NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2008-KA-0471**
VERSUS	*	
		COURT OF APPEAL
WILLIAM D. HUNTER	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

*** * * * * * ***

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 459-230, SECTION "F"
Honorable Dennis J. Waldron, Judge
* * * * * *
Judge David S. Gorbaty
* * * * * *
(Court composed of Judge Michael E. Kirby, Judge David S. Gorbaty, Judge Roland L. Belsome)

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AFFIRMED

Defendant William D. Hunter was charged by bill of information on May 4, 2005 with possession of cocaine, a violation of La. R.S. 40:967(C). Defendant pleaded not guilty at his June 7, 2005 arraignment. The trial court denied defendant's motion to suppress the evidence on April 28, 2006. Defendant was tried on December 6, 2006 by a six-person jury and found guilty as charged. On June 4, 2007, defendant was adjudicated a fourth-felony habitual offender, and the trial court sentenced him to twenty years at hard labor. Defendant filed a motion for appeal on October 11, 2007, which was granted that same date.

The record was lodged with this court on April 21, 2008, and supplemented on July 16, 2008 with a transcript of the hearing on defendant's motion to suppress the evidence.

FACTS

New Orleans Police Officer Michael Lorio testified at trial that on April 20, 2005 he and Officer Frank Robertson were traveling west on North Robertson Street in a marked police unit when he observed defendant, approximately fifteen feet away, peering into the driver's side window of an unoccupied Ford Crown Victoria. Officer Lorio was in the front passenger seat. Defendant began walking

away when he observed the officers. Officer Lorio said he and his partner decided to conduct a pedestrian check of defendant. The officers exited and called defendant over to their vehicle. As defendant walked toward the officers, Officer Lorio observed him drop two bags of a white powdered substance the officer believed to be cocaine, and a bag of what he believed to be marijuana. Officer Lorio said defendant was approximately seven feet away from him when defendant dropped the contraband and, although the area was dark, there were streetlights. Officer Lorio said he advised other officers of what he had just witnessed, and defendant was placed in handcuffs. Officer Lorio said defendant was "Mirandized"[1] and, in response to questioning, said the vehicle did not belong to him. Defendant denied having been looking into the vehicle. Officer Lorio testified that there did not appear to be any damage to the vehicle.

Officer Lorio testified on cross examination that he felt defendant was acting suspiciously because defendant was peering into the car and, upon observing the officers, began walking away in the opposite direction. He thought defendant was breaking into the vehicle. Officer Lorio replied in the negative when asked whether there was any other debris in the area when he went to retrieve the narcotics defendant had discarded. Officer Lorio was shown the narcotics discarded by defendant, and he stated that the item number on the evidence tag was the same item number on a crime lab report with a police report attached.

New Orleans Police Officer Frank Robertson replied in the affirmative when asked whether he was working for the New Orleans Police Department on April 20, 2005 at approximately 10:30 p.m. and as to whether he assisted in the arrest of defendant at that time. Officer Robertson, who said he was with Officer Lorio and

[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

an Officer Torres, testified that Officer Lorio saw defendant first, but that he too observed defendant peering into the vehicle. He said they stopped to ascertain if defendant owned the vehicle. Officer Robertson saw defendant release his clenched hand after Officer Lorio called him over, but could not tell what defendant dropped. He was approximately seven to eight feet away from defendant at that point. He recalled it as being dark, but said the area was well-lit by streetlights. Officer Robertson advised defendant of his Miranda rights.[2] Officer Robertson identified the contraband by his initials on the seal and his name on the front of the evidence packet.

New Orleans Police Department Criminalist John Palm was qualified by stipulation as an expert in the examination and identification of marijuana and cocaine. Officer Palm testified that he tested the white powder in each of two bags and the greenish vegetable matter in one bag, and that the substances tested positive for cocaine and marijuana, respectively. Officer Palm testified as to the chain of custody of the contraband.

ERRORS PATENT

A review of the record reveals no patent errors.

ASSIGNMENT OF ERROR NO. 1

In his sole counseled assignment of error, defendant argues that his sentence is unconstitutionally excessive. Immediately after sentencing the defendant the trial court noted an objection "to protect the record on behalf of the defendant." In State v. Dunbar, 2006-1030, p. 3 (La. App. 4 Cir. 3/19/08), 981 So. 2d 51, 53,

[2] Id.

when considering the defendant's claim of excessive sentence, this court stated: "the trial court pronounced sentence and immediately noted an objection - obviously, as to the length of the sentence …." Consistent with that, in the instant case it is presumed that the trial court's objection to the sentence on defendant's behalf was as to the length of the sentence, and defendant's claim of excessiveness claim was thereby preserved for review.

Defendant was sentenced as a fourth-felony habitual offender to twenty years at hard labor pursuant to La. R.S. 15:529.1(A)(c)(i). La. R.S. 15:529.1(A)(c)(i) provides that if the fourth or subsequent conviction is such that the offender would be punishable by imprisonment for any term less than his natural life, he shall be sentenced to imprisonment for the fourth or subsequent felony for a determinate term "not less than the longest prescribed for a first conviction but in no event less than twenty years and not more than his natural life …." Defendant's conviction in the instant case, his fourth felony conviction, was for possession of cocaine, a violation of La. R.S. 40:967(C). Defendant was subject to a sentence under La. R.S. 40:967(C)(2) of imprisonment with or without hard labor for not more than five years. Accordingly, under La. R.S. 15:529.1(A)(c)(i), the twenty-year sentence imposed on defendant by the trial court was the minimum statutory sentence for a fourth-felony offender in defendant's circumstances.

Even though a sentence under the Habitual Offender Law is the minimum provided by that statute, the sentence may still be unconstitutionally excessive if it "makes no measurable contribution to acceptable goals of punishment, or is nothing more than the purposeful imposition of pain and suffering and is grossly out of proportion to the severity of the crime." State v. Johnson, 97-1906, pp. 6-7

(La. 3/4/98), 709 So. 2d 672, 677 (quoting State v. Dorthey, 623 So. 2d 1276, 1280-81 (La. 1993)). However, the entire Habitual Offender Law has been held constitutional and, thus, the minimum sentences it imposes upon habitual offenders are also presumed to be constitutional. Johnson, 97-1906 at pp. 5-6, 709 So. 2d at 675; see also State v. Young, 94-1636, p. 5 (La. App. 4 Cir. 10/26/95), 663 So. 2d 525, 527. There must be substantial evidence to rebut the presumption of constitutionality. State v. Francis, 96-2389, p. 7 (La. App. 4 Cir. 4/15/98), 715 So. 2d 457, 461, grant of post conviction relief on other grounds affirmed, 2001-1667 (La. App. 4 Cir. 2/6/02), 809 So. 2d 1132. To rebut the presumption that the mandatory minimum sentence is constitutional, the defendant must show by clear and convincing evidence that he is exceptional, which in this context means that because of unusual circumstances he is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case. State v. Lindsey, 99-3302, p. 5 (La. 10/17/00), 770 So. 2d 339, 343; Johnson, 97-1906 at p. 8, 709 So.2d at 677. "Departures downward from the minimum sentence under the Habitual Offender Law should occur only in rare situations." Johnson, 97-1906 at p. 9, 709 So. 2d at 677.

Defendant argues that, considering his prior convictions, the twenty-year minimum mandatory sentence was unconstitutionally excessive.

Defendant's prior convictions were for possession of cocaine in 2004, distribution of false drugs in 1994, and illegal use of a weapon in 1993. The offense for which defendant was first convicted, illegal use of a weapon, involved a firearm, as evidenced by the arrest register contained in the record. Illegal use of weapons is a crime of violence as defined by La. R.S. 14:2(B)(29). That

conviction for illegal use of a weapon arose out of defendant's arrest in August 1993 for two counts of attempted murder of a police officer, four counts of aggravated assault on a police officer, illegal possession of a firearm, and possession of a firearm with an obliterated serial number. While none of the above charges was accepted by the District Attorney's Office, and defendant may have been overcharged by police at the time of his arrest, his illegal use of a weapon on this occasion apparently involved the discharge of a firearm in proximity to police officers.

A trial court is entitled to consider the defendant's entire criminal history, including arrests that do not result in convictions, in determining the appropriate sentence to be imposed. State v. Ballett, 98-2568, p. 25 (La. App. 4 Cir. 3/15/00), 756 So. 2d 587, 602. Thus, while the complete circumstances of defendant's 1993 arrests for these serious offenses involving a firearm are not known, the arrests can be considered in evaluating defendant's claim of excessiveness.

In the instant case, defendant was arrested for the misdemeanor offense of first offense possession of marijuana at the same time he was arrested for the felony offense of possession of cocaine. Defendant was only prosecuted on the cocaine charge. However, at defendant's trial in the instant case New Orleans Police Department Criminalist John Palm testified that the greenish vegetable matter seized from defendant tested positive for marijuana. Defendant was also convicted of contempt of court in June 2005 and sentenced to six months in Orleans Parish Prison. Defendant was also previously adjudicated and sentenced as a second-felony habitual offender, in connection with his 1994 plea of guilty to distribution of false drugs.

In State v. Jones, 2007-0533 (La. App. 4 Cir. 12/28/07), 975 So. 2d 73, this court affirmed a twenty-year mandatory minimum sentence imposed on a fourth-felony habitual offender defendant convicted of possession of a small amount of cocaine. His three prior convictions were for simple robbery, illegal use of a weapon and possession of cocaine. The defendant had been arrested for armed robbery, but had been found guilty of simple robbery, and had pleaded guilty to resisting an officer at the same time he pleaded guilty to illegal use of a weapon. This court noted that because the trial court had imposed the minimum sentence under the Habitual Offender Law, the burden was on the defendant to rebut the presumption of constitutionality, which this court found he failed to do.

Considering the defendant's record in the instant case, it cannot be said that he showed by clear and convincing evidence that he is exceptional, meaning that because of unusual circumstances he is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case. Thus, defendant has failed to rebut the presumption that the mandatory minimum sentence imposed on him as a fourth-felony habitual offender is unconstitutionally excessive, that is, that the sentence makes no measurable contribution to acceptable goals of punishment, or is nothing more than the purposeful imposition of pain and suffering and is grossly out of proportion to the severity of the crime.

There is no merit to this assignment of error.

PRO SE 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.

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.

In the instant case two police officers testified that they observed defendant peering into the window of a parked vehicle. It was approximately 10:30 p.m. When defendant saw the officers he began walking away from the car in the opposite direction from that in which the officers were driving. One officer testified that he thought defendant was breaking into the car, and they stopped to investigate him as a suspicious person. The other officer testified that they stopped to ascertain if defendant owned the car he was peering into. That officer said the situation looked suspicious because defendant did not get into the vehicle. They stopped, exited their vehicle, and called defendant over to them. Defendant dropped three bags of contraband from his clenched hand as he began to walk over to the officers.

Because the officers stopped their vehicle, exited, and essentially commanded defendant to walk over to them, it must be considered that the encounter constituted an official investigative stop of defendant.

La. C.Cr.P. art. 215.1 (A) codifies the U.S. Supreme Court's authorization of stops based on reasonable suspicion set forth in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and provides:

> 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.

"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; State v. Littles, 98-2517, p. 3 (La. App. 4 Cir. 9/15/99), 742 So. 2d 735, 737. Evidence derived from an unreasonable stop, i.e., seizure, will be excluded from trial. State v. Benjamin, 97-3065, p. 3 (La. 12/1/98), 722 So. 2d 988, 989; State v. Tyler, 98-1667, p 4 (La. App. 4 Cir. 11/24/99), 749 So. 2d 767, 770. 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.

Flight from police officers alone will not provide justification for a stop. State v. Benjamin, supra; State v. Sartain, 98-0378, pp. 17-18 (La. App. 12/1/99), 746 So. 2d 837, 849. However, flight from police officers is highly suspicious and, therefore, may be one of the factors leading to a finding of reasonable suspicion to stop. State v. Fortier, 99-0244, p. 7, (La. App. 4 Cir. 1/26/00), 756 So. 2d 455, 459-460 (citing Benjamin, supra).

In State v. Johnson, 2001-2081 (La. 4/26/02), 815 So. 2d 809, two New Orleans Police Officers patrolling an area of the city known to them as a hotspot of narcotics activity by trespassers coming into the Melpomene Housing Development observed two males walking in the 2500 block of Thalia Street through a courtyard of the development. As the officers drove up alongside the two, the men significantly picked up their pace, heading toward a crossover leading to another courtyard. One officer testified that the men were "nearly running," and that they looked over their shoulders repeatedly at the officers. He believed the men were attempting to elude the officers by crossing over to the other courtyard into which the patrol car would not have had access. The officers stopped the two men and recovered a crack pipe discarded by one of them after the stop. The trial court granted the defendant's motion to suppress the evidence. This court affirmed in State v. Johnson, unpub., 2001-0640 (La. App. 4 Cir. 7/3/01), stating that the police officer "plainly testified that neither Mr. Johnson nor his companion fled from the officers, or even changed their direction of travel; they just began walking more quickly." The Louisiana Supreme Court reversed, stating:

> Giving due deference to that deduction by a trained police officer, we conclude that in the context of the other circumstances known to the officer, including the lateness of the hour, the high crime character of the area, and the nervous demeanor of the two men reflected in their repeated glances over their shoulders, respondent's evasive conduct provided the minimal objective justification for an investigatory stop.

Johnson, 2001-2081 at p. 3, 815 So. 2d at 811.

In the instant case, police observed defendant peering into the window of a parked vehicle at 10:30 p.m. When defendant saw the police he reacted by beginning to walk away from the vehicle. Officer Lorio testified he believed the defendant was acting suspiciously because (1) he was peering into the car window; and (2) when defendant saw the police he began walking away in the opposite direction, obviously meaning in the opposite direction from that in which the police were driving. That officer also testified that he thought defendant was breaking into the vehicle. While defendant in the instant case did not run, considering the totality of the circumstances, defendant's conduct provided the minimal objective justification for an investigatory stop to ascertain whether was committing, had committed or was about to commit an offense.

Thus, the officers lawfully asked defendant to walk over to them. When defendant dropped the three bags of contraband as he began walking toward the officers, Officer Lorio lawfully retrieved it. See Johnson, 2001-2081 at pp. 3-4, 815 So. 2d at 812 ("If … a citizen abandons or otherwise disposes of property prior to any unlawful intrusion into the citizen's right to be free from governmental interference, then such property may be lawfully seized and used against the citizen in a resulting prosecution.") (quoting State v. Tucker, 626 So. 2d 707, 710 (La. 1993)).

Police made a lawful investigatory stop of defendant pursuant to La. C.Cr.P. art. 215.1 and Terry v. Ohio, supra, and lawfully retrieved the two bags of cocaine and one bag of marijuana defendant abandoned in response to the lawful stop. Accordingly, the trial court properly denied defendant's motion to suppress the evidence.

There is no merit to this pro se assignment of error.

PRO SE ASSIGNMENT OF ERROR NO. 2

In this assignment of error, defendant argues that his appellate counsel was ineffective because he did not raise as an assignment of error on appeal that the trial court erred in denying the motion to suppress the evidence.

"As a general rule, claims of ineffective assistance of counsel are more properly raised by application for post conviction relief in the trial court where a full evidentiary hearing may be conducted if warranted." State v. Howard, 98-0064, p. 15 (La. 4/23/99), 751 So. 2d 783, 802. However, where the record is sufficient, the claims may be addressed on appeal. State v. Bordes, 98-0086, p. 7 (La. App. 4 Cir. 6/16/99), 738 So. 2d 143, 147. Defendant in the instant case is correct when he argues that the record is sufficient to conduct a review for ineffective assistance of appellate counsel in this appeal.

Ineffective assistance of counsel claims are reviewed under the two-part test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). State v. Brooks, 94-2438, p. 6 (La. 10/16/95), 661 So. 2d 1333, 1337 (on rehearing); State v. Robinson, 98-1606, p. 10 (La. App. 4 Cir. 8/11/99), 744 So. 2d 119, 126. In order to prevail, the defendant must show both that: (1) counsel's performance was deficient; and (2) he was prejudiced by the deficiency. Brooks, supra; State v. Jackson, 97-2220, p. 8 (La. App. 4 Cir. 5/12/99), 733 So. 2d 736,

741. Counsel's performance is ineffective when it is shown that he made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 686, 104 S.Ct. at 2064; State v. Ash, 97-2061, p. 9 (La. App. 4 Cir. 2/10/99), 729 So. 2d 664, 669.

Given that it has been determined that the trial court properly denied defendant's motion to suppress the evidence, defendant has failed to show that counsel's decision not to raise that issue on appeal was deficient, or that he was prejudiced by that decision.

There is no merit to this assignment of error.

CONCLUSION

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

AFFIRMED