

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 1518

STATE OF LOUISIANA

VERSUS

FLAVIO V. CARDOZA

—
**On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, Louisiana
Docket No. 366,506, Division "J"
Honorable William J. Knight, Judge Presiding**
—

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Flavio V. Cardoza**

BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

Judgment rendered March 23, 2012

RHB
EPK
TMH

PARRO, J.

The defendant, Flavio V. Cardoza, was charged by bill of information with possession of sixty pounds or more but less than two thousand pounds of marijuana, a violation of LSA-R.S. 40:966(F)(1). The defendant pled not guilty. The defendant filed a motion to suppress the evidence and, following a hearing on the matter, the motion was denied. Thereafter, the defendant withdrew his prior plea of not guilty and, at a **Boykin** hearing, entered a **Crosby** plea of guilty to the charge, reserving his right to challenge the trial court's ruling on the motion to suppress. See State v. Crosby, 338 So.2d 584 (La. 1976). The defendant was sentenced to twenty-one years of imprisonment at hard labor. The defendant now appeals, designating one assignment of error. We affirm the conviction and sentence.

FACTS

At the motion to suppress hearing, State Trooper Donald Pierce was the only witness who testified. According to Trooper Pierce, on May 5, 2003, at about 1:35 p.m., he was patrolling eastbound on I-12 in St. Tammany Parish. He observed the defendant, who was driving a Chevy pickup truck with a white camper top, change lanes without signaling. Trooper Pierce effected a traffic stop. The trooper looked through a window that was in the camper top and saw a large white propane tank in the bed of the truck. Set sideways, the hundred-gallon tank took up the whole width of the truck bed. When Trooper Pierce asked the defendant what the tank was, the defendant said he did not know. Trooper Pierce checked the defendant's driver's license and, after a brief discussion about where the defendant was heading, the defendant stated that the tank was filled with propane and was used to run the truck. Trooper Pierce asked the defendant if he could search his truck. The defendant gave both oral and written consent.

Trooper Pierce had the defendant follow him to Troop L so he could have a closer and safer look at the tank. Once at Troop L, two drug-detection dogs alerted to the presence of narcotics in the back of the truck. Trooper Pierce **Mirandized** the

defendant and obtained a search warrant to search the tank. The fire department emptied the tank of any propane that may have been in it. When the gauge was removed from the tank, Trooper Pierce observed a smaller tank inside of the propane tank. The fire department cut off the end of the smaller tank, which contained sixty-nine bundles of marijuana, weighing about one hundred eighty-seven pounds.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues that the trial court erred in denying his motion to suppress. Specifically, the defendant contends that, even assuming Trooper Pierce had reasonable suspicion to stop him, the trooper detained him longer than was reasonably necessary to complete the investigation of the violation.

An officer may temporarily detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot. **United States v. Sokolow**, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989). Louisiana Code of Criminal Procedure article 215.1(D) states, in pertinent part, that in conducting a traffic stop "an officer may not detain a motorist for a period of time longer than reasonably necessary to complete the investigation of the violation and issuance of a citation for the violation, absent reasonable suspicion of additional criminal activity."

If an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop. **United States v. Sharpe**, 470 U.S. 675, 685, 105 S.Ct. 1568, 1575, 84 L.Ed.2d 605 (1985). An extensive detention can invalidate consent to search even after a valid traffic stop. See **State v. Bunnell**, 517 So.2d 439, 441-42 (La. App. 1st Cir. 1987). In determining whether a detention is too lengthy to be considered as an investigatory stop, it is appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly. A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the

court should not indulge in unrealistic second-guessing. **Sharpe**, 470 U.S. at 686, 105 S.Ct. at 1575.

The state shall have the burden of proving the admissibility of any evidence seized without a warrant. LSA-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 reliable 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**, 09-1589 (La. 12/1/09), 25 So.3d 746, 751.

In denying the motion to suppress the evidence, the trial court stated, in pertinent part:

The Court, in reviewing the testimony of Trooper Pierce from yesterday's hearing, notes several things. At the time of the initial traffic stop, the initial question to Mr. Cardoza was what the tank was for. The initial answer was that Mr. Cardoza did not know what the tank was for. There was an indication the vehicle had just been bought, that he had had the vehicle for only about three weeks. Certainly, those articulable grounds for reasonable [suspicion], coupled with the Trooper's knowledge of the use of tanks of this nature to transport drugs, form adequate articulable grounds for [suspicion] to proceed further.

Accordingly, the Court finds that the actions of the Trooper fit within the confines of the Constitutional protections[.]

The defendant does not contest the legality of the traffic stop. In his brief, he states that Trooper Pierce "observed [his] vehicle change lanes without a signal and the initial stop was justified[.]"

Trooper Pierce testified at the motion to suppress hearing that, when he stopped the defendant, he advised him why he was being stopped. The trooper observed a hundred-gallon white propane tank in the back of the truck and asked the defendant about the tank. The defendant replied that he did not know what the tank was. The trooper asked the defendant for his driver's license and inquired about where the defendant was coming from and going. The trooper conducted a criminal records check on the defendant to determine if the truck was stolen, which it was not. The trooper learned that the defendant had had the truck for about three weeks. Trooper Pierce

then took a closer look at the tank. At this point, the defendant told the trooper that the tank was used to run the truck. Trooper Pierce asked for the paperwork on the truck and learned, upon viewing it, that the only accessories listed on the bill of sale were the V-8 engine and the camper top. The trooper asked the defendant for consent to search the truck, and the defendant gave him both verbal and written consent. Trooper Pierce also testified that he was very familiar with propane tanks being used for other purposes. He stated that he had been "trained on people transporting illegal things in propane type tanks."

Given the lawfulness of the initial stop, the reasonableness of the escalating encounter between the defendant and Trooper Pierce hinged on whether the actions undertaken by Trooper Pierce following the stop were reasonably responsive to the circumstances justifying the stop in the first place, as augmented by information gleaned by the trooper during the stop. See **State v. Miller**, 00-1657 (La. 10/26/01), 798 So.2d 947, 949-50 (per curiam). The defendant's inconsistent statements in not knowing and then, shortly thereafter, knowing what the tank was for, coupled with the bill of sale not listing the tank as part of the truck, and with Trooper Pierce's experience with tanks being used to carry contraband, led to a shift in Trooper Pierce's focus that was neither unusual nor impermissible. See **Miller**, 798 So.2d at 950. The traffic stop occurred at 1:35 p.m. The defendant signed the consent-to-search form at about 1:50 p.m. Thus, only fifteen minutes after the initial stop, the defendant granted consent to search his truck. During this brief time, Trooper Pierce had the right to conduct a routine license check and to engage respondent in conversation as he did so. See **State v. Lopez**, 00-0562 (La. 10/30/00), 772 So.2d 90, 92-93 (per curiam). Trooper Pierce diligently pursued his investigation, and the brief duration of the traffic stop and consensual search was reasonable under the Fourth Amendment. See **Miller**, 798 So.2d at 949-51 (where a fifty-three-minute investigatory stop was found to be reasonable). Accordingly, we find no merit to the defendant's argument that he was unlawfully detained.

Regarding the search of the truck, the defendant, as noted, gave the trooper both oral and written consent to search the vehicle. Trooper Pierce did not need any degree of reasonable suspicion to ask for, and receive, the defendant's consent to search the vehicle. See **State v. Strange**, 04-0273 (La. 5/14/04), 876 So.2d 39, 42 (per curiam). A search that is conducted pursuant to consent is one of the specifically established exceptions to the requirements of both a warrant and probable cause. The validity of such consent is dependent upon it having been given voluntarily, free of duress or coercion, either express or implied. See **State v. Montgomery**, 432 So.2d 340, 343 (La. App. 1st Cir. 1983). See also **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). Oral consent is valid. **State v. Ossey**, 446 So.2d 280, 287 n.6 (La.), cert. denied, 469 U.S. 916, 105 S.Ct. 293, 83 L.Ed.2d 228 (1984). Trooper Pierce's testimony at the motion to suppress hearing indicates the defendant's consent was neither forced nor coerced, and was clearly given voluntarily. Accordingly, the defendant's voluntary consent rendered the search and seizure of the marijuana constitutionally valid. See **Montgomery**, 432 So.2d at 343.

We find no legal error or abuse of discretion in the trial court's denial of the defendant's motion to suppress. Accordingly, this assignment of error is without merit.

SENTENCING ERROR

Under Louisiana Code of Criminal Procedure article 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record, we have found a sentencing error. See **State v. Price**, 05-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112 (en banc), writ denied, 07-0130 (La. 2/22/08), 976 So.2d 1277.

In addition to a term of imprisonment at hard labor for not less than five nor more than thirty years, any person who knowingly or intentionally possesses sixty pounds or more but less than two thousand pounds of marijuana shall pay a fine of not less than fifty thousand dollars nor more than one hundred thousand dollars. See LSA-

R.S. 40:966(F)(1). The sentencing transcript indicates the trial court failed to impose the mandatory fine.¹ Accordingly, the defendant's sentence, which did not include the fine, is illegally lenient. However, since the sentence is not inherently prejudicial to the defendant, and neither the state nor the defendant has raised this sentencing issue on appeal, we decline to correct this error. See Price, 952 So.2d at 123-25.

CONVICTION AND SENTENCE AFFIRMED.

¹ The minutes also reflect no fine was imposed.