NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 KA 0821

STATE OF LOUISIANA

VS.

ANTHONY DEWAYNE MCDONALD

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JUDGMENT RENDERED: NOV 14 2008

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ON APPEAL FROM
THE THIRTY-SECOND JUDICIAL DISTRICT COURT
DOCKET NUMBER 477,974
PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA

THE HONORABLE RANDALL BETHANCOURT, JUDGE

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BEFORE: PETTIGREW, McDONALD, AND HUGHES, JJ

J. P. Pettigrew, J. Concurs

Hughes, J., concurs.

McDONALD, J.

Defendant, Anthony Dewayne McDonald, was charged by bill of information with possession with intent to distribute cocaine, a violation of La. R.S. 40:967(A). Defendant entered a plea of not guilty and was tried before a jury. The jury determined defendant was guilty of the responsive verdict of possession of cocaine. The trial court subsequently sentenced defendant to a term of two years at hard labor.

Defendant appeals, citing the following as error:

> The trial court erred in denying defendant's motion to suppress because there was no justification for an investigatory stop.
>
> The trial court failed to inform defendant of the time limit for filing an application for post-conviction relief.

FACTS

On August 11, 2006, at approximately 11:00 p.m., Agent Shane Fletcher, an investigator with the Terrebonne Parish Narcotics Task Force, received an anonymous telephone call. The caller stated that an unknown black male, approximately six feet tall, wearing a white T-shirt and black pants, was sitting outside of Room 38 at the A-Bear Motel, located at 342 New Orleans Boulevard in Houma, Louisiana. The caller also stated that this subject did not have a room at the motel and was selling illegal narcotics. The caller claimed to know the subject was from Mississippi and was staying at the Sugar Bowl Motel with his brother.

Agent Fletcher, who was conducting criminal patrol with Agent Sidney Simmons, decided the tip provided enough information to warrant further investigation. Driving a white, unmarked Crown Victoria police cruiser with tinted windows, Agent Simmons drove over to the A-Bear Motel. When the agents pulled into the parking lot, Agent Fletcher observed defendant, dressed in a white T-shirt and black pants, sitting in a chair outside of Room 38.

According to Agent Fletcher, defendant seemed to notice the vehicle was a police vehicle, because he got out of his chair, went into Room 38, and shut the door. Agents Fletcher and Simmons decided against conducting a knock and talk of Room 38, because they did not know how many other people, if any, were in the room, or if defendant had discarded any contraband. The agents left, planning to return shortly.

Approximately ten to fifteen minutes later, the agents returned to the parking lot of the A-Bear Motel. They observed defendant walking from Room 38 to the middle of the parking lot in the direction of where the motel office was located. After the agents pulled into the motel driveway, defendant turned away from them and began walking towards New Orleans Boulevard. Because of the layout of this particular portion of the parking lot, only pedestrian traffic could get to the road. The agents turned around and left the parking lot. In order to make contact with defendant, Agent Simmons had to drive past him in the opposite lane of New Orleans Boulevard. Upon leaving the motel parking lot, defendant had traversed through a grassy area and was walking alongside the road in the direction of the Sugar Bowl Motel.

The agents decided to stop and check defendant. Agent Simmons pulled the vehicle over and Agent Fletcher immediately got out and directed defendant to place his hands on the hood of the vehicle. As defendant moved to place his hands on the vehicle he stated, "I don't have any drugs on me." Defendant then took his right hand off the vehicle and moved it towards his right-front pants pocket. Agent Fletcher ordered defendant to place his hands back on the vehicle. Defendant again denied he had any drugs on his person and stated, "I'll empty my pockets for you." Agent Fletcher reminded defendant that was not what he had been requested to do. Defendant again moved his right hand toward his right-front pants pocket.

Agent Fletcher then grabbed defendant's hand and placed it on the vehicle and ordered him not to move it again.

Agent Fletcher conducted a weapons frisk of defendant, but failed to detect any bulky items that could be a weapon. Because defendant made several attempts to move his hand toward his right front-pants pocket, Agent Fletcher directed his attention to that area. Agent Fletcher noticed a cigarette packet protruding from this pocket. Having previously encountered weapons such as needles, ice picks, and even small, one-shot firearms being hidden in cigarette packages, Agent Fletcher retrieved the item and looked inside. Agent Fletcher observed several pieces of suspected crack cocaine.[1] Defendant was then placed in handcuffs and arrested. Agent Fletcher subsequently seized $538.00 in cash from defendant.

According to defendant's trial testimony, on August 11, 2006 he was at the A-Bear Motel in Houma to purchase cocaine for his own use. Defendant stated he had recently been paid for his service with Coastal Catering and was staying by himself at the Sugar Bowl Motel. Defendant explained he had previously met a few people who were selling cocaine at the A-Bear Motel.

MOTION TO SUPPRESS

In his sole assignment of error, defendant argues that there was no justification for a **Terry** stop. Defendant contends that Agent Fletcher admitted that he did not observe defendant or anyone else involved in activity that could be construed as a narcotics transaction.

In determining the validity of the seizure of the cocaine, the two actions by the police that must be examined are the initial detention of the defendant and the

[1] Subsequent testing conducted at the Louisiana State Police Crime Lab confirmed this substance was cocaine, with a net weight of 1.02 grams. Agent Fletcher testified that the estimated street value of the crack cocaine seized was approximately $500.00.

subsequent frisk. If either action was not justified, the evidence obtained is inadmissible. **State v. Schuler**, 457 So.2d 1240, 1242 (La. App. 1st Cir.), writ denied, 462 So.2d 191 (La. 1984).

The Fourth Amendment protects citizens against unreasonable searches and seizures, but not every encounter between a citizen and a policeman involves a "seizure." **Terry v. Ohio**, 392 U.S. 1, 19 n.16, 88 S.Ct. 1868, 1879 n.16, 20 L.Ed.2d 889 (1968). Whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. As long as a reasonable person would feel free to disregard the encounter and walk away, there has been no seizure. **State v. Ossey**, 446 So.2d 280, 285 (La. 1984), cert. denied, 469 U.S. 916, 105 S.Ct. 293, 83 L.Ed.2d 228 (1984). Furthermore, if a citizen after being approached by law enforcement officers consents to stop and answer questions, there is no Fourth Amendment violation. If there is no detention--no seizure within the meaning of the Fourth Amendment--then no constitutional rights have been infringed. **Florida v. Royer**, 460 U.S. 491, 497-98, 103 S.Ct. 1319, 1324, 75 L.Ed.2d 229 (1983).

Agent Fletcher testified, at both the motion to suppress hearing and at the trial, that as Agent Simmons pulled the unmarked unit next to defendant as defendant walked in the street, Agent Fletcher exited and immediately ordered defendant to place his hands on the vehicle.[2] Under these circumstances, no reasonable person would have felt free to disregard this encounter and walk away. Accordingly, because defendant was seized within the meaning of the Fourth Amendment, we must determine whether Agent Fletcher had reasonable suspicion to conduct the investigatory stop.

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[2] In determining whether the ruling on defendant's motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may consider all pertinent evidence introduced at the trial of the case. **State v. Chopin**, 372 So.2d 1222, 1223 n.2 (La. 1979).

Although La. C.Cr.P. art. 215.1 permits an officer to stop a citizen in a public place and question him, the right to make such an investigatory stop must be based upon reasonable suspicion that the individual has committed, or is about to commit, an offense. See **Terry v. Ohio**, 392 U.S. at 26, 88 S.Ct. at 1882; **State v. Andrishok**, 434 So.2d 389, 391 (La. 1983). Determining whether "reasonable, articulable suspicion" existed requires weighing all of the circumstances known to the police at the time the stop was made. **State v. Williams**, 421 So.2d 874, 875 (La. 1982).

In making a brief investigatory stop on less than probable cause to arrest, the police must have a particularized and objective basis for suspecting the particular person stopped for criminal activity. **State v. Kalie**, 96-2650, p. 3 (La. 9/19/97), 699 So.2d 879, 881(per curiam). The police must articulate something more than an inchoate and unparticularized suspicion or hunch. **Terry v. Ohio**, 392 U.S. at 27, 88 S.Ct. at 1883.

In reviewing the totality of circumstances, the reputation of an area is an articulable fact upon which a police officer may legitimately rely and is therefore relevant in the determination of reasonable suspicion. See **State v. Buckley**, 426 So.2d 103, 108 (La. 1983). Further, we note that evasive actions are another factor to be weighed when evaluating the totality of the circumstances. See **State v. Newman**, 01-1274, p. 4 (La. App. 5th Cir. 3/26/02), 815 So.2d 295, 298.

In the instant case, Agent Fletcher's suspicions were initially alerted to defendant from an anonymous telephone call. Because an anonymous tip alone seldom demonstrates an informant's basis of knowledge or veracity, there are situations in which an anonymous tip, suitably corroborated, exhibits sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.

Among the factors used in determining whether an anonymous tip has a sufficient indicia of reliability are whether the tip provides predictive information so the police may test the informant's knowledge and credibility. See **Florida v. J.L.**, 529 U.S. 266, 271, 120 S.Ct. 1375, 1379, 146 L.Ed.2d 254 (2000).

An accurate description of a subject's readily observable location and appearance is reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster had knowledge of concealed criminal activity. In order for a tip alone, to provide reasonable suspicion, it must be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. See **Florida v. J.L.**, 529 U.S. at 272, 120 S.Ct. at 1379.

In the present case, the tip provided to Agent Fletcher accurately described defendant as a black male, approximately six feet tall, wearing a white T-shirt and black pants, who was sitting outside of Room 38 of the A-Bear Motel and selling narcotics. The tip further provided the defendant did not have a room at the motel, was from Mississippi, and was staying with his brother at the Sugar Bowl Motel in Houma. However, Agent Fletcher made no attempt to corroborate that information.

Agent Fletcher was aware that the A-Bear Motel and Sugar Bowl Motel were located in the same general vicinity and were in an area known for narcotics activity. After receiving the tip, Agents Fletcher and Simmons proceeded to the A-Bear Motel in the Crown Victoria with tinted windows. Although the vehicle had no bar lights or police markings, Agent Fletcher testified that it was well-known within the community this was a police vehicle.

As the police vehicle pulled into parking lot of the A-Bear Motel, Agent Fletcher observed defendant, who matched the description provided in the tip.

However, when defendant noticed the vehicle, he got up and went inside of Room 38. Agent Fletcher admitted that he made no effort to ascertain who was in Room 38 of the A-Bear Motel, and told Agent Simmons they would "check" defendant later. Agent Fletcher explained he decided against conducting a knock and talk because it was unknown whether anyone else was in Room 38, and because defendant may have destroyed any contraband.

The agents returned to the A-Bear Motel parking lot approximately ten to fifteen minutes later. This time, Agent Fletcher observed defendant walking in the parking lot from Room 38 in the direction of the motel office. Again, when defendant noticed the agents' vehicle, he turned around and began walking in the opposite direction toward the direction of the Sugar Bowl Motel. There was no driveway that the agents could follow with their vehicle in the same direction as he was travelling, so the agents exited the parking lot and drove around the motel in order to make contact with defendant. The agents encountered defendant as he was walking alongside the road. Agent Fletcher testified that because the area was dimly lit, he advised defendant to place his hands on the vehicle. Agent Fletcher admitted that at no time did he observe anyone else in the parking lot on either occasion he had entered the parking lot.

Considering the totality of the circumstances, we find there was reasonable cause to justify this investigatory stop. The stop was based on a reasonable belief by Agent Fletcher that defendant was engaged in criminal conduct, i.e., narcotics activity. Although the anonymous tip failed to include any information predictive of defendant's behavior, defendant was observed on two separate occasions to take evasive action when the agents appeared in the parking lot of an area associated with narcotics activity.

Although the initial investigatory stop of defendant was proper, we find that Agent Fletcher was not justified in conducting a protective weapons frisk of defendant. An officer's right to conduct a protective frisk is codified in La. C.Cr.P. art. 215.1(B) which provides that "[w]hen a law enforcement officer has stopped a person for questioning pursuant to this Article and reasonably believes that he is in danger, he may frisk the outer clothing of such person for a dangerous weapon." While it is true that an officer is never justified in conducting a pat down for weapons unless the original investigatory stop itself was justified, a lawful detention for questioning does not automatically give the officer authority to conduct a pat down for weapons. Even after a lawful investigatory stop, a police officer may frisk the suspect only where a reasonably prudent person would be warranted in the belief that his safety or that of others is in danger. La. C.Cr. P. art. 215.1(B); **State v. Sims**, 02-2208, p. 6. (La. 6/27/03), 851 So.2d 1039, 1043.

The officer's suspicion that he is danger is not reasonable unless the officer can point to particular facts that led him to believe that the individual was armed and dangerous. The officer need not establish that it was more probable than not that the detained individual was armed and dangerous. Rather, it is sufficient that the officer establish a substantial possibility of danger. In determining the lawfulness of an officer's frisk of a suspect, courts must give due weight not to an officer's inchoate and unparticularized suspicion or hunch, but to the specific reasonable inferences that he is entitled to draw from the facts in light of his experience. **State v. Sims**, 02-2208 at p. 6, 851 So.2d at 1043-44.

Courts must give deference to the training and experience of police officers in determining which suspects might prove to be a danger to themselves or others. Allowing police officers to conduct a protective frisk based on anything less than specific and articulable facts illustrating their reasonable belief that danger existed

would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches. **State v. Sims**, 02-2208 at p. 8-9, 851 So.2d 1045. However, the reasonableness of official suspicion must be measured by what the police knew before conducting the search. **Florida v. J.L.**, 529 U.S. at 271, 120 S.Ct. at 1379.

Regarding his decision to frisk defendant, Agent Fletcher testified that as soon as he and Agent Simmons exited the vehicle, he immediately ordered defendant to place his hands on the hood. Clearly, Agent Fletcher intended to conduct a weapons frisk prior to obtaining any further information other than what he had learned from the anonymous tip and his own observations of defendant. Although the information known to Agent Fletcher at that point justified an investigatory stop, the information clearly did not give rise to a reasonable suspicion on Agent Fletcher's part that defendant was armed and dangerous.

From his own observations, Agent Fletcher did not observe defendant having contact with any other person, thus, there was no corroboration of the tip that defendant was engaged in narcotics activity. Further, although Agent Fletcher testified that it was widely known that the unmarked vehicle with tinted windows was a police vehicle, he also had information that defendant was not from the area. Thus, defendant's actions of walking away from this approaching vehicle may not have been suspicious under these circumstances. Finally, the fact that defendant was stopped in a dimly lit area is more attributable to police actions than any choice on defendant's part.

Under the circumstances of this case, we find Agent Fletcher's weapons frisk of defendant was not based on any articulable facts reflecting his reasonable belief that defendant possessed a weapon. Accordingly, we find the weapons frisk

was in violation of defendant's rights against unreasonable search and seizure. The trial court erred in denying defendant's motion to suppress.

The assignment of error has merit.

CONVICTION AND SENTENCE VACATED, REMANDED FOR FURTHER PROCEEDINGS.