

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	NO. 2010-KA-1521
VERSUS	*	
TAUTUS S. SMITH, JR. A/K/A	*	COURT OF APPEAL
TAURUS SMITH	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

APPEAL FROM
 CRIMINAL DISTRICT COURT ORLEANS PARISH
 NO. 488-202, SECTION "H"
 Honorable Camille Buras, Judge

Judge Terri F. Love

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Michael E. Kirby, Judge Terri F. Love)

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CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED

This appeal arises from the defendant's conviction of one count of possessing a firearm as a convicted felon for which he was sentenced to thirteen years at hard labor. The defendant alleges that he was illegally stopped by the National Guard, who seized the weapon, and that the trial court erred by denying his motion to suppress the evidence. We find that the trial court did not err and affirm the defendant's conviction. However, we find that the trial court erred in sentencing the defendant. Therefore, we vacate the defendant's sentence and remand the matter for resentencing to include the imposition of the mandatory fine, as required by La. R.S. 14:95.1.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Officer Neville Payne testified that he was dispatched to the 4200 block of America Street in New Orleans to investigate a suspicious person hiding something under a step. The information Off. Payne received from the dispatcher was that the suspicious person was an unknown black male, who was wearing a hoodie, black shirt, and black pants, and was hiding something under a stairway. Off. Payne drove to the area, but did not see anything immediately. Off. Payne then parked his car, turned his car lights off, and sat in his car to survey the area. About five minutes later, Off. Payne witnessed Taurus Smith a/k/a Stephen Smith, a man

fitting the description given by the dispatcher, walking into the area. Off. Payne, who was waiting for National Guardsmen to assist him with his investigation of the suspicious person, began following Mr. Smith with his car, while keeping his car lights turned off. About a minute or two later, the National Guardsmen came into the area in a marked unit. Off. Payne then turned on his bright lights, as well as his spotlights, and proceeded towards Mr. Smith in his car. Off. Payne proceeded towards Mr. Smith from one direction; and the National Guardsmen proceeded toward Mr. Smith from another direction.

As the National Guardsmen approached Mr. Smith, he raised the left side of the shirt he was wearing and exposed a firearm that was in his waistband, and said: "Come get this here off me." The National Guardsmen placed Mr. Smith in handcuffs, and Off. Payne read him his Miranda rights.

On cross examination, Off. Payne testified that a concerned citizen called the dispatcher to report a suspicious person in the area, but that he never spoke directly with that concerned citizen. Off. Payne further testified that he arrested Mr. Smith because he was in possession of a concealed firearm. Off. Payne stated that the National Guardsmen who initially put Mr. Smith in handcuffs were not in court on the day of the trial.

Officer George Jackson, a fingerprint examiner, testified that he fingerprinted Mr. Smith in court on the day of trial. Off. Jackson then compared the fingerprints he obtained from Mr. Smith in court to those on a bill of information from Jefferson Parish, which named Mr. Smith and included two guilty pleas. Off. Jackson testified that the fingerprints obtained from Mr. Smith in court matched those found on the bill of information from Jefferson Parish, thereby indicating that, at the time of his trial, Mr. Smith was a convicted felon.

Mr. Smith testified that, on the night in question, he was on his way to a friend's house when an unidentified man asked him for a light. Before Mr. Smith could give him a light, the unidentified man pulled a firearm on him, and a fight ensued. Mr. Smith was victorious in the fight and ended up in possession of the firearm. Following the alleged fight, the unidentified man ran away from the area without the firearm. Shortly thereafter, Mr. Smith stated that he saw Off. Payne's marked police unit in the area, and attempted to flag Off. Payne down. Mr. Smith testified that he wanted to flag Off. Payne down to give him the firearm he just obtained from the unidentified man. Mr. Smith stated that after he was unsuccessful in trying to flag down Off. Payne, he saw a National Guard unit parked in the middle of the street with National Guardsmen sitting on the hood of the unit. Mr. Smith testified that he "made it down to them as fast as [he] could and tried to give them the weapon." As Mr. Smith approached the National Guardsmen, "[he] walked straight to them pulling [his] shirt up and told them, 'Here, I'd like to turn this in to you.'" After he indicated to them that he wanted to turn the firearm in, he was arrested. Mr. Smith testified that at the time of his arrest, he had previously been convicted of aggravated burglary, a felony, in 2000. Mr. Smith also testified that he did not intend to keep the firearm he had on him at the time of his arrest.

On cross examination, Mr. Smith testified that at the time of his arrest, that he had two prior felony convictions: one for simple burglary and one for aggravated burglary. Mr. Smith testified that when he initially tried to flag Off. Payne down, he was holding the firearm in his hand, but that he put the firearm in his waistband shortly thereafter. Mr. Smith testified that he did not cover the firearm with his shirt, but that the firearm was in his belt.

During a suppression hearing, Off. Payne testified that after he saw Mr. Smith in the area, he followed him from behind, and put a spotlight on his body to illuminate him. The National Guardsmen were in front of Mr. Smith when his body was illuminated. Off. Payne then observed Mr. Smith raise his hands and, referring to a firearm in his waistband, said to the National Guardsmen: “Come get this thing.” The National Guardsmen approached Mr. Smith, removed the firearm, and handcuffed him. Mr. Smith was then advised of his Miranda rights by Off. Payne.

The State charged Mr. Smith with one count of possessing a firearm as a convicted felon. Mr. Smith pled not guilty. A twelve-member jury found Mr. Smith guilty as charged and he was sentenced to serve thirteen years at hard labor without the benefit of probation, parole, or suspension. Prior to imposing sentence, the trial court denied Mr. Smith’s motion for post-verdict judgment of acquittal. Mr. Smith’s appeal followed.

ERRORS PATENT

The record reveals that Mr. Smith’s sentence is illegally lenient because it does not impose the requisite fine mandated by La. R.S. 14:95.1(B). Mr. Smith was found guilty of violating La. R.S. 14:95.1. The trial court sentenced Mr. Smith to serve thirteen years at hard labor without the benefit of probation, parole, or suspension of sentence, but failed to impose a fine, as required by La. R.S. 14:95.1(B).

La. R.S. 14:95.1(B) provides that:

Whoever is found guilty of violating the provisions of [La. R.S. 14:95.1] shall be imprisoned at hard labor for not less than ten nor more than twenty years without the benefit of probation, parole, or suspension of sentence and be fined not less than one thousand dollars nor more

than five thousand dollars.

Accordingly, we vacate Mr. Smith's sentence and remand for the correction of the trial court's omission of the requisite fine. *See, State v. Stephens*, 09-0631, 09-0632, p. 10 (La. App. 4 Cir. 11/24/09), 27 So. 3d 987, 993.

MOTION TO SUPPRESS

Mr. Smith contends that the trial court erred when it denied his motion to suppress the evidence of the firearm found on his person. Mr. Smith argues that the evidence of the firearm should be suppressed because he was illegally stopped by the National Guardsmen and Off. Payne prior to being arrested. Specifically, Mr. Smith argues that his Fourth Amendment right against unlawful searches and seizures was violated because he was approached by the National Guardsmen and Off. Payne with such force that he believed an actual stop was virtually certain to occur.

However, Mr. Smith's argument contradicts his own testimony at trial. Mr. Smith testified that after he obtained the firearm from the unidentified man, he wanted to turn it into the police. Mr. Smith then stated that he saw Off. Payne's police unit in the area, and tried to flag it down so that he could turn over the firearm. Additionally, Mr. Smith testified that when he saw the National Guardsmen, he quickly went to them and said "Here, I'd like to turn this in to you."

Off. Payne testified at the suppression hearing that he put a spotlight on Mr. Smith to illuminate him and that after Mr. Smith's body was illuminated, he witnessed Mr. Smith raise his hands and say to the National Guardsmen: "Come get this thing." The record presents no evidence that Mr. Smith was approached with any force. The evidence presented demonstrates that Off. Payne used a

spotlight to illuminate Mr. Smith, and that once Mr. Smith's body was illuminated, Off. Payne witnessed him approach the National Guardsmen and attempt to give them the firearm. Therefore, we find that Mr. Smith's assertion that he was stopped illegally lacks merit and affirm.

DECREE

Accordingly, we affirm Mr. Smith's conviction, vacate his sentence, and remand the case for resentencing to include the imposition of the mandatory fine, as required by La. R.S. 14:95.1.

CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED