NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 0142

STATE OF LOUISIANA

VERSUS

JAMES E. CHATMAN

Judgment Rendered: June 8, 2007

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On Appeal from the 22nd Judicial District Court
In and For the Parish of Washington
Trial Court No. 05 CR3 94468, Division "A"

Honorable Raymond S. Childress, Judge Presiding

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BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

HUGHES, J.

Defendant James Chatman was charged by bill of information with possession of a Schedule II controlled dangerous substance (cocaine), a violation of LSA-R.S. 40:967(C) (Count One), and possession of drug paraphernalia, a violation of LSA-R.S. 40:1033 (Count Two).[1] Initially, defendant pled not guilty and filed a motion to suppress evidence. After a hearing, the trial court denied defendant's motion to suppress. The defendant withdrew his original plea and entered a plea of guilty to both charges, reserving his right to appeal the trial court's denial of the motion to suppress. See **State v. Crosby**, 338 So.2d 584, 588 (La. 1976).

On Count One, the trial court sentenced defendant to five years at hard labor, and a concurrent six months in parish jail on Count Two. The trial court suspended both sentences and placed defendant on probation with special conditions.

Because we find the trial court erred in denying defendant's motion to suppress evidence, we vacate defendant's convictions and sentences and remand this matter for further proceedings.

FACTS

On February 1, 2006 at approximately midnight, Officer Craig James of the Franklinton Police Department was on criminal patrol in a marked police unit. Officer James came across defendant walking south on T. W. Barker Drive near the intersection with Desmare Street. Due to the late hour

[1] The substance of LSA-R.S. 40:1033 has been redesignated as LSA-R.S. 40:1023 pursuant to 2006 La. Acts, No. 676, § 3, which provided: "The Louisiana State Law Institute is hereby directed to redesignate and incorporate Parts X-A, X-B, X-C, and X-D of Chapter 4 of Title 40 of the Louisiana Revised Statutes of 1950."

and because the area was a high crime and high drug-traffic area, Officer James stopped his unit, exited, and asked defendant for identification. Officer James questioned defendant about where he was going and where he had been.

According to Officer James, defendant placed both hands in his pockets. When Officer James asked defendant to remove his hands, defendant became nervous. For "officer safety," Officer James asked defendant to place both of his hands on the hood of the police unit.

On cross-examination, Officer James admitted he remembered that defendant was carrying some videos in one of his hands. Officer James testified that when he asked defendant for identification, defendant reached both hands into his pockets. Defense counsel then asked Officer James, "So, when [defendant] reached in to his pocket to give you ID, you asked him to step up to the car so you could pat him down; is that correct?" Officer James answered, "Yes, sir." Officer James also stated on cross-examination that he did not observe any weapons on defendant, nor did he observe any bulging that could have resembled a weapon.

Officer James then conducted a pat down of the outer layer of defendant's clothing to check for weapons. During the pat down, Officer James felt a cylinder shaped object about four to five inches long in defendant's pocket.[2] Based on his experience, Officer James believed this to be a device commonly associated with using narcotics, a crack pipe.

On cross-examination, defense counsel posed the following question to Officer James:

[2] The exact pocket in which the crack pipe had been concealed was not identified at the hearing.

[PROSECUTOR]
A. ... Other than the fact that it's a citizen, in a poor area of town, with videos, reaching in to his pocket to get an ID, was there any reason that you were afraid of him at that point?

[OFFICER JAMES]
Q. No, sir. Other than the fact that he may have had a weapon on him.

Officer James removed the object from defendant's pocket and confirmed that it was, in fact, a crack pipe. Placing defendant under arrest, Officer James then conducted a search incidental to arrest. During this search, a rock of suspected crack cocaine was discovered in a plastic bag in the brim of defendant's hat.

MOTION TO SUPPRESS EVIDENCE

In his sole assignment of error, defendant contends the trial court erred in denying his motion to suppress physical evidence. Specifically, defendant argues that the investigatory stop was made without any articulable suspicion.

In determining the validity of the seizure of the drug paraphernalia, the two actions by the police that must be examined are the initial detention of defendant and the subsequent frisk. If either action was not justified, the evidence obtained is inadmissible. **State v. Schuler**, 457 So.2d 1240, 1242 (La. App. 1 Cir.), writ denied, 462 So.2d 191 (La. 1984).

A threshold issue is to determine whether the initial encounter between the police and defendant constituted a seizure within the meaning of the Fourth Amendment. If there is no seizure, the Fourth Amendment is not implicated. If there is a seizure, however, such an investigatory stop must be

based on reasonable suspicion that a person is committing, has committed, or is about to commit an offense. See LSA-C.Cr.P. art. 215.1(A).

The Fourth Amendment protects citizens against unreasonable searches and seizures, but not every encounter between a citizen and a policeman involves a seizure. Whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person. As long as a reasonable person would feel free to disregard the encounter and walk away, there has been no seizure. Furthermore, if a citizen after being approached by law enforcement officers consents to stop and answer questions, there is no Fourth Amendment violation. If there is no detention, there is no seizure within the meaning of the Fourth Amendment, and no constitutional rights have been infringed. **State v. Oliver**, 457 So.2d 1269, 1271 (La. App. 1 Cir. 1984) (citations omitted).

In the present case, Officer James testified that he observed defendant walking on T. W. Barker Drive near the intersection of Desmare Street. Officer James testified on cross-examination that he pulled his unit up beside defendant and a "little in front" of defendant, then exited the unit. Officer James then asked defendant where he was going and for identification. Officer James admitted on direct testimony that he intended to determine defendant's identity. Moreover, Officer James's testimony on cross-examination revealed that he directed defendant to place his hands on the police unit after defendant reached into his pockets to produce the very identification Officer James had requested. Whether defendant actually produced any identification was never revealed at the hearing on the motion

to suppress. Moreover, Officer James could not remember if defendant was carrying videos at the time or what he did with the videos when asked to produce identification.[3]

Based on this testimony, we find the Fourth Amendment is implicated in this situation. As the Louisiana Supreme Court has held, an individual is seized within the meaning of the Fourth Amendment when he submits to a police show of authority. See **State v. Tucker**, 626 So.2d 707, 712 (La. 1993). In the present case, Officer James's action requesting identification then directing defendant to place his hands on the police unit when defendant reached into his pockets in response to his request, indicate a show of authority to which defendant clearly submitted. We cannot say under these circumstances, a reasonable person would have felt free to walk away from such an encounter.

Although LSA-C.Cr.P. art 215.1 permits an officer to stop a citizen in a public place and question him, the right to make such an investigatory stop must be based upon reasonable suspicion that the individual has committed, or is about to commit, an offense. If an officer stops a person pursuant to Article 215.1, the officer may conduct a limited pat down frisk for weapons if he reasonably believes that he is in danger or that the suspect is armed.

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[3] On cross-examination, Officer James initially indicated he did not recall whether defendant was carrying videos when he was stopped, but thereafter the following colloquy between defense counsel and the officer occurred:

Q. But you do ... recall some videos; is that right?
A. Yes, sir.
Q. But that's not in your report, is it?
A. No, sir.

* * *

Q. So, ... if he had videos in his hand and ... you asked him for an ID, then he would have to reach in to his pocket presumably to get the ID; isn't that true?
A. Yes, sir. He reached both hands in to his pocket [sic].
Q. So did he hand you the videos then?
A. No, sir.
Q. Well, then he must - - how did he hold the videos and reach both hands in to his pocket?
A. I don't remember.
Q. Is it possible that he only reached with one hand in his pocket?
A. That's possible.

LSA-C.Cr.P. art. 215.1(B). 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. Temple**, 2002-1895, p. 4 (La. 9/9/03), 854 So.2d 856, 859.

In making a brief investigatory stop on less than probable cause to arrest, the police must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. The police must articulate something more than an inchoate and unparticularized suspicion or hunch. The level of suspicion, however, need not rise to the probable cause required for a lawful arrest. **State v. Temple**, 2002-1895 at p. 4, 854 So.2d at 859-60.

In determining whether the police possessed the requisite minimal level of objective justification for an investigatory stop based on reasonable suspicion of criminal activity, reviewing courts must look at the totality of the circumstances of each case, a process that allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person. **State v. Temple**, 2002-1895 at p. 5, 854 So.2d at 860.

In reviewing the totality of circumstances, the reputation of an area is an articulable fact upon which a police officer may legitimately rely and is therefore relevant in the determination of reasonable suspicion. The assessment by a reviewing court of the cumulative information known to the officers avoids a divide-and-conquer analysis by which the whole becomes less than the sum of its parts because each circumstance examined individually may appear readily susceptible to an innocent explanation. **State v. Temple**, 2002-1895 at p. 5, 854 So.2d at 860.

In the instant case, Officer James was the only witness to testify at the motion to suppress hearing. According to Officer James's testimony, he decided to stop and question defendant because of the late hour and defendant's presence in a high-crime area. We note that it has long been held that the mere fact that a police officer addresses or approaches a citizen to converse with him does not constitute a forcible stop. The citizen has a legal right to walk away or ignore the officer. **State v. Neyrey**, 383 So.2d 1222, 1224 (La. 1979).

Officer James testified that he asked defendant to place his hands on the police unit because during questioning, defendant placed both hands in his pockets, then became nervous after Officer James directed him to remove his hands. However, Officer James later admitted defendant reached into his pockets after being directed to produce identification.

In reviewing the totality of the circumstances, we find there was no reasonable suspicion to justify this investigatory stop. The stop was not based on any reasonable belief by Officer James, justified by some conduct on the part of defendant, that he was, or was about to be, engaged in criminal conduct. See **State v. Smith**, 347 So.2d 1127, 1129 (La. 1977). Officer James's testimony indicates that it was only after defendant attempted to comply with the request to produce identification that he was ordered to place his hands on the police unit.

On cross-examination, Officer James acknowledged that the area where defendant was stopped was a predominantly poor area of town, where law abiding citizens also lived. Officer James conceded that it was common for innocent citizens to act nervous around the police, particularly when that person is a poor person in a high-crime area.

In response to defense counsel's specific question of why he felt defendant was a suspect when Officer James saw him, Officer James replied, "Like I said, due to the high crime area, I got out and was going to question him. Ask him for an ID." The mere presence of a person walking along a street at night in a high-crime area, with nothing more, will not amount to a reasonable suspicion that such person has been engaged in, or was about to engage in, criminal activity.[4] See **State v. Fleming**, 457 So.2d 1232, 1234-35 (La. App. 1 Cir.), writ denied, 462 So.2d 191 (La. 1984). See also **State v. Temple**, 2002-1895 at pp. 5-7, 854 So.2d at 860-61.

As the Louisiana Supreme Court stated in **State v. Temple**, 2002-1895 at p. 7, 854 So.2d at 861, reasonable suspicion for a stop is more than looking nervous and presence in a high crime area (sitting on a porch). Moreover, the court reminded that, "We must presume that citizens are law abiding, even those in public housing developments and other targeted high crime areas." 2002-1895 at p. 7, 854 So.2d at 861.

In the present case, the State failed to produce any testimony that would indicate a basis for a belief that defendant was engaged, or about to be engaged, in any criminal activity. Rather, what the State proved was that defendant was walking along a street with some videos when he was approached by the police, then reached into one or perhaps both of his pockets when he attempted to comply with the police request for identification. These circumstances do not amount to reasonable suspicion that a crime had been, or was about to have been committed on the part of defendant.

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[4] Nothing in Officer James's testimony indicated any action on defendant's part (when he decided to stop defendant) that was suggestive of potentially criminal conduct, such as suspicious behavior, furtive glances, alighting from a house or building, concealed or fidgeting hands, flight upon seeing a police officer, intoxication, or inappropriate clothing.

While a police officer is never justified in conducting a pat down for weapons unless the original detention itself was justified, a lawful detention for questioning does not necessarily give the officer authority to conduct a pat down for weapons. **State v. Hunter**, 375 So.2d 99, 101 (La. 1979). Thus, since the original detention of the defendant was not justified, the subsequent pat down of the defendant was not justified.

Accordingly, the State failed to establish reasonable grounds for the investigatory stop; thus the evidence seized from defendant must be suppressed. The trial court erred in denying the motion to suppress and we therefore reverse the denial of defendant's motion to suppress. The conviction and sentence are vacated and the case is remanded to the trial court for further proceedings.

RULING DENYING MOTION TO SUPPRESS REVERSED; CONVICTION AND SENTENCE VACATED; CASE REMANDED.