NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2018-K-0402**
VERSUS	*	
		COURT OF APPEAL
JONATHAN YOUNG	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

*** * * * * * ***

APPLICATION FOR WRITS DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 538-320, SECTION "G"
Honorable Byron C. Williams, Judge
* * * * * *

JAMES F. MCKAY III
CHIEF JUDGE
* * * * * *

(Court composed of Chief Judge James F. McKay III, Judge Roland L. Belsome, Judge Joy Cossich Lobrano)

LOBRANO, J., CONCURS IN THE RESULT

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WRIT GRANTED

MAY 22, 2018

NOT DESIGNATED FOR PUBLICATION

For the reasons set forth below, the state's writ application, seeking review of the trial court's granting of the defendant's motion to suppress evidence, is granted. The trial court's ruling is reversed, and the matter is remanded for further proceedings.

STATEMENT OF FACTS AND PROCEDURAL HISTORY:

The defendant is charged with: 1) illegal carrying of a weapon with CDS, to wit Heroin, in violation of La. R.S. 14:95(E); 2) possession of drug paraphernalia in violation of La. R.S. 40:1023; and 3) illegal carrying of a weapon, second conviction, in violation of La. R.S. 14:95(C).

The defendant's motion for a preliminary hearing and motion to suppress evidence was heard on April 30, 2018. Officer Harold Nunnery testified that on October 11, 2017, he and his partner, Officer Fuller, observed a silver Infinity with extremely dark tinted windows traveling in the 2800 block of South Robertson Street. After having to first go around the block, the Infinity was already parked when the officers came back to conduct the traffic stop.

The officers exited their vehicle and approached the Infinity. The driver rolled down his window and the officers smelled marijuana coming from inside the

vehicle. The three occupants in the vehicle were the driver, a front seat passenger, and the defendant, in the rear seat.

The officers asked the occupants to get out of the vehicle. After running their names, it was discovered that the driver and front seat passenger had outstanding warrants. Both were handcuffed and arrested. At that time, the officers discovered a small undisturbed mound of heroin on the rear floorboard where the defendant was seated.

A further search of the vehicle was conducted. Officer Fuller pulled down the rear seat center armrest which provided for a pass through to the trunk. Officer Nunnery stated that as soon as Officer Fuller pulled down the armrest, he could see a gun (a loaded .22 caliber Aero 15 pistol) and a digital scale inside the trunk. The defendant was arrested for the heroin, the firearm and the drug paraphernalia.

The driver claimed ownership of the gun. The driver's father appeared on the scene, and he also stated that the gun belonged to his son. The driver stated that he keeps his gun in the trunk and that the weapon had been in the trunk for the entire day.

A small amount of marijuana was discovered in the driver's side door. No one was charged in connection with the marijuana. The driver was issued a citation for the tinted windshield. The vehicle was impounded for investigation in connection with a prior shooting incident.

During cross examination, Officer Nunnery acknowledged that the defendant claimed that he got into the Infinity after it parked. Officer Nunnery was unable to verify this statement.

At the conclusion of the hearing, defense counsel argued that the facts submitted failed to establish probable cause to believe that the defendant was ever

in actual or constructive possession of the gun. Defense counsel noted that the gun was found in the trunk of a vehicle that did not belong to him and that there was nothing to suggest that the defendant knew the weapon was in the trunk. Defense counsel noted that everyone interviewed agreed that the gun belonged to the driver.

Defense counsel further argued that the most reasonable conclusion to draw from the evidence was that the mound of heroin was on the floorboard before the defendant entered the vehicle. Counsel suggested that if defendant had known the mound was present he would have disturbed it with his foot in an attempt to conceal it.

At the conclusion of the hearing, the trial court found no probable cause, "[b]ased on the totality of the circumstances, the testimony of the witness, and the evidence presented." Without providing reasons, the trial court further granted the defendant's motion to suppress evidence. The state filed the present writ application, asserting that the trial court erred in granting the motion to suppress evidence.

In a *per curiam* opinion, submitted upon this Court's request, the trial court stated:

> The state never elicited testimony regarding officer's safety or whether the search was incident to a lawful arrest. Moreover, the defendant was not under arrest when the search was conducted, unlike the driver and the front seat passenger. Finally, the officer testified that he smelled the odor of marijuana coming from the car, however no one in the car was arrested for the marijuana that was found inside the driver's door.

DISCUSSION:

In this writ application, the state argues that it met its burden of proving the admissibility of the evidence that was seized without a warrant. We agree.

The Fourth Amendment to the United States Constitution and Article I, § 5 of the Louisiana Constitution protect people against unreasonable searches and seizures. A search made without a warrant issued on probable cause is considered unreasonable unless that search can be justified by one of the narrowly drawn exceptions to the warrant requirement. *State v. Cavalier*, 2014-0579, p. 17 (La. App. 4 Cir. 6/19/15), 171 So.3d 1117, 1128. As per La. C.Cr.P. art. 703(D), the state has the burden of proving the admissibility of any evidence seized without a warrant. *State v. Wells*, 2008-2262, p. 5 (La. 7/6/10), 45 So.3d 577, 581.

Here, it is clear that the impermissible tint of the windshield (a traffic violation pursuant to La. R.S. 32:3611.1) gave the officers probable cause to stop the vehicle. As a general matter, our jurisprudence provides that "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v. United States*, 517 U.S. 806, 810, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89 (1996) (citations omitted). Moreover, "[i]t is well-settled that once officers make a valid traffic stop, they are justified in ordering the driver and the passengers out of the vehicle for safety reasons." *State v. Lewis*, 2015-0773, pp. 11-12 (La. App. 4 Cir. 2/3/16), 187 So.3d 24, 30-31 (*citing Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997); *State v. Cure*, 2011-2238 (La. 7/2/12), 93 So.3d 1268).

The jurisprudence also supports the state's argument that the officers had probable cause to conduct a search after they detected the odor of marijuana emanating from the vehicle. *See State v. Jackson*, 2009-1983 (La. 7/6/10), 42 So.3d 368. The fact that no one was arrested on the marijuana is of no consequence.

CONCLUSION:

Upon review of the record, and considering the applicable jurisprudence, we find that the evidence in this case was lawfully seized. Accordingly, the trial court erred in granting the defendant's motion to suppress the evidence. The ruling is reversed, and the matter is remanded for further proceedings.

WRIT GRANTED

Please Serve:
Office of the Judicial Administrator, c/o Sandy Meadoux, Appellate Clerk
Criminal District Court, Orleans Parish