, an area noted for drug trafficking. As the officers approached the intersection of Music and Rocheblave Streets, they observed the defendant standing in the front of a neighborhood store looking at something he held in his hand. When the defendant noticed the patrol car, he dropped what he was holding

and entered the store. Officer Dees stopped the patrol car and retrieved the object the defendant discarded, while Officer Emery pursued the defendant into the store. Officer Dees examined the object the defendant dropped - a white napkin containing a marijuana pipe and a crack pipe displaying a white residue. Officer Dees entered the store and told Officer Emery to arrest the defendant for possession of drug paraphernalia. Officer Emery handcuffed the defendant and placed him under arrest. Thereafter, Officer Emery searched the defendant and discovered a packet of cocaine in the defendant's left sock.

The parties stipulated that NOPD Officer Harry O'Neal is an expert in the examination and identification of cocaine. Further, the State and the defense stipulated that if Officer O'Neal was called to testify, he would verify that he examined the contents of the plastic bag recovered from the defendant and that the white substance contained therein proved to be cocaine.

ERRORS PATENT

A review of the record for errors patent reveals none.

ASSIGNMENT OF ERROR NUMBER 1

In his first assignment of error, the defendant complains that the trial court erred in denying his Motion to Suppress the Evidence. He asserts that the officers lacked cause for an investigatory stop.

A police officer has the right to detain briefly and interrogate a person when the officer has a reasonable articulable suspicion that the person is, has been, or is about to engage in criminal conduct. La.C.Cr.P. art. 215.1; *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Tucker*, 626 So.2d 720 (La.1993). "Reasonable suspicion" is something less than probable cause, and the reviewing court must look to the facts and circumstances of each case to determine

whether the detaining officer had sufficient facts within his knowledge to justify an infringement of an individual's right to be free from governmental interference. *State v. Robertson*, 1997-2960, p. 2-3 (La. 1998), 721 So.2d 1268, 1269. Mere suspicious activity is not a sufficient basis for police interference with an individual's freedom. *State v. Williams*, 421 So.2d 874 (La.1982). "However, the level of suspicion need not rise to the probable cause needed for a lawful arrest." *State v. Huntley*, 1997-0965, p. 3 (La. 1998), 708 So.2d 1048, 1049. The detaining officer must have knowledge of specific, articulable facts, which if taken together with rational inferences from those facts, reasonably warrants the stop. *State v. Dennis*, 98-1016 (La.App. 4 Cir. 9/22/99), 753 So.2d 296. The police do not have to observe what they know to be criminal behavior before investigating. *State v. Benjamin*, 1997-3065, p. 3 (La. 1998), 722 So.2d 988, 989. The totality of the circumstances must be considered in determining whether reasonable suspicion exists. *State v. Belton*, 441 So.2d 1195 (La.1983). An investigative stop must be justified by some objective manifestation that the person to be stopped is or is about to engage in criminal activity, or else there must be reasonable grounds to believe that the person is wanted for past criminal conduct. *State v. Moreno*, 619 So.2d 62 (La.1993). 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. Cook*, 99-0091 (La.App. 4 Cir. 5/5/99), 733 So.2d 1227.

When property is abandoned before any unlawful intrusion into a citizen's right of freedom from governmental interference, it may be lawfully seized by the police. *Belton*, 441 So.2d at 1198. There is no expectation of privacy and no violation of the person's custodial rights. *Tucker*, 626 So.2d at 710.

In this case, the relevant inquiry is whether, at the time defendant abandoned the drug paraphernalia, the officers had illegally accomplished an actual or imminent actual stop.

In three cases similar to this case, this Court found that officers were justified in stopping a defendant and seizing abandoned objects because the officers' initial actions did not amount to an imminent actual stop. In *State v. Jackson*, 2001-1062 (La.App. 4 Cir. 2/13/02), 812 So.2d 139, three officers, driving in one vehicle down a one-way street with parked cars on both sides, approached a group of men loitering on the steps of an abandoned building. As they approached, the officers observed the defendant separate himself from the group of young men and throw something over a fence before returning to the group. The officers secured all of the men and subsequently retrieved the discarded contraband. This Court found that the object was discarded, by the defendant, without police interference, and therefore, the defendant had no expectation of privacy and the contraband was lawfully seized. This Court further found that the defendant's abandonment of the object gave the officers reasonable suspicion to detain him while they retrieved the object, and when the officers discovered the abandoned object contained contraband, they had probable cause to arrest the defendant.

Likewise, in *State v. Portis*, 2000-2665 (La.App. 4 Cir. 2/13/02), 811 So.2d 951, the officers had stopped at a stop sign when they saw the defendant throw down something. The officers detained the defendant and retrieved the objects which were rocks of crack cocaine. As in *Jackson*, this Court found the officers had not violated any privacy rights prior to the defendant's abandonment of the cocaine, and thus they could lawfully seize the cocaine. This Court found the

abandonment gave the officers reasonable suspicion to detain the defendant while they retrieved the abandoned objects, and the discovery of the cocaine gave them probable cause to arrest the defendant.

In *State v. Wilso*n, 2002-0776 (La.App. 4 Cir. 1/22/03), 839 So.2d 206, three officers, who were patrolling a housing complex in response to numerous complaints about narcotics activity, formulated a plan whereby they approached anyone they observed from different directions in order to prevent them from running away. After observing the defendant standing on a poorly lit porch of an apartment building, two officers drove their vehicle to within fifteen or twenty feet of the porch and illuminated the area with their spotlight, the third officer approached the defendant on foot from the side. After the spotlight was illuminated, the defendant moved to the side of the porch and discarded a ziplock bag containing crack cocaine. This Court held that at the time the defendant discarded the contraband there had been no prior unlawful intrusion into his right to be free from governmental interference. Moreover, noting that the officers did not brandish weapons or come upon the defendant with a show of force, the court found that an actual stop was not imminent.

The record in this case indicates that the defendant was not stopped until after he abandoned the cocaine and marijuana pipes. The record also reflects that an unlawful actual imminent stop did not trigger defendant's abandonment of the pipes. Officer Dees and Officer Emery did not exit their patrol car until after the defendant dropped the napkin containing the pipes. Neither of the officers contacted the defendant in any manner nor exhibited any show of force prior to the time the defendant discarded the drug pipes. The defendant was not surrounded by the police. Rather, Officer Emery followed the defendant into the store while

Officer Dees retrieved the objects the defendant dropped. Once Officer Dees identified the abandoned items as contraband, the officers had probable cause to arrest the defendant. The Fourth Amendment permits a warrantless search or seizure incident to a constitutionally valid custodial arrest. *State v. Sherman*, 2005-0779 (La. App. 4 Cir. 4/4/06), 931 So.2d 286,295 (citing *United States v. Robinson*, 414 U.S. 218, 224, 94 S.Ct. 467, 471, 38 L.Ed.2d 427 (1973) and *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)). The lawful search of the defendant, incident to his arrest, produced the cocaine found in the defendant's sock. The facts in this case indicate that the trial court did not err in denying the defendant's Motion to Suppress the Evidence. This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 2

In a second assignment error, the defendant complains that he was improperly tried by a six-member jury. The defendant maintains that because of previous felony convictions he was subject to being charged as a multiple offender and sentenced as such to imprisonment of no less than twenty years at hard labor. Therefore, he argues he was entitled to be tried before a jury of twelve persons.

The number of persons required for a jury in a criminal case is dictated by La. Const. art. 1, § 17(A), which provides:

> (A) A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, all of who must concur to render a verdict ...

Also, La.C.Cr.P. art. 782(A), provides in pertinent part, that "[C]ases in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, all of whom must concur to render a verdict."

The habitual offender proceeding is not applicable until after a person has been convicted of a felony within this state. La.R.S. 15:529.1(A) and (D). Thereafter, the filing of information accusing the convicted felon of a previous conviction(s) is discretionary with the district attorney. La.R.S. 15:529.1(D). Hence, the habitual offender proceeding is a separate proceeding applicable only after conviction and then at the discretion of the district attorney. It forms no part of the punishment of the criminal case involving defendant's guilt or innocence; therefore, it has no bearing on the determination of the number of persons comprising the jury for the trial of the case. *State v. Sherer,* 354 So.2d 1038, 1040 (La. 1978). In this case, the defendant was tried by a six-member jury for possession of cocaine pursuant to La. R.S. 40:967(C), which carries a sentence of imprisonment “with or without hard labor.” Because the punishment for a conviction for possession of cocaine is not necessarily confinement at hard labor, the defendant was properly tried before a jury of six persons. La. Const. art. 1, § 17(A); La. C.Cr.P. art. 782. This assignment is meritless.

ASSIGNMENT OF ERROR NUMBER 3

In his third and final assignment, the defendant complains that his sentence is excessive.

Article I, Section 20 of the Louisiana Constitution of 1974 provides that "[n]o law shall subject any person ... to cruel, excessive or unusual punishment." A sentence within the statutory limit is constitutionally excessive if it is "grossly out of proportion to the severity of the crime" or is "nothing more than the

purposeless imposition of pain and suffering." *State v. Caston,* 477 So.2d 868, 871 (La.App. 4 Cir.1985). Generally, a reviewing court must determine whether the trial judge adequately complied with the sentencing guidelines set forth in La.C.Cr.P. art. 894.1, and whether the sentence is warranted in light of the particular circumstances of the case. *State v. Soco,* 441 So.2d 719, 720 (La.1983).

When adequate compliance with La.C.Cr.P. art. 894.1 is found, the reviewing court must determine whether the sentence imposed is too severe in light of the particular defendant and the circumstances of the case, keeping in mind that maximum sentences should be reserved for the most egregious violators of the offense so charged. *State v. Caston, supra.* The trial judge is afforded wide discretion in determining a sentence and, if the record supports the sentence imposed, the court of appeal will not set aside a sentence for excessiveness. La.C.Cr.P. art. 881.4(D).

Prior to sentencing the defendant in this case, the trial court requested a Pre-Sentence Investigation report on January 9, 2007. At the sentencing hearing, the trial judge noted that he received letters from the defendant's family members requesting leniency. Further, the trial judge reviewed the pre-sentence report with the defendant in court and characterized the defendant's criminal history as "horrific." The report shows that the defendant is no stranger to the criminal justice system. In 1977 and 1981, the defendant had two juvenile arrests. His history of arrests range from property offenses to drug offenses and domestic violence to crimes against persons; he also has a 1995 conviction for carrying a concealed weapon. He has had his probation revoked and been released on good time/parole supervision seven times with five of the periods of supervision ending in revocation.

In *State v. Esteen*, 01-879 (La. App. 5 Cir. 5/15/02), 821 So.2d 60, the Fifth Circuit concluded that a sentence of fifty years at hard labor on each count for possession of cocaine, and the enhanced habitual offender sentence of twenty-five years for the possession of cocaine, as a second felony offender, was not constitutionally excessive; defendant could have received a sentence of sixty years as a second offender. Likewise, in *State v. Colar*, 2004-1003 (La. App. 3 Cir. 2/2/05), 893 So.2d 152, the Third Circuit deemed not excessive a twenty-five year sentence at hard labor for a second offender convicted of possession of cocaine.

In this case the defendant faced the possibility of life imprisonment as a fourth offender; however, he received a sentence of only five years more than the minimum prescribed by law. La. R.S. 15:529.1. Considering the facts of this case and the sentences imposed in other jurisdictions for the same offense, the sentence herein is not excessive.

CONCLUSION

Accordingly, we affirm the defendant's conviction and sentence.

AFFIRMED