NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 1688

STATE OF LOUISIANA

VERSUS

DERRICK ALLEN

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 06-04-828, Section II
Honorable Richard D. Anderson, Judge Presiding

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Derrick Allen

BEFORE: PARRO, KUHN, AND DOWNING, JJ.

Judgment rendered February 20, 2008

PARRO, J.

The defendant, Derrick Allen, was charged by bill of information with possession of cocaine, a violation of LSA-R.S. 40:967(C). The defendant pled not guilty and filed a motion to suppress the evidence to be used against him. The trial court denied the defendant's motion to suppress. Prior to trial, the defendant filed a motion to dismiss his counsel. After a hearing on the motion, the defendant was allowed to dismiss his counsel and represent himself at trial.

The matter was tried before a jury. The jury found the defendant guilty as charged. The state instituted habitual offender proceedings seeking to have the defendant adjudicated a fourth-felony habitual offender. Following a hearing, the trial court adjudicated the defendant a fourth-felony habitual offender. The trial court sentenced the defendant to a term of fifty-five years of imprisonment at hard labor without benefit of probation, parole, or suspension of sentence.

The defendant appeals. After considering the assignments of error raised, we affirm his conviction, his habitual offender adjudication, and his sentence as amended.

FACTS

In the early evening of May 16, 2004, Sidney Cull was working at the Exxon refinery near the Scenic Highway and Winbourne Avenue entrance to the chemical plant. Cull heard a vehicle impact on the concrete barrier near the gate and went outside the building with a portable phone. Once outside, Cull observed that a vehicle had knocked over two concrete barriers and hit the chain link fence bordering Exxon. Cull checked the vehicle and saw a white T-shirt laying on the front of the vehicle. No one was in the vehicle. Cull saw a black male, approximately six feet tall, wearing blue shorts that went down to the knee, no shirt, and tennis shoes, running down Winbourne Avenue towards Plank Road. Cull contacted 911.

Officer David Kennedy of the Baton Rouge City Police arrived on the scene at approximately 6:47 p.m. Officer Kennedy observed a Yukon SUV with

temporary tags in the window lodged in the fence near the Exxon entrance. Officer Kennedy obtained a description of the subject seen running away from the scene as a heavyset, black male approximately six feet tall, wearing blue shorts and no shirt. The subject was reported to have been running in an easterly direction on Winbourne Avenue, toward Plank Road.

Officer Kennedy ran a registration check and learned that the Yukon was registered to a D. Allen, and the address associated with this name was on Iroquois Street approximately twenty blocks from the accident scene. Officers were dispatched to the address, and then began patrolling back to the scene.

Officers were subsequently dispatched to the intersection of Winbourne Avenue and Plank Road because of a report that a black male was in the street. When the police arrived at the intersection, they discovered a black male, later identified as the defendant, wearing only boxer shorts, rolling around on the side of the road. According to Officer Kennedy, the defendant was babbling incoherently and acting in a bizarre manner. EMS was summoned because of the possibility that the defendant had sustained an injury in the earlier accident.

When EMS arrived and attempted to evaluate the defendant, the defendant became combative. Because the defendant was too combative to allow EMS to perform any evaluation, the defendant was handcuffed and placed into the back of a police unit so he could be taken to Earl K. Long Hospital. Officer Kennedy explained that when the defendant was placed in the back of the police unit, he was not under arrest, but was placed in protective custody, because the manner in which he was acting presented a danger to himself and others. Under cross-examination by the defendant, Officer Kennedy admitted that based on his experience, the defendant appeared to be under the influence of crack cocaine.

Before the defendant was transported to the hospital, one of the EMS paramedics brought Officer Kennedy a pair of blue shorts that he recovered from approximately twenty feet away. The shorts contained the defendant's identification card, a remote access key (later identified to work on the Yukon at

the accident scene), a small glass pipe commonly used to smoke crack cocaine, and a small bag of crack cocaine.[1]

Officer Kennedy never read the defendant his **Miranda** rights because his impression of the defendant's condition was that the defendant was incapable of understanding his rights at that time.

Under cross-examination, Officer Kennedy denied that he had any involvement in causing the defendant's traffic accident or that he had pointed a weapon at the defendant and tried to kill him. Officer Kennedy further denied that he planted any evidence in the shorts.

On cross-examination, Officer Kennedy testified that he had recovered paperwork from the Yukon indicating the defendant had been released from prison on May 12, 2004, and had received $91,000 in life insurance proceeds.[2] Other paperwork indicated the defendant had paid $45,000 on May 15, 2004, for the Yukon.

Officer Jeremy Stanley of the Baton Rouge City Police Department transported the defendant to the hospital. Officer Stanley testified that while at the intersection of Plank and Winbourne, the defendant displayed irrational and violent behavior. According to Officer Stanley, the defendant was transported to the hospital because they believed he had been involved in a traffic accident and needed a medical evaluation.

Because the defendant was in protective custody, Officer Stanley stayed in constant contact with him while at the hospital. Officer Stanley was present when medical personnel took a history from the defendant. During this assessment, the defendant stated he had been smoking crack cocaine for four days prior to the accident. On cross-examination, Officer Stanley denied he conspired with anyone

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[1] Ronald Poche, a forensic scientist with the Louisiana State Police Crime Lab, was accepted by the trial court as an expert in drug analysis. Poche testified that his testing of the contents of the plastic bag seized from the shorts indicated the bag contained 2.05 grams of cocaine.

[2] Lance Joseph, an attorney who testified on the defendant's behalf, confirmed that on May 12, 2004, he issued the defendant a check for $91,000. Joseph testified that when the defendant was in his office, he did not appear to be under the influence of any alcohol or drugs.

else to have the defendant killed, or that he was involved in causing the defendant's traffic accident.

The defendant presented testimony from several witnesses, including Iris Lott, who supervised inmate accounts for the East Baton Rouge Parish Sheriff's Office. Lott testified that there was documentation indicating that the defendant had $77.13 on him when he was booked into Parish Prison.

Don Allen, a cousin of the defendant, also testified on the defendant's behalf. According to Don Allen, the defendant came to live with him following his release from prison. Don Allen never observed the defendant ingest any drugs or alcohol while at his home. Don Allen further testified that the Yukon involved in the accident was registered in his (Don's) name and the defendant had accompanied him when it was purchased.

The defendant also called the two EMS paramedics who attempted to assess him on the evening of May 16, 2004. One of the paramedics, Joyce Wales, testified that the defendant was lying on the sidewalk and was missing some clothing. The defendant had grabbed her partner, Larry Whitmore, by the leg and stated, "I'm resisting." Wales stated at that point, dealing with the defendant became a police matter. Larry Whitmore confirmed the defendant had grabbed him by the leg as he attempted to assess the defendant and he heard the defendant state he was resisting.

The defendant also questioned Jeff LeDuff, Chief of the Baton Rouge City Police. LeDuff was not one of the officers who dealt with the defendant. However, the defendant questioned LeDuff at length about police procedures.

MOTION TO SUPPRESS EVIDENCE

In his first counseled assignment of error, the defendant argues the trial court erred in finding that the search of his clothing prior to arrest was constitutional. The defendant argues that because he was in protective custody, he was not under arrest, nor did the police have a warrant or consent to search the shorts belonging to him.

The Fourth Amendment to the United States Constitution and Article I, § 5 of the Louisiana Constitution protect persons against unreasonable searches and seizures. A defendant adversely affected may move to suppress any evidence from use at a trial on the merits on the ground that it was unconstitutionally obtained. LSA-C.Cr.P. art. 703(A). A trial court's ruling on a motion to suppress the evidence is entitled to great weight, because the court had the opportunity to observe the witnesses and weigh the credibility of their testimony. **State v. Jones**, 01-0908 (La. App. 1st Cir. 11/8/02), 835 So.2d 703, 706, writ denied, 02-2989 (La. 4/21/03), 841 So.2d 791.

A three-tiered analysis governs the Fourth Amendment's application to interactions between citizens and police. At the first tier, mere communications between officers and citizens implicate no Fourth Amendment concerns where there is no coercion or detention. **State v. Pennison**, 99-0466 (La. App. 1st Cir. 12/28/99), 763 So.2d 671, 676, writs denied, 00-1105 and 00-2308 (La. 10/27/00), 772 So.2d 122 and 658, and 00-0298 (La. 11/3/00), 772 So.2d 663.

At the second tier, the investigatory stop recognized by the United States Supreme Court in **Terry v. Ohio**, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the police officer may briefly seize a person if the officer has an objectively reasonable suspicion, supported by specific and articulable facts, that the person is, or is about to be, engaged in criminal conduct or is wanted for past criminal acts. Louisiana Code of Criminal Procedure article 215.1(A) provides that an officer's reasonable suspicion of crime allows a limited investigation of a person. However, reasonable suspicion is insufficient to justify custodial interrogation even though the interrogation is investigative. **Pennison**, 763 So.2d at 676.

Lastly, at the third tier, a custodial "arrest," the officer must have "probable cause" to believe that the person has committed a crime. Louisiana Code of Criminal Procedure article 213 uses the phrase "reasonable cause." The "probable cause" or "reasonable cause" needed to make a full custodial arrest requires more

than the "reasonable suspicion" needed for a brief investigatory stop. **Pennison**, 763 So.2d at 676.

Further, we note that LSA-Const. art. I, § 5 prohibits only unreasonable invasions of privacy. In ascertaining whether individuals have a reasonable expectation of privacy that is constitutionally protected, a court must determine not only whether the individual has an actual or subjective expectation of privacy, but whether that expectation is also of a type which society at large is prepared to recognize as being reasonable. **State v. Pennison**, 763 So.2d at 677.

In the present case, the interaction between the defendant and the police came about after the police were dispatched in response to a report of a man (subsequently identified as the defendant) lying in the roadway at an intersection approximately one mile from the initial accident scene. The defendant matched the description of the subject seen leaving the accident scene. Because the defendant became combative and uncooperative with the EMS paramedics attempting to evaluate him for injury, the police properly placed the defendant in protective custody.[3]

Most importantly, at the time of this interaction, the defendant was only wearing boxer shorts. The pair of blue shorts matching the description of the shorts worn by the subject leaving the accident scene and containing the defendant's identification and the crack cocaine was recovered by an EMS

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[3] LSA-R.S. 28:53(L)(1) authorizes a police officer to place a subject in protective custody. The statute provides, in pertinent part:

> A peace officer or a peace officer accompanied by an emergency medical service trained technician may take a person into protective custody and transport him to a treatment facility for a medical evaluation when, as a result of his personal observation, the peace officer or emergency medical service technician has reasonable grounds to believe the person is a proper subject for involuntary admission to a treatment facility because the person is acting in a manner dangerous to himself or dangerous to others, is gravely disabled, and is in need of immediate hospitalization to protect such a person or others from physical harm. The person may only be transported to one of the following:
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> * * * *
>
> (b) A public or private general hospital.

paramedic approximately twenty feet away from where the defendant was encountered near the intersection of Plank Road and Winbourne Avenue.

It is well settled that if property is abandoned without any prior unlawful intrusion into the citizen's right to be free from governmental interference, then such property may be lawfully seized. In such cases, there is no expectation of privacy, and, thus, no violation of a person's custodial rights. **Jones**, 835 So.2d at 708.

Accordingly, we find the defendant had abandoned the blue shorts containing the cocaine prior to the arrival of the police. Because these blue shorts were abandoned property, the defendant had no expectation of privacy in their contents, and the defendant's rights were not violated by the seizure of the cocaine.

This assignment of error is without merit.

SELF-REPRESENTATION

In his second counseled assignment of error, the defendant argues the trial court erred in granting his motion to represent himself. On appeal, defense counsel argues that in the trial counsel's motion to withdraw, he informed the court that the defendant wanted him to pursue a trial strategy involving allegations of a police conspiracy on the present charges. Appellate defense counsel goes on to state that because the defendant intended to present a "bizarre plot" as his theory of the case, such a theory would constitute ineffective assistance of counsel if presented by the trial attorney. Thus, that was the trial counsel's primary reason for the motion to withdraw.

We disagree. Based on the transcript of the hearing on the motion to withdraw, the defendant's trial counsel indicated to the trial court that the defendant refused to cooperate with the investigator for the Public Defender's Office. The defendant's trial counsel went on to state that without such cooperation on the defendant's part, the trial counsel's efforts in the matter would

constitute ineffective assistance of counsel. The defendant's trial counsel further stated to the trial court that he would not pursue a trial strategy alleging the present charge was the result of a law enforcement conspiracy against the defendant.

Both the Louisiana and United States Constitutions guarantee a criminal defendant the right to the assistance of counsel. U.S. Const. amend. VI; LSA-Const. art. I, § 13. Nevertheless, a defendant may elect to represent himself if the choice is knowingly and intelligently made and the assertion of the right to represent himself is clear and unequivocal. **Faretta v. California**, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975); **State v. Bonit**, 05-0795 (La. App. 1st Cir. 2/10/06), 928 So.2d 633, 637, writ denied, 06-1211 (La. 3/16/07), 952 So.2d 688.

In **Faretta**, the United States Supreme Court recognized that a trial court may not force a lawyer upon a defendant when the defendant insists he wants to conduct his own defense and voluntarily and intelligently elects to proceed without counsel. However, he must ask clearly and unequivocally to proceed *pro se*, and he must also make his request in a timely manner. **Faretta**, 422 U.S. at 835, 95 S.Ct. at 2541. Further, a defendant must be made aware of the dangers and disadvantages of self-representation so that the record demonstrates that he knows what he is doing and his choice is made with his eyes open. **Faretta** made clear that the accused's technical legal knowledge, as such, is not relevant to an assessment of his knowing exercise of the right to defend himself. **Faretta**, 422 U.S. at 836, 95 S.Ct. at 2541.

In **State v. Santos**, the Louisiana Supreme Court held that where a trial judge is confronted with an accused's unequivocal request to represent himself, the judge need determine only whether the accused is competent to waive counsel and is voluntarily exercising his informed free will. **State v. Santos**, 99-1897 (La. 9/15/00), 770 So.2d 319, 321 (per curiam).

In the present case, the defendant was taken into custody following the May 16, 2004 incident. On August 10, 2004, the defendant was arraigned. The defendant filed multiple *pro se* motions prior to trial. On August 7, 2006, the defendant filed a *pro se* motion seeking to dismiss his then counsel, Randy Trelles. The defendant's motion explained that Frank Saia had previously represented him, but Saia had died. In his motion, the defendant sought a copy of his file so that he could prepare for his trial on his own.

On August 11, 2006, the trial court granted the defendant's motion to dismiss Trelles as his counsel and appointed the Public Defender's Office to represent the defendant. On October 16, 2006, Public Defender Nelvil Hollingsworth made an oral motion to withdraw from representing the defendant. Hollingsworth cited the defendant's refusal to cooperate in trial preparation and his own reluctance to pursue a trial strategy of conspiracy that the defendant claimed. The defendant's trial subsequently commenced on March 12, 2007.

The trial court questioned the defendant and the defendant indicated he wanted to represent himself. During this exchange with the defendant, the defendant indicated he had one year of college. The trial court noted that the defendant had already filed multiple motions on his own behalf. The trial court explained that if the defendant was convicted of the present charge, the state would institute habitual offender proceedings, exposing him to a potential term of life imprisonment. Finally, the trial court explained to the defendant that if he chose to represent himself, he would be required to know the rules of evidence and procedure. The trial court specifically told the defendant, "You're going to be stuck with the results." The trial court informed the defendant that once the trial started, the fact that the defendant may realize that he was "in over [his] head" would not be the basis for a new trial.

In the instant case, the record indicates that the defendant's waiver of counsel was made intelligently and knowingly, and that the defendant's decision to represent himself was a clear and unequivocal choice.

Appellate counsel for the defendant argues on appeal that the trial strategy pursued by the defendant, i.e., alleging that the present offense was the result of some law enforcement conspiracy, was ineffective and prejudiced the jury. However, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to the denial of effective assistance of counsel. See **Faretta**, 422 U.S. at 834, 95 S.Ct. at 2540-41.

The appellate counsel for the defendant also argues the trial court erred in failing to appoint standby counsel to assist the defendant at trial. In **McKaskle v. Wiggins**, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), the United States Supreme Court confirmed the right of a criminal defendant to represent himself or herself *pro se* while allowing the trial court to appoint standby counsel to explain and enforce basic rules of courtroom protocol. **McKaskle**, 465 U.S. at 184, 104 S.Ct. at 954. The court further found that standby counsel may participate in the trial as long as his or her participation does not seriously undermine the defendant's appearance before the jury in the status of one representing himself. **McKaskle**, 465 U.S. at 187-88, 104 S.Ct. at 955-56.

In reviewing the transcript of the trial, the defendant never sought the assistance of standby counsel in the trial of this matter. Further, we find the defendant competently cross-examined witnesses, argued objections, and was able to subpoena and examine his own witnesses. Under the circumstances of this case, we cannot say the trial court erred in not appointing standby counsel to assist the defendant at trial.

This assignment of error is without merit.

SENTENCING ERROR

In reviewing the record, we have discovered a sentencing error which requires us to amend the sentence to delete the restriction on parole eligibility. The trial court ordered the defendant's fifty-five-year sentence to be served without benefit of probation, parole, or suspension of sentence. The inclusion of the parole restriction rendered this sentence illegal. At the time of the offense,

any sentence imposed under the provisions of the habitual offender law was to be served without benefit of probation or suspension of sentence, but neither LSA-R.S. 15:529.1(G) nor LSA-R.S. 40:967(C)(2) provided for the imposition of sentence without benefit of parole. Pursuant to LSA-C.Cr.P. art. 882(A), which provides that an appellate court may correct an illegal sentence on review, we amend the sentence to strike and delete the portion of the sentence that provides it shall be served without benefit of parole. See **State v. Charles**, 00-0664 (La. App. 1st Cir. 12/22/00), 775 So.2d 667, 670, writ denied, 01-1067 (La. 1/4/02), 805 So.2d 1186.

CONVICTION AND HABITUAL OFFENDER ADJUDICATION AFFIRMED; SENTENCE AMENDED AND AFFIRMED AS AMENDED.