NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 0527

STATE OF LOUISIANA

VERSUS

DANIEL CRUMEDY

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Judgment Rendered: March 23, 2012

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APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF WASHINGTON
STATE OF LOUISIANA
DOCKET NUMBER 09-CR3-103306

THE HONORABLE RAYMOND S. CHILDRESS, JUDGE

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

Hughes, J., concurs with reasons.

McDONALD, J.

The defendant, Daniel Crumedy, was charged by bill of information of possession of a Schedule II Controlled Dangerous Substance, cocaine, a violation of La. R.S. 40:967(C). See also La. R.S. 40:964, Schedule II (A). The defendant pled not guilty. The defendant filed a motion to suppress the evidence obtained after an alleged illegal seizure, which the trial court denied. Subsequently, the defendant entered a **Crosby** plea of guilty,[1] reserving his right to appeal the denial of his motion to suppress. The trial court sentenced him to five years with the Department of Public Safety and Corrections. The trial court ordered the sentence to run concurrently with the sentences the defendant is currently serving on other matters. The defendant now appeals, urging one assignment of error. For the following reasons, we affirm the conviction and sentence.

FACTS

Because the defendant pled guilty, the facts in this case were not developed. The testimony that the arresting officer, Detective Robert Harris, gave at the suppression hearing provides the factual background for this matter. On May 5, 2009, Detective Harris was working with the street crimes unit of the Washington Parish Drug Task Force. That day, Detective Harris and three other street crime unit detectives were patrolling in separate, marked police cars in Bogalusa's high-crime areas.

Shortly before noon, the detectives were in route to Lee's Lounge on Fourth Street and Second Avenue. The bar is in an area known for crime and illegal drug sales. The detectives approached the bar from different directions.

When Detective Harris first saw the defendant, the defendant was standing in the intersection of Fourth Street and Second Avenue, facing away from the detective. Although there was no traffic, Detective Harris described the defendant

[1] See **State v. Crosby**, 338 So.2d 584 (La. 1976).

as "looking in different directions." One of the other detectives, Detective Brent Goings, was advancing in the distance on Second Avenue. When the defendant turned his head and noticed Detective Goings's police car heading in his direction, he immediately stopped and did "an about-face." The defendant did not run. However, he began walking toward a fence at the rear of an abandoned lot next to Lee's Lounge. The defendant kept his right hand in his pocket. Detective Harris radioed this information to the other detectives and cautioned them to watch for a weapon as they approached.

Detective Harris watched as the defendant, who was approximately fifty feet away, continued walking toward the fence. The detective parked his vehicle in a parking area adjacent to the bar, stepped out of his vehicle, announced he was a deputy, and asked the defendant to come over and speak with him.

The defendant, with his back to the deputy, did not stop and continued walking to the fence. While the defendant was still walking, Detective Harris saw him pull a brown paper object out of his pocket and throw it on the ground landing next to a crate.

As soon as he discarded the object, the defendant, who was quite a bit larger than the detective, turned around and faced Detective Harris. The other detectives had arrived at the scene but were still in their parked police cars. Because of the defendant's size, Detective Harris grabbed the defendant by his arm, took him to the ground, handcuffed him, and conducted a pat down on the defendant.

The discarded object was next to the crate by the defendant's feet. Detective Harris retrieved it, opened the brown paper bag, and saw what he believed to be seven rocks of crack cocaine. Detective Harris read the defendant his **Miranda** rights[2] and placed him under arrest. Subsequent laboratory testing confirmed the substance contained cocaine.

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[2] See **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant urges the trial court erred in denying the motion to suppress. The defendant contends that he was seized, for constitutional purposes, when Detective Harris exited his police vehicle to confront him. At that moment, the defendant asserts, some form of official detention was imminent. The defendant argues the fact that he may have turned away from the approaching police vehicle and walked away is not sufficient to form a reasonable suspicion that the defendant was engaged in, was about to engage in, or had just completed engaging in criminal conduct. Therefore, the defendant contends the seizure was unlawful. Because the defendant abandoned the cocaine after the alleged unlawful seizure, the defendant claims the cocaine should have been suppressed as fruit of an illegal seizure.

Conversely, the state asserts the trial court was correct in denying the motion to suppress, as an actual stop was not imminent at the time the defendant abandoned the cocaine.

In the instant matter, the evidence at issue was seized without a warrant. Thus, the state has the burden of proving the admissibility of the evidence. La. C.Cr.P. art. 703(D). 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, 280-81. 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.

The Fourth Amendment of the United States Constitution and Article I, Section 5 of the Louisiana Constitution protect persons from unreasonable searches

and seizures. Police may not make a warrantless arrest of a citizen without probable cause that the citizen has engaged in criminal conduct. Additionally, while the police may briefly detain and interrogate an individual, a less encroaching intrusion of an individual's right to be free from governmental interference than an arrest, the police may only do so based upon reasonable, articulable suspicion that the individual has engaged in, is engaging in, or is about to engage in criminal activity. La. C.Cr.P. art. 215.1; **State v. Tucker**, 626 So.2d 707, 710 (La. 1993).

However, these constitutional protections do not proscribe all interaction between the police and other individuals. Police do not need probable cause to arrest or reasonable suspicion to detain an individual each time they approach a citizen. Police officers have the right to engage anyone in conversation, even without reasonable grounds to believe that they have committed a crime. As long as the person approached by a law enforcement officer remains free to disregard the encounter and walk away, the foregoing constitutional provisions are not implicated. See **State v. Dobard**, 2001-2629 (La. 6/21/02), 824 So.2d 1127, 1130.

To discourage police misconduct, evidence recovered as a result of an unconstitutional search or seizure is inadmissible. Consequently, evidence abandoned by a citizen and recovered by the police as a direct result of an unconstitutional seizure may not be used in a resulting prosecution. **Tucker**, 626 So.2d at 710. If, however, property is abandoned prior to any unlawful intrusion into a citizen's right to be free from governmental interference, then the property may be lawfully seized and used in a resulting prosecution. Because the rules of inadmissibility are intended to protect individuals from unwarranted, forcible governmental interference, it is only when the citizen is actually stopped without reasonable suspicion or when a stop without reasonable suspicion is imminent that

the right to be left alone is violated, thereby rendering unlawful any resultant seizure of abandoned property. See **Dobard**, 824 So.2d at 1130.

In **Tucker**, the Louisiana Supreme Court, adopting the U.S. Supreme Court's pronouncement in **California v. Hodari D.**, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991), held that an individual has been "actually stopped," *i.e.*, seized, for purposes of La. Const. art. I, § 5, when he submits to a police show of authority or when he is physically contacted by police. Additionally, recognizing our constitution provides greater protections than those provided by the Fourth Amendment of the U.S. Constitution, the **Tucker** court went beyond **Hodari D.**, by holding our constitution also protects individuals from an "imminent actual stop." The **Tucker** court recognized the necessity for determining what constitutes an "imminent actual stop" for those situations where the police attempt to seize an individual, but the individual neither submits to the police show of authority, nor is physically contacted by the police. **Tucker**, 626 So.2d. at 712.

In determining whether an "actual stop" is "imminent," the focus must be on the degree of certainty that the individual will be "actually stopped" as a result of the police encounter. This degree of certainty may be ascertained by examining the extent of police force employed in attempting the stop. An "actual stop" is imminent only when the police come upon an individual with such force that, regardless of the individual's attempts to flee or elude the encounter, an actual stop of the individual is virtually certain. **Tucker**, 626 So.2d at 712.

The relevant question, in the instant case, is whether an actual stop was imminent at the time the defendant threw down the cocaine, as he had not been "actually stopped" at that time. Although non-exhaustive, **Tucker** instructs that the following factors may be useful in assessing the extent of police force employed and determining whether that force was virtually certain to result in an "actual stop" of the individual: (1) the proximity of the police in relation to the

defendant at the outset of the encounter; (2) whether the individual has been surrounded by the police; (3) whether the police approached the individual with their weapons drawn; (4) whether the police and/or the individual are on foot or in motorized vehicles during the encounter; (5) the location and characteristics of the area where the encounter takes place; and (6) the number of police officers involved in the encounter. **Tucker**, 626 So.2d at 712-13.

In the instant matter, the defendant was in an area known for illegal drug trafficking. However, this case is not one where law enforcement officers swung their patrol car into an individual's path, switched on the bright lights, and stopped a few feet in front of the individual. Compare **State v. Chopin**, 372 So.2d 1222, 1224-25 (La. 1979). Nor is it a case where law enforcement officers "sprang" from their patrol car and "overtook" an individual. Compare **State v. Saia**, 302 So.2d 869, 873 (La. 1974), cert. denied, 420 U.S. 1008, 95 S.Ct. 1454, 43 L.Ed.2d 767 (1975).

The sole testimony in this matter reveals that, at the outset of this encounter, Detective Harris and the defendant were separated by fifty feet when the detective parked his car, got of his vehicle, first announced himself to the defendant, and asked the defendant to come over and speak with him. Clearly, the defendant felt free to not respond to the detective's request and to continue walking. There is no indication that Detective Harris sprang from his car, rushed the defendant to overtake him, or that his weapon was drawn. To the contrary, Detective Harris testified that he walked toward the defendant only after seeing him pull out the brown paper bag from his pocket and throw it on the ground. Although three other detectives were in the area and ultimately assisted Detective Harris after he handcuffed the defendant, there is no indication that they were present prior to that time.

The record before us does not reveal that Detective Harris physically contacted the defendant, ordered or signaled him to stop, or otherwise asserted any official authority over the defendant at the time he discarded the cocaine. See **Dobard**, 824 So.2d at 1132-33. Detective Harris did not seize the defendant by merely stepping out of his vehicle, announcing his presence, and asking the defendant to come over and talk with him. Law enforcement officers do not seize a person simply by identifying their presence and approaching an individual without taking any additional measures to assert their authority over the person that would not be expected from the encounter if it had occurred with an ordinary citizen. **Dobard**, 824 So.2d at 1133.

Furthermore, at the point the defendant discarded the cocaine, an actual stop of the defendant was not imminent. Detective Harris had not yet indicated by word or action that a forcible detention was about to take place. The defendant threw down the cocaine prior to any unlawful intrusion into his right to be free from governmental interference. Thus, at the time the defendant abandoned the evidence, the defendant had not been illegally seized.

CONCLUSION

After a thorough review of the record and in light of **Tucker**, we find the defendant's "actual stop" was not "imminent" at the time he abandoned the crack cocaine. For this and the other reasons set forth above, we find the trial court did not err or abuse its discretion in denying the motion to suppress.

CONVICTION AND SENTENCE AFFIRMED.

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VERSUS

DANIEL CRUMEDY

HUGHES, J., concurring.

The arrest, when defendant was handcuffed, was unlawful, but the contraband was abandoned before the arrest.