NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 KA 0530

STATE OF LOUISIANA

VERSUS

CODY MINOR

Judgment Rendered: NOV - 9 2011

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 08-09-0231

Honorable Donald R. Johnson, Judge Presiding

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

GUIDRY, J.

The defendant, Cody Minor, was charged by bill of information with possession of a Schedule I controlled dangerous substance (marijuana), a violation of La. R.S. 40:966(A), and illegal possession of a firearm while in possession of a controlled dangerous substance, a violation of La. R.S. 14:95(E). He pled not guilty and moved to suppress the evidence. Following a hearing, the trial court denied the motion to suppress. Prior to trial, the state dismissed the possession of marijuana charge. The defendant was tried by a jury on the illegal possession of a firearm charge. He was found guilty as charged. The defendant was sentenced to imprisonment at hard labor for ten years. The defendant moved for reconsideration of the sentence. The trial court denied the motion. The defendant now appeals. In two assignments of error, the defendant asserts the trial court erred in denying his motion to suppress and in imposing an excessive sentence. For the following reasons, we affirm the defendant's conviction and sentence.

FACTS

On June 30, 2009, Baton Rouge City Police Officer Jason Dohm was on proactive patrol in North Baton Rouge seeking leads on a murder that occurred on Kaufman Street. As Officer Dohm turned onto Kaufman Street, an area known as a "very high-crime area," where narcotics activity is common, he observed the defendant standing near the street in front of a residence. The defendant appeared to be talking with two other individuals standing on the porch of the residence. According to Officer Dohm, once the defendant saw the police vehicle, he immediately ran away. Officer Dohm and Corporal Andy Kuber (also of the Baton Rouge City Police) pursued the defendant. The defendant ran inside the residence. Officer Dohm and Corporal Kuber ran down opposite sides of the residence towards the rear. Shortly thereafter, Officer Dohm observed an air-conditioning unit being pushed out of a window of the residence from inside. The defendant

attempted to exit through the window and fell out onto the ground. Office Dohm observed a Rohm revolver in the defendant's left hand and a bag in his right hand. Officer Dohm ordered the defendant to stop, but the defendant did not comply. The defendant ran northbound through the backyard of the residence. Eventually, the defendant stopped and dropped the gun and bag on the ground. The defendant was apprehended, advised of his Miranda rights, and placed under arrest. The contents of the bag were later determined to be marijuana.

DENIAL OF MOTION TO SUPPRESS

In his first assignment of error, the defendant contends the trial court erred in denying his motion to suppress the evidence. Specifically, he argues that the police officers lacked reasonable suspicion of criminal activity to justify an investigatory stop. The defendant argues that reasonable, articulable suspicion did not exist simply because he became nervous and ran away at the sight of the police. He asserts that since sufficient justification for the stop was lacking when the officers initiated the chase, the stop was unlawful, and, thus, the evidence found as a result of that stop should have been suppressed.

When the constitutionality of a warrantless search and seizure is placed at issue by a motion to suppress, the state bears the burden of proving the admissibility of evidence seized without a warrant. La. C. Cr. P. art. 703(D); State v. Warren, 05-2248, p. 13 (La. 2/22/07), 949 So. 2d 1215, 1226. However, 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. Welch, 11-0274 (La. 4/29/11), 60 So. 3d 603; State v. Green, 94-0887, p. 11 (La. 5/22/95), 655 So. 2d 272, 280-81. However, a trial court's legal findings are subject to a *de novo* standard of review. See State v. Hunt, 09-1589, p. 6 (La. 12/1/09), 25 So. 3d 746, 751. Further, the entire record, not merely the evidence adduced at the

motion to suppress, is reviewable by the appellate court in considering the correctness of a ruling on a pretrial motion to suppress. State v. Francise, 597 So. 2d 28, 30 n.2 (La. App. 1st Cir.), writ denied, 604 So. 2d 970 (La. 1992).

The Fourth Amendment of the United States Constitution and the Louisiana Constitution, Article I, § 5 protect against unreasonable searches and seizures. Subject only to a few well-established exceptions, a search or seizure conducted without a warrant issued upon probable cause is constitutionally prohibited. State v. Griffin, 07-0974, p. 12 (La. App. 1st Cir. 2/8/08), 984 So. 2d 97, 109.

Louisiana Code of Criminal Procedure article 215.1 allows an officer to conduct an investigatory stop of a citizen in a public place when there is reasonable suspicion that the individual is committing, has committed, or is about to commit a criminal offense. See also Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (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). 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. 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); State v. Temple, 02-1895, p. 4 (La. 9/9/03), 854 So. 2d 856, 860. The reviewing court must take into account the totality of the circumstances, giving deference to the inferences and deductions of a trained police officer that might elude an untrained person. See State v. Huntley, 97-0965, p. 3 (La. 3/13/98), 708 So. 2d 1048, 1049 (per curiam).

While flight, nervousness, or a startled look at the sight of a police officer is, by itself, insufficient to justify an investigatory stop, this type of conduct may be highly suspicious and, therefore, may be one of the factors leading to a finding of reasonable suspicion for an investigatory stop. State v. Benjamin, 97-3065, p. 3 (La. 12/1/98), 722 So. 2d 988, 989; State v. Scott, 561 So. 2d 170, 173-74 (La. App. 1st Cir.), writ denied, 566 So. 2d 394 (La. 1990). The United States Supreme Court has recognized that, while a person approached by an officer without reasonable suspicion or probable cause has a right to ignore the police and go about his business, flight constitutes more than a mere refusal to cooperate. In Illinois v. Wardlow, 528 U.S. 119, 124, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000), the Supreme Court stated that "[h]eadlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." Thus, the Supreme Court held in Wardlow that "[a]llowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning." Wardlow, 528 U.S. at 125, 120 S.Ct. at 676. In view of its highly suspicious nature, flight from a police officer greatly lessens the amount of additional information needed in order to provide police officers with reasonable suspicion that a person is engaged in criminal conduct. Benjamin, 97-3065 at 3, 722 So. 2d at 989.

At the hearing on the motion to suppress, Officer Seth Sinclair of the Baton Rouge City Police, Narcotics Division, testified that the Kaufman Street area was known for a high rate of drug activity. He explained that he was involved in controlled drug purchases at two separate residences on Kaufman Street, including the residence the defendant was observed standing in front of on the date of his arrest for the instant offense. Officer Sinclair further testified that there had been a recent homicide that remained unsolved on Kaufman Street.

Officer Dohm testified that immediately upon observing the marked police vehicle on the street, the defendant ran away. The defendant ran inside the residence and then attempted to escape through a window by pushing out an air conditioning unit. He fell to the ground holding a gun and a bag.

The defendant's flight alone is not sufficient to justify an investigatory stop. However, considering the defendant's unprovoked flight at the sight of the police, coupled with the high-crime nature of the area, and the recent unsolved homicide that occurred on the same street, Officer Dohm had sufficient information to form a reasonable suspicion, based on specific, articulable facts, that the defendant had committed or was about to commit a criminal offense. See State v. Alvarez, 09-0328, p. 3 (La. 3/16/10), 31 So. 3d 1022, 1023-24 (per curiam) (police officers had reasonable suspicion for investigatory stop when the defendant, who had demonstrated furtive behavior while observing police officers, balked at their request that he come over to them, then ran when the officers approached him); Benjamin, 97-3065 at 3, 722 So. 2d at 989 (the defendant running away when he saw a marked police unit, while holding his waistband as if he were supporting a weapon or contraband, provided reasonable suspicion for an investigatory stop); State v. Morgan, 09–2352, p. 14 (La. 3/15/11), 59 So. 3d 403, 411 (unprovoked flight, coupled with the lateness of the hour and a dimly lit area, justified an investigatory stop). Under the circumstances presented, Officer Dohm was lawfully entitled to briefly detain defendant, under the authority of La. C. Cr. P. art. 215.1(A), for the purpose of investigating his extremely suspicious behavior. The trial court did not err or abuse its discretion in denying the motion to suppress.

This assignment of error lacks merit.

EXCESSIVE SENTENCE

In his second assignment of error, the defendant argues the trial court erred in imposing an unconstitutionally excessive sentence. Specifically, he argues that the maximum sentence was not warranted in this case, because there was no showing that he is the worst type of offender or that he committed the most serious violation of the offense. He notes that the instant conviction was his first felony conviction, and the trial court erred in considering the fact that he had other criminal charges pending.

Article I, § 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. Generally, a sentence is unconstitutionally excessive if it is grossly disproportionate to the severity of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. See State v. Dorthey, 623 So. 2d 1276, 1280 (La. 1993). A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. State v. Hogan, 480 So. 2d 288, 291 (La. 1985).

The Louisiana Code of Criminal Procedure sets forth items that must be considered by the trial court before imposing sentence. See La. C. Cr. P. art. 894.1. The trial court need not cite the entire checklist of article 894.1, but the record must reflect that it adequately considered the criteria. State v. Herrin, 562 So. 2d 1, 11 (La. App. 1st Cir.), writ denied, 565 So. 2d 942 (La. 1990). In light of the criteria expressed by article 894.1, a review for individual excessiveness should consider the circumstances of the crime and the trial court's stated reasons and factual basis for its sentencing decision. State v. Watkins, 532 So. 2d 1182, 1186 (La. App. 1st Cir. 1988). Remand for full compliance with article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. State v. Lanclos, 419 So. 2d 475, 478 (La. 1982).

The illegal carrying of a firearm while in possession of a controlled dangerous substance is punishable by imprisonment at hard labor for not less than five nor more than ten years without benefit of probation, parole, or suspension of sentence. La. R.S. 14:95(E). As previously noted, the defendant received a sentence of imprisonment for ten years, the maximum sentence. This court has stated that maximum sentences permitted under statute may be imposed only for the most serious offenses and the worst offenders, State v. Easley, 432 So.2d 910, 914 (La. App. 1st Cir. 1983), or when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. See State v. Chaney, 537 So. 2d 313, 318 (La. App. 1st Cir. 1988), writ denied, 541 So. 2d 870 (La. 1989).

At the sentencing hearing, the court was advised that the defendant had other criminal charges pending and was out on bail when he was arrested for the instant offense. The court was also made aware of the fact that the defendant failed a pretrial drug screening while out on bail. In imposing the maximum sentence, the court reasoned:

> Mr. Cody Minor, you have complicated my decision today by your repetitive conduct. On the one hand, this amounts to a first felonious conviction. On the other hand, you have two pending felonious charges. In-between all of that, you have some other proclivity to be arrested for violation of criminal law. For some reason, Mr. Cody Minor, you don't get it. I don't know if it's more your fault, someone else's fault, but I do know you share in it. For some reason, Mr. Minor, you think you can do what you want. And I'm telling you today that you do not have that option any more. You need to stop so that people who do want to obey our rules will be away from you.

We cannot say the trial court abused its discretion in imposing the maximum sentence in this case. Prior criminal activity is one of the factors to be considered by the trial court in sentencing a defendant. La. C. Cr. P. art. 894.1(B)(12). Prior criminal activity is not limited to convictions. State v. Jackson, 98-0004, p. 10 (La. App. 1st Cir. 11/6/98), 724 So. 2d 215, 221, writ denied, 98-3056 (La. 4/1/99), 741 So. 2d 1283. The sources of information relied upon by the sentencing court may

include evidence usually excluded from the courtroom at the trial of guilt or innocence, *e.g.*, hearsay and arrests, as well as conviction records. State v. Dyas, 45,065, p. 10 n.3 (La. App. 2d Cir. 3/3/10), 32 So. 3d 364, 371 n.3, writ denied, 10-0759 (La. 11/19/10), 49 So. 3d 397. Although the maximum sentence is severe, considering the reasons for sentence provided by the court, and the fact that the defendant has shown little regard for the law (as evidenced by the fact he was out on bail for unrelated felony charges when he committed the instant offense), we do not find the sentence to be excessive.

This assignment of error lacks merit.

CONCLUSION

Therefore, having thoroughly reviewed the record and considered the applicable law, we find no error in the trial court's ruling denying the defendant's motion to suppress or in the sentencing decree rendered herein. Accordingly, we affirm the defendant's conviction for illegal possession of a firearm while in possession of a controlled dangerous substance, a violation of La. R.S. 14:95(E), and his consequent sentence for the maximum term of incarceration of ten years.

CONVICTION AND SENTENCE AFFIRMED.