

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA** \* **NO. 2012-KA-1319**  
**VERSUS** \*  
**WENDELL THOMAS II** \* **COURT OF APPEAL**  
\* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**  
\* \* \* \* \*

APPEAL FROM  
CRIMINAL DISTRICT COURT ORLEANS PARISH  
NO. 483-837, SECTION "L"  
Honorable Franz Zibilich, Judge

\* \* \* \* \*

**Judge Dennis R. Bagneris, Sr.**

\* \* \* \* \*

(Court composed of Chief Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr., Judge Terri F. Love)

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II**

**JUNE 19, 2013**

**CONVICTION AND SENTENCE AFFIRMED**

## **STATEMENT OF CASE**

The State charged Wendell Thomas with possession of heroin, a controlled and dangerous substance, prohibited by La. R.S. 40:966(C)(1). After a July 8, 2011 hearing, the trial court denied a motion to suppress evidence and found probable cause for Thomas' continued detention. His case proceeded to trial on March 19, 2012; at the conclusion of trial, the jury found him guilty as charged.

The trial court denied Thomas' motion for new trial. Thomas waived sentencing delays; and thereafter, the trial court sentenced him to five years with credit for time served. This appeal follows.

## **STATEMENT OF FACT**

On December 9, 2008, Detectives Wesley Humbles and Rafael Dobard were on proactive patrol in the 2900 block of Dinkins Drive at approximately 4:30 p.m. It was still daylight. Both detectives were part of the New Orleans Police Department's Fourth District narcotics unit. Both detectives testified at trial that the area was known as a high crime area, mainly for drug related crimes. Det. Humbles had previously made several drug crimes arrests and a car-jacking arrest in the area.

As the officers passed 2920 Dinkins Drive, they saw a group of men standing outside. Thomas was part of the group; however, he began distancing himself from the group when he saw the police car. According to both detectives,

Thomas looked nervous and surprised when he saw their car. Det. Dobard testified that he found Thomas' behavior suspicious because he had seen such behavior in previous narcotics cases, wherein a person is with a group, sees the police, and walks away without any handshakes. As Thomas distanced himself, he reached in his right pocket and discarded a syringe, which Det. Humbles associated with heroin and cocaine use. Det. Humbles advised Det. Dobard of the syringe. The detectives exited their vehicle.

Thomas continued into his house. When the officers asked him to stop, he ran. Det. Dobard went to retrieve the syringe, while Det. Humbles pursued Thomas in the house. Based on the syringe, Det. Humbles believed Thomas may have narcotics and more paraphernalia that he might destroy. Accordingly, after Thomas closed the door on Det. Humbles, Det. Humbles resorted to kicking in the door to gain entry. Upon initial entry, Det. Humbles encountered Keiona James sitting at a computer desk. Det. Humbles went down a hall to a bedroom, where he found Thomas hiding under a bed. Det. Humbles ordered Thomas to come out, handcuffed him, and read him his rights.

Det. Humbles did not search the house, but found a spoon and a cigarette filter on Thomas' person. Det. Humbles explained that heroin or cocaine can be placed in a spoon, cooked, and drawn through the filter.

Det. Humbles observed track marks on Thomas, indicating drug use. Thomas was arrested for possessing drug paraphernalia and resisting arrest. Det. Humbles subsequently spoke to Thomas' mother and sister to explain what had transpired.

At the prison, Thomas was processed by Deputy Damian Anthony. Deputy Anthony found a foil pack of heroin in the sole of Thomas' right shoe. Both

Detectives Humbles and Dobard were present during the processing and saw the search. Deputy Anthony gave the contraband to Det. Dobard.

On cross examination, Det. Humbles testified that he was unaware of any outstanding municipal warrants for Thomas when the incident happened. However, the police report indicated that such outstanding municipal warrants existed at the time. Det. Humbles did not recall whether he searched Thomas' shoe incident to his arrest at his home. If he did, then the narcotics in his shoe were not found at that time.

On cross examination, when asked if the other men who were with Thomas outside the house were detained, Det. Dobard stated the following:

Our attention was initially to ascertain why Mr. Thomas reacted like that. But during the course of the investigation if somebody discards a syringe and *there's a group of black males* speaking and one tends to react in the manner he did, one of them might have been the seller the citizens are complaining about. So at that point our investigation – he brought them into the investigation. We conducted the name inquiries and everybody was good to go; everybody went home.  
*Emphasis added.*

Captain Harry O'Neill, director of the Crime Lab, testified that tests revealed no controlled and dangerous substances on the syringe or the cotton filter. However, the tin foil packet containing a tan powder tested positive for 0.05 milligrams of heroin.

Jaret Conner, a friend and neighbor of Thomas, was one of the men standing with Thomas on December 9, 2008. He testified that they were preparing to play basketball. According to Mr. Conner, the police drove up as Thomas was already walking inside his house. He denied that Thomas dropped anything from his hand. On cross examination, Mr. Conner advised that he did not know why Thomas was headed inside his home at the time they were about to play a game of basketball.

He stressed that Thomas was already in his house when the detectives exited their vehicle.

Mr. Conner verified that Det. Humbles kicked Thomas' front door in. He said that he was ordered to lie on the ground and handcuffed. The other two men were Thomas' brother and an unidentified man. Mr. Conner heard Thomas' sister, Keionia James, screaming and saw her being escorted out of the house. He could not see what happened inside. He did not see Det. Dobard retrieve anything from the ground.

Mr. Conner saw Thomas being patted down and placed in the police car after Thomas was brought out of the house. At that point, Thomas' feet were outside of the car, and the officers took his shoes off. Ms. James was on the other side of the car, handcuffed. Mr. Conner never saw the police take anything from Thomas' pockets. However, he did not know whether heroin introduced at trial belonged to Thomas. He denied knowing who owned the heroin. Mr. Conner acknowledged that he was convicted of illegally carrying weapons in 2011 and received a sentence of thirty days of inactive probation.

Keionia James testified that on the day of her brother's arrest, she was on the computer in her house when she heard a loud "boom." She lived in the house with her mother and three brothers. She was in the house alone when Thomas opened the front door and walked in. According to Ms. James, "[h]e just walked in like he was normally coming inside" and went in the back of the house. Then, Det. Humbles kicked the front door in, entered the house, and pointed a gun at Ms. James. Although Ms. James testified that she was in the house alone, she also

testified that after pointing the gun at her, Det. Humbles “went to my brother.” Ms. James went outside and called her mother to tell her that the police had kicked the front door in.

Thomas was taken out of his house in handcuffs while Ms. James was talking to their mother. She saw him being seated in the police car, with his legs dangling outside the car. The police searched Thomas, taking his shoes and socks off and flipping his pockets inside out. Ms. James saw her brother being searched twice. She never saw them recover anything from him. Ms. James also did not see the detectives place the heroin in his shoes.

According to Ms. James, the detectives also placed her in the car “because my mouth was too big because I was on the phone with my mama letting her know what was going on in the house.” She denied being searched.

### **ERRORS PATENT**

The record reveals no errors patent.

### **ASSIGNMENT OF ERROR**

Thomas presents one assignment of error: that the trial court erred in denying his motion for new trial. The motion for new trial was premised on his assertion that the trial court committed prejudicial error. *See* La. C.Cr.P. art. 851(2). Thomas now asserts the following rulings were prejudicial error: 1) the trial court’s ruling that prohibited the defense from referencing race in its opening statements; and 2) the trial court’s ruling that prohibited the defense from cross examining the arresting officer on the issue of whether the officers had a constitutional right to enter his home.

***Standard of review for a denial of a motion for new trial based upon La. C.Cr.P. art. 851(2)***

La. C.Cr.P. art 851(2) mandates that the trial court grant a motion for new trial where, “[t]he trial court’s ruling on a written motion or an objection made during the proceedings, shows prejudicial error.” Such relief is “based in the supposition that injustice has been done the defendant.” La. C.Cr.P. art. 851. Absent a showing of such, the “motion shall be denied.” *Id.* A trial court’s determination of a motion for new trial based upon La. C.Cr.P. art. 851(2) is reviewed for abuse of discretion. State v. Hollier, 2009-1084, p. 12 (La. App. 3 Cir. 4/7/10), 37 So.3d 466, 475, State v. Davis, 06-402, p. 11 (La. App. 5 Cir. 11/28/06), 947 So.2d 48, 55.

***Right to present a defense***

U.S. Const. Amend’s 6 and 14 and La. Const. art. 1, § 16 provide criminal defendants with a constitutional right to present a defense. State v. Blank, 2004-0204, p. 49 (La. 4/11/07), 955 So.2d 90, 130. Due to this right, a criminal defendant should be allowed to present evidence on any relevant matter. *Id.* However, this right does not require the trial court to permit the introduction of evidence that is irrelevant or has so little probative value that it is substantially outweighed by other legitimate considerations in the administration of justice. State v. Fernandez, 2009-1727 (La. App. 4 Cir. 10/6/10), 50 So.3d 219, 229, *citing State v. Mosby*, 595 So.2d 1135 (1992), *and* La. C.E. art. 403.

The instant assignment of error concerns the scope of a defendant’s opening statement and whether this defendant’s right to present a defense was prejudiced by the limitations the trial court placed on his counsel’s opening statement. While the present Code of Criminal Procedure fails to specify rules for the defendant’s

opening statement, the Louisiana Supreme Court has held that when a defendant avails himself of the right to present an opening statement afforded by La. C.Cr.P. art. 765(4), counsel must confine remarks to an explanation of the nature of the defense and the evidence which is expected to establish it. State v. Bell, 268 So.2d 610, 620 (La. 1972). That decision found that the trial court has wide discretion in controlling opening statements in order to ensure they are confined to these limits. Id. Whether or not the scope of an opening statement has exceeded these limits is reviewed for abuse of discretion. Id.

***Racial reference in opening statement***

At trial of the present matter, the State objected to the following assertion by defense counsel during opening statement:

The question you are going to have to answer at the end of this trial is, can the police bust down your door because you are a young black man.

In sustaining the State's objection, the court admonished, "Don't talk about race again, sir. That is your first and last warning. That goes for both sides."

In State v. Van Winkle, 94-0947 (La. 6/30/95), 658 So.2d 198, the Court found that the defendant's right to present a defense had been violated when the trial court prevented the defendant from questioning a witness as to another party's sexual orientation. Van Winkle had been accused of killing her son and had attempted to present evidence that her housemate was homosexual and had killed her son - intentionally or not - with the help of a partner. Id., 94-0947, p. 4, 658 So.2d at 201. The trial court did not allow Van Winkle to question her housemate about his sexual orientation and to pursue questions as to whether the results of an anal swab test could have disproved that her son had been sexually abused prior to his death. Id., 94-0947, p. 3, 658 So.2d at 201. The Court found that the excluded



evidence was relevant to establishing the defense's theory of events, and that the exclusion had violated Van Winkle's right to present a defense. Id., 94-0947, p. 7, 658 So.2d at 202.

This case, however, is distinguishable from Van Winkle in that defense counsel's statement made no reference to any facts that support the theory that the police officer's actions were racially motivated. La. C.Cr.P. art. 774 prohibits argument that appeal to prejudice. In Van Winkle, the Court found questions regarding the sexual orientation of the defendant's housemate relevant to the defendant's theory of events; however, in the present matter, defense counsel's reference to race failed to demonstrate its relevancy with supporting facts. Because the statement lacked factual support that the police officer acted under racial motivation, it appealed to the jury's racial sensitivities or prejudices. Accordingly, the trial court did not err in sustaining the State's objection to defense counsel's racial argument in his opening statement.

In support of his claim that his arrest was motivated by racial animus, Thomas also points to Det. Dobard's trial testimony which included a racial reference. As previously noted, Det. Dobard indicated that the presence of a group of "black males" talking to each other, combined with other facts, entered into his calculation as to whether he suspected a crime was being committed. Thomas asserts that based upon this testimony that he should have been allowed to present a defense that the officers arrested him based upon race and planted evidence on him. While the opening statement failed to show a basis for a racial argument, we agree that Det. Dobard's testimony opened the door. However, if Thomas had a legitimate argument that his arrest was race based, his counsel should have cross examined Det. Dobard about the racial component of his decision making. No

such questioning occurred. Although Thomas asserts that the trial court's decision to exclude racial references in his counsel's opening statement extended to the entire trial, the record contains no evidence that the defense was prevented from presenting evidence of Det. Dobard's racial bias during the trial. On this issue, this Court has nothing to review other than the sustained objection during opening statements. Therefore, defendant's representation that he was improperly precluded from establishing that his detention was triggered by racial bias lacks merit.

***Limited Cross Examination of Det. Humbles on warrantless search***

Thomas complains that the trial court erred in sustaining the State's objection on grounds of relevancy when the defense sought to cross examine Det. Humbles as to whether he had a warrant to enter Thomas' residence. The trial court indicated that the issue was one for a motion to suppress the evidence or a finding of probable cause, and not proper for the jury to consider. Thomas contends that the officers' belief as to whether they had a right to enter the house was relevant to show that the entire incident was based on race.

We find this argument fails for two reasons. First, whether Det. Humbles and Det. Dobard believed they had a right to enter Thomas' residence is not dispositive as to whether they targeted Thomas based on race.

More importantly, the record indicates that Det. Humbles pursued Thomas into the house after observing him drop a syringe on the ground. La. R.S. 40:1023(C) prohibits the use or possession with the intent to use drug paraphernalia. *See also* La. R.S. 40:1021(11)(drug paraphernalia includes hypodermic syringes and needles intended for drug use). When the arresting officers saw Thomas drop the syringe in public in an area known as a high drug

crime area, they had reasonable suspicion to stop Thomas, if not probable cause to arrest him. *See* La. C.Cr.P. art 213(1) and (3)(An officer may arrest a person who commits an offense in his presence as well as a person whom he has reasonable cause to believe had committed an offense); *see also* State v. Parker, 2006–0053, p. 2 (La.6/16/06), 931 So.2d 353, 355 (probable cause to arrest exists when the facts and circumstances known to the officer, and of which he has reasonable trustworthy information, are sufficient to justify a man or ordinary caution in believing the person to be arrested has committed an offense) *and* State v. Wells, 2008-2262, p. 7 (La. 7/6/10), 45 So.3d 577, 582 (reasonable suspicion for making a brief investigatory stop on less than probable cause to arrest exists where the police have a particularized and objective basis for suspecting the particular person stopped of criminal activity). When Thomas ignored the arresting officers’ order to stop and ran into his house, exigent circumstances existed for the ensuing hot pursuit into the house. *See* State v. Bell, 2009-0574 (La. App. 4 Cir. 12/9/9) 28 So.3d 502 (where probable cause exists that a suspect has committed a crime, his flight produces exigent circumstances to pursue him into a home without a warrant). Thus, whether Det. Dobard had a warrant to enter Thomas’ home was irrelevant to Thomas’ defense because Det. Dobard had a right to pursue Thomas without a warrant.

### **CONCLUSION**

Wherefore, based on the reasons above, Thomas’ right to present a defense was not violated. The trial court did not err in denying his motion for new trial. Accordingly, his conviction and sentence are affirmed.

**CONVICTION AND SENTENCE AFFIRMED**