NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 KA 0702

STATE OF LOUISIANA

VERSUS

EDWARD L. ODOM, JR.

Judgment rendered September 14, 2007.

J.J.P.
B.J.C.
by J.J.P.
JEW

* * * * * *

Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. 412925
Honorable Peter J. Garcia, Judge

* * * * * *

HON. WALTER P. REED
DISTRICT ATTORNEY
COVINGTON, LA
AND
KATHRYN W. LANDRY
ASSISTANT DISTRICT ATTORNEY
BATON ROUGE, LA

ATTORNEYS FOR
STATE OF LOUISIANA

MARY E. ROPER
BATON ROUGE, LA

ATTORNEY FOR
DEFENDANT-APPELLANT
EDWARD L. ODOM JR.

* * * * * *

BEFORE: CARTER, C.J., PETTIGREW, AND WELCH, JJ.

PETTIGREW, J.

Defendant, Edward L. Odom, Jr., was charged by bill of information with one count of possession with intent to distribute cocaine, a violation of La. R.S. 40:967(A)(1). Defendant pled not guilty. Prior to trial, defendant filed a motion to suppress evidence and a motion to suppress a statement, both of which were denied. Following a trial by jury, defendant was found guilty as charged. The trial court sentenced defendant to ten years at hard labor, with the first two years to be served without the benefit of probation, parole, or suspension of sentence.

The State instituted habitual-offender proceedings. The trial court subsequently adjudicated defendant as a third-felony-habitual offender. In accordance with this finding, the trial court vacated the original sentence and sentenced defendant to twenty years at hard labor, without the benefit of probation or suspension of sentence, two years of which were to be served without the benefit of parole. For the reasons that follow, we affirm defendant's conviction, habitual-offender adjudication, and sentence.

FACTS

On May 5, 2006, the Slidell Police Department received a call from an unidentified, concerned citizen suggesting that illegal narcotics were being sold from a FEMA trailer in the 2800 block of Washington Avenue, an area well-known as a narcotics-crime area. That same evening at approximately 10:30 p.m., Detectives Dennis Bush and David Lentz began conducting surveillance of a trailer located at 2805 Washington Avenue. Detective Bush parked an unmarked police vehicle near the intersection of the 2800 block of Washington Avenue and Stanley Street. Within five to six minutes of their arrival, the detectives observed a succession of three individuals approach the trailer, enter, and quickly exit the trailer, all within a couple of minutes of each other. This activity aroused their suspicions that there was illegal-narcotics activity occurring inside the trailer.

The detectives then observed a fourth individual, later identified as defendant, enter the trailer and within a few seconds exit the trailer and leave on a bicycle. As defendant pedaled away, Detective Bush drove the unmarked unit up alongside him, while Detective Lentz rolled down the passenger-side window and identified himself as a

Slidell Police Officer. Detective Lentz then requested that defendant stop. According to Detective Bush, defendant appeared startled, and began to distance himself from the vehicle. Detective Lentz repeated his identification and again told defendant to stop. According to Detective Lentz, defendant stated, "[W]hy are you-all F'ing with me." Detective Lentz then began to exit the vehicle as defendant jumped off the bicycle, threw the bicycle down, and began to flee. Both detectives exited the vehicle and began pursuing defendant on foot.

Defendant ran into a residential yard, but realized there was no escape route. He reversed his direction and started running in the direction from where he had started. Both detectives testified that the entire time defendant was running, he had his right hand in his pocket, as if he were trying to remove something. During the chase, both detectives observed defendant discard something with his right hand. Detective Bush stopped his pursuit to pick up the object, which had landed on the sidewalk. Detective Bush immediately recognized the object as being a large piece of crack cocaine.

The detectives pursued defendant to a vacant lot, where defendant attempted to conceal himself in the bushes. Both detectives observed defendant attempting to retrieve something with his left hand from his left front pocket. Defendant came out of the shrubbery, and looked as if he were going to resume his flight, but then tripped and fell face forward on the ground. The detectives were able to subdue defendant and wrestle his left hand from his pocket.

Defendant was placed under arrest in connection with the crack cocaine that Detective Bush recovered during the pursuit. Defendant was advised of his rights. During the search subsequent to arrest, the detectives recovered $295.00 in currency and a small plastic bag with marijuana.

MOTION TO SUPPRESS EVIDENCE

In his first assignment of error, defendant argues the trial court erred in denying defendant's motion to suppress the evidence that was recovered after being discarded by him during the foot chase. Defendant argues the detectives admitted they had no probable cause to arrest defendant at the point in which they ordered him to stop and

began to chase him. Defendant argues that the detectives admitted that it was their intention to arrest him when they ordered him to stop.

Louisiana Code of Criminal Procedure article 703(A) provides, "A defendant adversely affected may move to suppress any evidence from use at the trial on the merits on the ground that it was unconstitutionally obtained." The Fourth Amendment to the United States Constitution and Article I, section 5 of the Louisiana Constitution protect persons against unreasonable searches and seizures. A trial court's ruling on a motion to suppress evidence is entitled to great weight, because the district court had the opportunity to observe the witnesses and weigh the credibility of their testimony. **State v. Jones**, 2001-0908, p. 4 (La. App. 1 Cir. 11/8/02), 835 So.2d 703, 706, writ denied, 2002-2989 (La. 4/21/03), 841 So.2d 791.

The Louisiana Supreme Court has recognized a three-tier analysis governing 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. 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. Lastly, at the third tier of custodial "arrest," the officer must have probable cause to believe that the person has committed a crime. **State v. Fisher**, 97-1133, pp. 4-5 (La. 9/9/98), 720 So.2d 1179, 1182-83.

In evaluating alleged violations of the Fourth Amendment, reviewing courts must undertake an objective assessment of an officer's action in light of the facts and circumstances then known to the officer. **State v. Cooper**, 2005-2070, pp. 5-6 (La. App. 1 Cir. 5/5/06), 935 So.2d 194, 198, writ denied, 2006-1314 (La. 11/22/06), 942 So.2d 554. "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that

action." **Scott v. United States**, 436 U.S. 128, 138, 98 S.Ct. 1717, 1723, 56 L.Ed. 2d 168 (1978).

In the present case, the detectives were conducting surveillance of the FEMA trailer located at 2805 Washington Avenue pursuant to a citizen complaint of narcotics trafficking. The actions of three different individuals who entered and exited the trailer within a short amount of time of each other after 10:30 p.m. raised the detectives' suspicions about narcotics activity occurring inside the trailer. With their suspicions heightened, the detectives observed defendant enter and quickly exit the trailer. The detectives decided to stop defendant and question him about his involvement with the trailer.

In brief, defendant makes issue that Detective Bush testified that at the time they asked defendant to stop, they had no information that he had committed a crime, but that when they told him to stop, they were arresting him. A closer reading of the transcript of the motion to suppress hearing reveals this is not an accurate portrayal of Detective Bush's testimony.

Detective Bush clearly testified that when defendant was initially directed to stop, he was not under arrest. Rather, they were merely trying to ascertain defendant's involvement with the trailer because they were suspicious of the trailer. In response to defense counsel's question that "When you told [defendant] to stop, you, in effect, were arresting him weren't you" Detective Bush responded, "I guess so," and added, "Well, if you consider arrest being detaining him, yes." Detective Bush further emphasized that they were attempting to interview defendant to determine his relationship to the trailer.

Further, Detective Lentz testified that defendant was not under arrest when the detective first stepped out of the vehicle because at the time he only wanted to speak with defendant. The concern of both officers was that once defendant began to flee, he immediately appeared to be trying to retrieve something from his right, front pocket, which the officers believed was either a weapon or contraband. Detective Lentz explained that defendant was actually arrested once he was physically apprehended and charged with discarding the crack cocaine while running from them.

Clearly, the detectives had a reasonable basis to conduct an investigatory stop of defendant based on their surveillance of the trailer. Defendant's actions of ignoring the request to stop, then flight, and throwing down the item, which turned out to be crack cocaine, clearly justified the officers' pursuit. Moreover, we note that La. Code Crim. P. art. 215.1(A) provides that a law enforcement officer may stop a person in a public place whom he reasonably suspects is committing, has committed, or is about to commit an offense and may demand of him his name, address, and an explanation of his actions.

In addition, we note that in the instant case, defendant was not "actually stopped" before he abandoned the property, since he ignored Detective Lentz's request to stop riding the bicycle. While the Fourth Amendment protects individuals from actual stops, Article I, section 5 of the Louisiana Constitution also protects individuals from "imminent actual stops." **State v. Tucker**, 626 So.2d 707, 712 (La. 1993). In determining whether an "actual stop" of an individual 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. It is 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, that an "actual stop" of the individual is "imminent." Although non-exhaustive, 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 were 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.

While flight, nervousness, or a startled response to the sight of a police officer is, of itself, insufficient to justify an investigatory stop, it nevertheless may be highly

suspicious and may be considered along with other facts and circumstances in the reasonable cause inquiry. **State v. Belton**, 441 So.2d 1195, 1198 (La. 1983), cert. denied, 466 U.S. 953, 104 S.Ct. 2158, 80 L.Ed.2d 543 (1984).

In determining whether defendant was constitutionally protected because an actual stop of him was imminent, we note that at the outset of the encounter, the detectives were in an unmarked vehicle that rode up alongside defendant as he pedaled away from the suspicious trailer. Defendant was not surrounded by the police when the encounter began, nor did the two detectives have their weapons drawn. The area in which this initial encounter occurred was described by the detectives as a high-crime area, particularly with respect to narcotics trafficking. The detectives' presence in the area was in direct response to a citizen complaint of narcotics trafficking. Considering these factors, we cannot say that at the time of the initial encounter between defendant and the detectives that an actual stop was imminent. The crack cocaine in question was abandoned without any prior unlawful intrusion into defendant's right to be free from governmental interference and was lawfully seized. Accordingly, the trial court properly denied defendant's motion to suppress. This assignment of error is without merit.

OBJECTION TO EXPERT TESTIMONY

In his second assignment of error, defendant argues that the trial court erred in allowing the State's witness, Captain Barney Tyrney, to testify as to whether the amount of drugs in this case was for personal use. Defendant contends that this was direct testimony as to an ultimate fact at issue of whether defendant was guilty of simple possession or of possession with intent to distribute.

Captain Tyrney was accepted by the trial court as an expert in the use, distribution, and value of street drugs. Defense counsel objected to Captain Tyrney's expert qualifications because he had no training in this particular area; however, the trial court overruled the objection.

The transcript reflects the following exchange:

[PROSECUTOR]: The amount that's sitting in front of you in that bag --

[CAPTAIN TYRNEY]: Yes, ma'am.

> [PROSECUTOR]: -- to the jury that might not look like a huge amount of cocaine. To you, in your expert opinion, is that amount for personal use?
>
> [DEFENSE COUNSEL]: Your Honor, I would object. It would vary upon who the possible user is, and unless she would qualify the question as to occasional user, a heavy user --
>
> [BY THE COURT]: Overrule the objection.
>
> [CAPTAIN TYRNEY]: I would say absolutely not. There again, because this amount of dope, it looks like it's about a quarter ounce, which would be seven grams, approximately 7.2 grams, somewhere in that neighborhood. Like I said earlier, if you buy a larger quantity, that would normally sell for roughly about $225 to maybe 250, 275 if you buy it in this quantity.
>
> If you break it off and sell it in $20 rocks like I said, let's hypothetically say they were one tenth of a gram. You get 10 rocks for every gram. If that's seven, you get 70 rocks out of this. At $20 a rock, that's $1,400.

It is well settled that a new basis for objection may not be raised for the first time on appeal. La. Code Crim. P. art. 841. The purpose of an objection is to apprise the trial judge of the specific basis for the complaint, so that the trial judge can intelligently rule on the complaint and take corrective action, when necessary. **State v. Francis**, 345 So.2d 1120, 1122 (La.), cert. denied, 434 U.S. 891, 98 S.Ct. 267, 54 L.Ed.2d 177 (1977).

The objection to Captain Tyrney's testimony made at trial addressed only one ground for objection (how the amount of drugs for personal use differs from person-to-person depending on the severity of the individual's drug habit). The trial court had no opportunity to rule on the grounds now asserted. Accordingly, we find this argument not properly preserved for appellate review.

Moreover, we note that when questioned on the predicate regarding Captain Tyrney's expert qualifications, defense counsel specifically asked this witness if someone with a bad drug habit would buy a large amount of crack (estimated at a $500 a day habit) to use personally. Captain Tyrney responded that if a drug user had a "bad habit" that such an individual would still be purchasing $20-$40 rocks at a time. Captain Tyrney explained that drug users do not want to carry large amounts of drugs on them, because if they get caught, smaller amounts are easier to dispose. Defense

counsel then elicited testimony from Captain Tyrney regarding how a drug dealer would go about distributing the amount of drugs recovered in this case. Through this line of questioning, defense counsel clearly placed the issue of whether this particular amount of crack cocaine was consistent with personal use or intended for distribution. This assignment of error is without merit.

TIME DELAYS FOR POST-CONVICTION RELIEF

In his final assignment of error, defendant argues that the trial court erred in failing to properly advise defendant as to the time delays for filing an application for post-conviction relief. After reviewing the sentencing transcript, we note defendant is correct in that the trial court improperly advised him of the prescriptive period for filing an application for post-conviction relief.

While La. Code Crim. P. art 930.8(C) directs the trial court to inform the defendant of the prescriptive period at the time of sentencing, its failure to do so has no bearing on the sentence and is not grounds to reverse the sentence or remand the case for resentencing, and the article does not provide a remedy for an individual defendant who is not told of the limitations period. Moreover, as the issue has been expressly raised herein, it is obvious that defendant has actual notice and knowledge of the correct limitation period or has the benefit of an attorney to provide him with such notice. Although we have done so in the past under similar circumstances, we decline to remand for resentencing. **State v. LeBoeuf**, 2006-0153, pp. 13-14 (La. App. 1 Cir. 9/15/06), 943 So.2d 1134, 1142-43. Out of an abundance of caution and in the interest of judicial economy, we instead note for the record and advise defendant that Article 930.8 generally provides that no application for post-conviction relief, including applications that seek an out-of-time appeal, shall be considered if it is filed more than two years after the judgment of conviction and sentence have become final under the provisions of La. Code Crim. P. arts. 914 or 922.

CONVICTION, HABITUAL-OFFENDER ADJUDICATION, AND SENTENCE AFFIRMED.