NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 KA 0031

STATE OF LOUISIANA

VERSUS

ANTONIO L. SIMMONS

Judgment Rendered: JUN 17 2011

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket Number 449417

Honorable William J. Knight, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Hughes, J., concurs.

GUIDRY, J.

The defendant, Antonio L. Simmons, was charged by bill of information with second offense possession of marijuana, a violation of La. R.S. 40:966(C). The defendant pled not guilty. The defendant filed a motion to suppress the evidence and his confession and, after a hearing on the matter, the motion was denied. Following a jury trial, the defendant was found guilty as charged. He was sentenced to three years at hard labor. The defendant now appeals, designating one assignment of error. We affirm the conviction and sentence.

FACTS

On October 18, 2007, shortly after midnight, Deputies Eric Pearson and Jeffery Brady, both with the St. Tammany Parish Sheriff's Office, were patrolling together in Slidell. In a white, unmarked police unit, the deputies drove to Walnut Street, a high-crime area of Slidell, north of La. Hwy. 190 and near Front Street. They observed the defendant leaning into the rolled-down window of a vehicle stopped in the middle of the street. When the defendant observed the deputies, he immediately turned away from the vehicle and briskly walked away. The vehicle drove away.

Based on what they had observed, the deputies conducted a "suspicious person" stop. The defendant was told to place his hands on the police unit. While Deputy Pearson patted down the defendant for weapons, he asked the defendant if he had any weapons or contraband on his person. The defendant replied that he had nothing and that Deputy Pearson could search him. Deputy Pearson searched the defendant and found two small Ziploc bags of marijuana in his pants pocket. The total amount of marijuana was about 1.6 grams. The defendant was given a misdemeanor summons for the possession of the marijuana and released.

The defendant had a prior conviction in March of 2005 for possession of marijuana. The defendant did not testify at trial.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues the trial court erred in denying his motion to suppress. Specifically, the defendant contends that the deputies did not have reasonable suspicion to effect an investigatory stop, and that the subsequent Miranda warnings he received were not timely given.

When a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, i.e., unless such ruling is not supported by the evidence. See State v. Green, 94-0887 (La. 5/22/95), 655 So.2d 272, 281. However, a trial court's legal findings are subject to a *de novo* standard of review. See State v. Hunt, 2009-1589 (La. 12/1/09), 25 So.3d 746, 751.

In determining the validity of the seizure of the marijuana, the initial detention of the defendant by the deputies must be examined. If this initial action was not justified, the evidence obtained is inadmissible. See State v. Schuler, 457 So.2d 1240, 1242 (La. App. 1st Cir.), writ denied, 462 So.2d 191 (La. 1984). The threshold issue, thus, is whether the initial encounter between the deputies and the defendant constituted a seizure within the meaning of the Fourth Amendment. If there is no seizure, the Fourth Amendment is not implicated. If there is a seizure, however, such an investigatory stop must be based on reasonable suspicion that a person is committing, has committed, or is about to commit an offense. See La. C.Cr.P. art. 215.1(A).

In State v. Oliver, 457 So.2d 1269, 1271 (La. App. 1st Cir. 1984), we stated:

> 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). "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Id. at 16, 88 S.Ct. at 1877. "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[1]) (quoting Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)); State v. Belton, 441 So.2d 1195, 1199 (La. 1983), cert. denied, [466] U.S. [953], 104 S.Ct. 2158, 80 L.Ed.2d 543 (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, 103 S.Ct. at 1324.

Deputy Pearson testified at both the motion to suppress hearing and the trial.[2] Deputy Brady testified at the trial only. Their testimony established that, upon seeing the defendant walk away from the vehicle, the deputies drove toward the defendant, exited the police unit, and made contact with the defendant. Both deputies were wearing tactical uniforms. The defendant was ordered to place his hands on the police unit. Deputy Pearson then patted down the defendant. According to Deputy Pearson's testimony at trial and the motion to suppress hearing, they were conducting a "suspicious person" stop "to see if any type of illegal activity was going on." Deputy Pearson also testified at trial and the motion to suppress hearing that when the defendant was told to place his hands on the police unit, he was not under arrest, but he was not free to leave.

We find the testimonial evidence of the deputies clearly established that the defendant was detained pursuant to an investigatory stop. A reasonable person under these circumstances would not have felt free to disregard the encounter and walk away. See Oliver, 457 So.2d at 1271; see also State v.Chopin, 372 So.2d 1222, 1224-25 (La. 1979).[3] Since the defendant was seized within the meaning of

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[1] cert. denied, 469 U.S. 916, 105 S.Ct. 293, 83 L.Ed.2d 228 (1984).

[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 given at the trial of the case. State v. Chopin, 372 So.2d 1222, 1223 n.2 (La. 1979).

[3] In Chopin, the Louisiana Supreme Court found that two police officers effected an intrusion upon the defendant's right to be free from governmental interference when they swung the patrol car around into his path, switched on the bright lights, and braked not more than three or four feet in front of him. Such an approach clearly indicated that some form of official detention was imminent. Chopin, 372 So.2d at 1224-1225.

the Fourth Amendment, we must determine whether the deputies had reasonable suspicion to effect the investigatory stop.

In State v. Temple, 2002-1895 (La. 9/9/03), 854 So.2d 856, 859-60, the supreme court stated:

> 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. 1, 88 S.Ct. 1868, 20 L.Ed.2d 8[8]9 (1968); 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).
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> 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 of criminal activity.'" State v. Kalie, 96-2650, p. 3 (La. 9/19/97), 699 So.2d 879, 881 (quoting United States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981)). The police must therefore "articulate something more than an "'inchoate and unparticularized suspicion or "hunch."'" United States v. Sokolow, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989) (quoting Terry v. Ohio, 392 U.S. at 27, 88 S.Ct. at 1883).
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> 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. State v. Buckley, 426 So.2d 103, 108 (La. 1983) (citing United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975)). . . .

In the instant matter, both deputies testified at trial that they were patrolling in a high-crime area of Slidell. According to Deputy Brady, this area had a high amount of drug trading. When they turned onto Walnut Street, the deputies observed the defendant leaning in the window of a vehicle that was stopped in the middle of the street. According to Deputy Pearson's testimony at the motion to suppress hearing, in his experience, this scenario -- a person leaning in a vehicle in the middle of the street in a high-drug area -- was consistent with street-level sales of narcotics. Deputy Pearson had also made numerous drug arrests in this area.

Deputy Brady testified at trial that he observed a vehicle parked in the middle of the street and the defendant leaning into the passenger-side window. When asked if he thought such behavior was suspicious, Deputy Brady responded:

> The manner in which a lot of drug transactions occur are similar to what we saw. What happens is the person looking to purchase the narcotics will pull off, and a lot of times they will make the transaction through the passenger side window. That way that distances themselves from the dealer or whoever is giving them the drugs or whoever they're purchasing the drugs from. So they'll drive up, lower their passenger side window, make the transaction on the street, and drive away.

Deputy Pearson testified at trial that he and Deputy Brady were in an unmarked, white Crown Victoria and that these vehicles are very well known in that neighborhood as police units. His Crown Victoria also had a light bar inside at the top of the windshield and a license plate on the front with the word "SWAT." Deputy Pearson testified at trial and the motion to suppress hearing that when the defendant saw the deputies approach, the defendant immediately turned from the vehicle he was leaning in and briskly walked away. Deputy Brady testified at trial that when the defendant looked up and saw the deputies approaching in their unit, the defendant appeared startled by their presence and suddenly turned around and walked away from the vehicle. The vehicle then left the scene.

In considering the totality of the circumstances, we find that there was reasonable suspicion to justify this investigatory stop. Given that it was past midnight in a high-crime area known mainly for its drug activity; the defendant was leaning into a vehicle in a manner consistent with a typical drug transaction; the defendant's hurried response in separating himself from the vehicle when he saw the deputies; the vehicle leaving the scene; and the deputies' experience and familiarity with drug transactions in this particular area, the deputies had a reasonable suspicion that the defendant had been, was, or was about to be engaged in criminal conduct. See State v. Morgan, 2009-2352 (La. 3/15/11), __ So.3d __,

2011 WL 880261 (where our supreme court noted that an individual's nervous, evasive behavior is also a pertinent factor in determining whether an officer has reasonable suspicion). See also State v. Johnson, 2001-2081 (La. 4/26/02), 815 So.2d 809, 811 (per curiam); State v. Hollimon, 2004-1195 (La. App. 5th Cir. 3/29/05), 900 So.2d 999, 1003-04; State v. White, 98-91 (La. App. 5th Cir. 6/30/98), 715 So.2d 714, 715-17, writ denied, 98-2043 (La. 11/25/98), 729 So.2d 577.

While Deputy Pearson patted the defendant down for weapons, he asked the defendant if he had any weapons or contraband on his person.[4] The defendant responded in the negative and told Deputy Pearson that he could search him. A search conducted with the consent of a defendant is an exception to both the warrant and the probable cause requirements of the law. See State v. Tennant, 352 So.2d 629, 633 (La. 1977), cert. denied, 435 U.S. 945, 98 S.Ct. 1529, 55 L.Ed.2d 543 (1978). Thus, given the defendant's consent to search, Deputy Pearson did not need probable cause, nor did he need to arrest the defendant (and thereby search him incident to arrest) in order to search the pockets of his pants. Upon finding the bags of marijuana in the defendant's pocket, Deputy Pearson took the defendant into custody and advised him of his Miranda rights. Deputy Pearson testified at trial and the motion to suppress hearing that, after he advised the defendant of his rights, the defendant told him that he forgot the marijuana was in his pocket. Deputy Pearson further testified that, upon the defendant's release, the defendant asked if he could return one of the bags of marijuana to him and keep the other one

[4] While the defendant does not directly address the issue in his brief, we also find that Deputy Pearson's Terry frisk of the defendant was proper under the circumstances. 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 suspects that he is in danger, he may frisk the outer clothing of such person for a dangerous weapon." 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. See La. C.Cr.P. art. 215.1(B); Terry v. Ohio, 392 U.S. at 27, 88 S.Ct. at 1883. Deputy Pearson testified at trial that weapons were consistent with narcotics distribution.

for evidence. The defendant was denied the request.

With no supportive argument, the defendant states in his brief that the deputies searched him without giving him the proper Miranda warnings, then adds a footnote, which references a single page from the trial transcript. On this page of the record, Deputy Brady states on direct examination that the defendant was not Mirandized before Deputy Pearson asked the defendant if he had any weapons or contraband on him. Thus, it would seem the defendant is arguing he should have been Mirandized before he was asked to make any incriminating statements about whether weapons or contraband was on his person. However, our review of the record indicates the defendant made the incriminating statements (i.e., he forgot the marijuana was in his pocket and he asked for one bag back) to Deputy Pearson only after he was arrested and properly Mirandized.[5] When Deputy Pearson asked the defendant if he had any weapons or contraband while patting down the defendant, the defendant had not yet been taken into custody. The right to Miranda warnings attaches upon custodial interrogation. The momentary stop and frisk for general investigatory purposes is not within the scope of those custodial interrogations which require the intelligent and knowing waiver of counsel and the giving of the Miranda warnings. State v. Amphy, 259 La. 161, 181, 249 So.2d 560, 567 (1971), cert. denied, 405 U.S. 1074, 92 S.Ct. 1502, 31 L.Ed.2d 807 (1972). Thus, since the defendant was not undergoing custodial interrogation at that time (during the pat down but before the marijuana was found), Deputy Pearson was under no legal obligation to Mirandize the defendant. Further, the defendant's

[5] At the motion to suppress hearing, Deputy Pearson testified he advised the defendant of his rights from memory. When asked to recite those rights given to the defendant, Deputy Pearson stated:

> You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford one, one will be appointed for you. You can decide to answer any questions at this point or you can decide to stop at any point and request an attorney prior to answering any further questions.

consent to search was not a statement against which Miranda was intended to protect. See Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); State v. Ealy, 530 So.2d 1309, 1315 (La. App. 2d Cir. 1988), writ denied, 536 So.2d 1234 (La. 1989).

The investigatory stop of the defendant was lawful. The deputies had reasonable suspicion to believe the defendant was committing, had committed, or was about to commit an offense. Further, based on the defendant's consent to search his person, Deputy Pearson lawfully seized the marijuana. Accordingly, the trial court did not err in denying the motion to suppress.

The assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.