NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 KA 1971

STATE OF LOUISIANA

VERSUS

JASON VANBUSKIRK

Judgment Rendered: March 26, 2008.

* * * * *

On Appeal from the
19th Judicial District Court,
in and for the Parish of East Baton Rouge
State of Louisiana
District Court No. 01-05-0391

The Honorable Todd Hernandez, Judge Presiding

* * * * *

Doug Moreau
District Attorney
Baton Rouge, La.
Will Morris
Dylan C. Alge
Assistant District Attorneys

Counsel for Plaintiff/Appellee,
State of Louisiana

Glynn J. Delatte, Jr.
Baton Rouge, La.

Counsel for Defendant/Appellant,
Jason Vanbuskirk

* * * * *

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

CARTER, C.J.

The defendant, Jason Vanbuskirk, was charged by bill of information with operating a vehicle while intoxicated (third offense DWI), in violation of La. R.S. 14:98. The defendant entered a plea of not guilty. The defendant filed a motion to suppress, which the trial court denied. The defendant waived his right to a jury trial, and following a bench trial, the defendant was found guilty as charged.

The trial court sentenced the defendant to three years imprisonment at hard labor. The trial court suspended all but sixty days of the sentence and placed the defendant on active, supervised probation for a period of five years upon his release from imprisonment. In addition to general conditions of probation, the trial court ordered the defendant to pay a fine of two thousand dollars plus court costs and fees; undergo substance abuse evaluation; undergo inpatient substance abuse treatment for a period of four to six weeks; and to serve six months supervised, monitored home incarceration upon completion of the substance abuse treatment. The trial court stated that during the period of probation the defendant is prohibited from operating any vehicle that is not equipped with an ignition interlocking device. The defendant was ordered to pay costs associated with conditions of probation; complete a driver improvement program; perform community service; attend three victim-impact programs and Alcoholics Anonymous meetings; maintain full-time and/or gainful employment; remain arrest, conviction, alcohol, and illegal drug free; submit to random drug and alcohol testing; and to report to the office of probation and parole within forty-eight hours of his release from custody.

The defendant now appeals, arguing that the trial court erred in finding a reasonable articulable suspicion to justify the stop of the defendant, probable cause to justify the arrest of the defendant, sufficient evidence to convict the defendant, and in sentencing the defendant to a greater punishment than statutorily provided for at the time of the offense. For the following reasons, we affirm the conviction, vacate the sentence, and remand for resentencing.

STATEMENT OF FACTS

While on patrol in Baton Rouge during the early morning hours (after midnight but before 2:00 a.m.) of October 10, 2004, Sergeant Christopher Holmes of the Department of Public Safety and Corrections (DPS) observed the defendant and his girlfriend engaging in a loud verbal confrontation on the corner of Florida Boulevard and Fourth Street. According to Sergeant Holmes, the defendant was waving his arms around and using explicit language. Sergeant Holmes pulled over, exited his unit, and approached the subjects. As the defendant walked away, stumbling and swaying, Sergeant Holmes addressed the female subject. Sergeant Holmes then walked toward the defendant and instructed him not to drive. The defendant made incoherent statements with slurred speech and continued to stumble. Once the defendant refused to allow the female subject to drive him home, Sergeant Holmes told the defendant to "sleep it off" in the area or in his car, strongly advising him not to drive.

Immediately after the encounter, Sergeant Holmes relayed his observations and exchange with the defendant to other DPS officers, including Officer Gailand Freeman. Sergeant Holmes pointed the defendant

out to Officer Freeman and advised him of the location of the defendant's vehicle. Near 2:00 a.m., approximately forty-five minutes after speaking to Sergeant Holmes, Officer Freeman had contact with the defendant. Officer Freeman was traveling westbound on Florida Boulevard when he observed the defendant standing on the side of Florida Boulevard and Fourth Street speaking to a female. Officer Freeman observed the defendant stumble as he walked toward his vehicle parked on the corner. As the defendant's headlights were activated, Officer Freeman positioned his unit in front of the defendant's vehicle. The police lights on Officer Freeman's unit were activated. The defendant maneuvered his vehicle around the police unit and proceeded east on Florida Boulevard. With his police lights and siren activated, Officer Freeman pursued the defendant for approximately six blocks. As the defendant approached the interstate, he came to a stop behind other vehicles that stopped to observe a red traffic light. As the traffic light changed, Officer Freeman positioned his vehicle in front of the defendant's vehicle.

Officer Freeman and the defendant exited their vehicles. As Officer Freeman approached the defendant, he detected the scent of an alcoholic beverage. Officer Freeman informed the defendant that he was being placed under arrest for flight from an officer. The defendant resisted as Officer Freeman attempted to handcuff him. Officer Freeman performed an "arm/bar takedown" to physically restrain the defendant and transported the defendant to the DPS police office. The defendant was asked and refused to submit to field sobriety and breath testing.

ASSIGNMENTS OF ERROR NUMBERS ONE, TWO, AND THREE

In a combined argument, the defendant contends that there was no reasonable suspicion to justify Officer Freeman's attempt to stop him, that there was no probable cause to justify his arrest, and that there was insufficient evidence to support his conviction. As to his first assignment of error, the defendant argues that the facts known by Officer Freeman did not give rise to a reasonable, articulable suspicion to justify the stop. As to his second assignment of error, the defendant argues that the facts known to Officer Freeman were insufficient to give rise to probable cause for arrest. The defendant contends that there is no evidence that he consumed alcohol during the time period between Sergeant Holmes's observations and the encounter with Officer Freeman. The defendant further contends that Officer Freeman was not in the process of an arrest when he attempted to stop the defendant. The defendant argues that no crime had been committed, no crime was being committed, and there was no reason to believe that a crime was going to be committed. The defendant also argues that Officer Freeman never gave him notice that he was under arrest at the time of the Fourth Street encounter; thus there was no resisting by flight. The defendant further argues that he had the right to resist an unlawful arrest. The defendant notes that Sergeant Holmes provided inconsistent testimony as to the time of his encounter with the defendant and as to whether he ever smelled alcohol on the defendant's breath. The defendant concludes that Sergeant Holmes's testimony was not credible as a whole. The defendant further concludes that, even if Sergeant Holmes's testimony is accepted,

there was no justification for the stop and subsequent arrest. The defendant contends that the trial court erred in denying the motion to suppress.

The Fourth Amendment to the United States Constitution and Article I, § 5, of the Louisiana Constitution protect persons against unreasonable searches and seizures. However, the right of law enforcement officers to stop and interrogate one reasonably suspected of criminal conduct is recognized by La. Code Crim. P. art. 215.1, as well as by state and federal jurisprudence. See **State v. Andrishok**, 434 So.2d 389, 391 (La. 1983); **Terry v. Ohio**, 392 U.S. 1, 22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968).

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. Caples**, 2005-2517 (La. App. 1 Cir. 6/9/06), 938 So.2d 147, 154, writ denied, 2006-2466 (La. 4/27/07), 955 So.2d 684.

At the second tier, the investigatory stop recognized by the United States Supreme Court in **Terry v. Ohio**, 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. Article 215.1A provides that an officer's reasonable suspicion of crime allows a limited investigation of a person. **Caples**, 938 So.2d at 154.

An individual has not been "actually stopped" unless he submits to a police show of authority or he is physically contacted by the police. **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. **Id.** This degree of certainty may be ascertained by examining the extent of police force employed in attempting the stop. **Id.** 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." **Id.** 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 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 712-713.

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(3) uses the phrase "reasonable cause." **Caples**, 938 So.2d at 154. 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. **Id.**

The Louisiana Supreme Court has recognized that in regard to brief investigatory stops, the level of suspicion required to justify the stop need only rise to the level of some minimal level of objective justification. **Caples**, 938 So.2d at 154. In determining whether sufficient suspicion existed for the stop, a reviewing court must consider the totality of the circumstances, giving deference to the inferences and deductions of a trained police officer that might well elude an untrained person, while also weighing the circumstances known to the police, not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement. **Caples**, 938 So.2d at 154-155.

During the hearing on the motion to suppress, Sergeant Holmes initially testified that his encounter with the defendant occurred at approximately 2:00 a.m. "or just before." Sergeant Holmes recalled that the downtown bars were still open at the time of the encounter. The defendant and his girlfriend were engaged in a loud verbal confrontation. The defendant's girlfriend was attempting to take the defendant's car key, as she did not want him to drive. When asked how close his contact with the defendant was, Sergeant Holmes stated that he came within two feet of the defendant. Sergeant Holmes noted that the defendant had a strong scent of alcohol, slurred speech, and staggered and swayed.

During cross-examination, the defense attorney questioned Sergeant Holmes regarding conflicts between his testimony on direct examination and statements made previously during a deposition. During the deposition, Sergeant Holmes stated that he only came within six to eight feet of the defendant during the initial encounter and that he could not smell alcohol on

the defendant during the encounter. During the hearing, Sergeant Holmes explained that he smelled alcohol on the defendant when he came to the scene of the defendant's arrest, if not during his initial encounter with the defendant. During the deposition, Sergeant Holmes speculated as to the time of the initial encounter with the defendant as follows: "This was, just a guess, somewhere around midnight." During the deposition, Sergeant Holmes consistently stated that the defendant's speech was very slurred, that the defendant was incoherent, and that he staggered profusely.

During the 2:00 a.m. encounter with the defendant, Officer Freeman observed the defendant as he stumbled to his vehicle. While Officer Freeman activated his warning lights and positioned his police unit in front of the defendant's vehicle, the defendant went around Officer Freeman's unit and drove out into the traffic. With police sirens and lights activated, Officer Freeman pursued the defendant for approximately six blocks. The defendant had to stop his vehicle when motorists in front of him stopped to observe a red traffic light. As the light changed, Officer Freeman was able to position his unit in front of the defendant's vehicle and another officer positioned his unit in the rear of the defendant's vehicle. Officer Freeman exited his unit and the defendant exited his vehicle. The defendant lost his balance as he exited his vehicle. After physically restraining the defendant, Officer Freeman was able to handcuff and arrest the defendant. As he arrested the defendant, Officer Freeman noted the strong odor of an alcoholic beverage. Officer Freeman testified that he placed the defendant under arrest for flight from an officer. Officer Freeman further testified that the information relayed by his supervisor, Sergeant Holmes, formed a basis

for the resisted stop of the defendant. Officer Freeman also reiterated his personal observations of the defendant stumbling to his vehicle.

In denying the motion to suppress, the trial court found that the information from Sergeant Holmes, coupled with Officer Freeman's personal observations of the defendant's behavior prior to entering his vehicle, formed reasonable suspicion for the stop. The defendant filed an application with this court for supervisory review of the trial court's denial of the motion to suppress. This court denied the defendant's writ application. **State v. Vanbuskirk**, 2006-2499 (La. App. 1 Cir. 1/17/07) (unpublished). The trial testimony of Officer Freeman and Sergeant Holmes was wholly consistent with the testimony presented during the motion to suppress hearing. [1]

According to La. R.S. 14:98A, in pertinent part, the crime of operating a vehicle while intoxicated (DWI) is the operating of any motor vehicle when the operator is under the influence of alcoholic beverages. Minimal force was used in the attempt to stop the defendant. Arguably, an actual stop of the defendant was not imminent. Nonetheless, Officer Freeman was justified in attempting to stop the defendant, as there were sufficient facts to support a reasonable suspicion that the defendant was under the influence of alcoholic beverages and/or drugs and set out to operate his vehicle in such a condition. Officer Freeman had been advised by Sergeant Holmes that the defendant was intoxicated. The defendant's girlfriend indicated to Sergeant Holmes that the defendant was intoxicated and should not drive his car. Although Sergeant Holmes admitted that he was not close enough to the

---

[1] In determining whether the ruling on defendant's motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may consider all pertinent evidence given at the trial of the case. **State v. Chopin**, 372 So.2d 1222, 1223 n. 2 (La. 1979).

defendant to smell alcohol during the initial encounter, the remainder of his testimony supports a finding that the defendant was under the influence. He testified consistently at the deposition, the motion to suppress hearing, and the trial that the defendant staggered and made no sense when he spoke.

According to La. R.S. 14:108.1A, "[n]o driver of a motor vehicle shall intentionally refuse to bring a vehicle to a stop knowing that he has been given a visual and audible signal to stop by a police officer when the officer has reasonable grounds to believe that the driver has committed an offense."[2] Once Officer Freeman attempted to stop the defendant, the defendant maneuvered into the traffic and refused to stop his car. After the defendant was forced to bring his vehicle to a stop, the defendant and Officer Freeman exited their respective vehicles. The defendant stumbled again as he exited his vehicle, and Officer Freeman immediately detected the odor of an alcoholic beverage. Officer Freeman had probable cause to arrest the defendant for flight from an officer and DWI. We find that the trial court did not abuse its discretion in denying the motion to suppress. Assignments of error numbers one and two are without merit.

As to his third assignment of error (a challenge to the sufficiency of the evidence), the defendant argues that the officers involved in the instant case were not highly trained in the DWI field. The defendant notes that Officer Freeman pursued the defendant for approximately six blocks and did not witness any suspicious activity. The defendant argues that any prior suspicions were unfounded based on the defendant's normal driving abilities. The defendant contends that behavioral manifestations such as

---

[2] There was no testimony as to whether Officer Freeman's vehicle was marked. However, it was interchangeably referred to in the record as a patrol car or police unit.

bloodshot eyes and an obvious odor of alcohol on his breath were absent. Finally, the defendant concludes that Officer Freeman made unsubstantiated assumptions based on information he received from Sergeant Holmes.

The constitutional standard for testing the sufficiency of the evidence, as enunciated in **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), requires that a conviction be based on proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find the essential elements of the crime beyond a reasonable doubt. In conducting this review, we must also be expressly mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove," every reasonable hypothesis of innocence is excluded. La. R.S. 15:438; **State v. Wright**, 98-0601 (La. App. 1 Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, 2000-0895 (La. 11/17/00), 773 So.2d 732.

In order to convict an accused of driving while intoxicated, the State need only prove that the defendant was operating a vehicle and that he was under the influence of alcohol. **State v. Pitre**, 532 So.2d 424, 428 (La. App. 1st Cir. 1988), writ denied, 538 So.2d 590 (La. 1989).

Intoxication, with its attendant behavioral manifestations, is an observable condition about which a witness may testify. **Pitre**, 532 So.2d at 428. What behavioral manifestations are sufficient to support a charge of driving while intoxicated must be determined on a case-by-case basis. **Id.** Some behavioral manifestations, independent of any scientific tests, are sufficient to support a charge of driving while intoxicated. **Id.**

In his brief to this court, the defendant does not contest the fact that he was actually operating a vehicle at the time of his arrest. Instead, he argues that the State failed to prove that he was driving under the influence of alcohol. The defendant argues that the testimony of the officers involved was insufficient to prove beyond a reasonable doubt that he was under the influence of alcohol. We disagree.

At the outset, we note that the officers were not questioned upon direct or cross-examination as to their experience or level of DWI training at the time of the offense. Based on Sergeant Holmes's trial testimony, consistent with his testimony at the hearing on the motion to suppress, the defendant was intoxicated at the time of their encounter. Although Sergeant Holmes was uncertain of the exact time of the encounter, he consistently stated that it took place between midnight and 2:00 a.m. The defendant was stumbling profusely and used incoherent, slurred speech. Based on his personal observations and statements by the defendant's girlfriend, Sergeant Holmes was reasonable in concluding that the defendant was intoxicated and should not drive. This information was relayed to Officer Freeman prior to his later contact with the defendant at bar closing time. Officer Freeman observed the defendant stumble to his vehicle. After Officer Freeman arrested the defendant, when requested to do so, the defendant refused field sobriety and breath testing. The defendant had slurred speech at the time. Defense witness Dr. Gary J. McGarity, a clinical pharmacist, testified that because of dilation of blood vessels, consumption of alcohol *could* cause a person's eyes or nose to appear red. He did not state the absence of such a manifestation was an indication of sobriety.

After a careful review of the record, we find that the evidence supports the trial court's determination of guilt. We are convinced that a rational trier of fact, viewing all of the evidence as favorable to the prosecution as any rational fact finder can, could have concluded that the State proved, beyond a reasonable doubt and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of the instant DWI offense. The defendant does not contest the evidence of the predicate DWI convictions. Due to the foregoing conclusions, the third assignment of error also lacks merit.

ASSIGNMENT OF ERROR NUMBER FOUR

In the fourth and final assignment of error, the defendant notes that he was sentenced on July 2, 2007. The defendant also notes that at the time of the offense, the applicable sentencing provision set forth that persons convicted of third offense DWI could be sentenced to incarceration for up to five years but required all of that time to be suspended, except for thirty days. The defendant further notes that the law in effect at the time of the sentencing gave the judge discretion as to what portion of the sentence (in excess of the thirty days that must be served without benefit of probation, parole, or suspension) may be suspended. The defendant argues that the imposition of a harsher sentence, in accordance with the law in effect at the time of sentencing, than that allowed by statute at the time of the offense, constitutes an *ex post facto* violation.

We find merit in this assignment of error. The instant offense occurred on or about October 10, 2004, and the defendant was convicted on February 9, 2007. The trial court applied the sentencing law in effect on the

date of the defendant's conviction, La. R.S. 14:98 as amended by 2005 La. Acts No. 497, in suspending all but sixty days of the defendant's three-year, hard labor sentence, as opposed to the law in effect at the time defendant committed the offense.

As recently noted by the Louisiana Supreme Court in **State v. Hyde**, 2007-1314 (La. 11/21/07), 968 So.2d 726, 726 (per curiam), a strong presumption exists in Louisiana law that the statute in effect at the time of the offense governs the applicable punishment for the crime. In **Hyde**, the Supreme Court noted the exception to the rule made in **State v. Mayeux**, 2001-3195 (La. 6/21/02), 820 So.2d 526, which held that the ameliorative changes made by 2001 La. Acts No. 1163 in the law of sentencing for third and fourth offense DWI convictions have limited retroactive application to crimes committed before its effective date when the defendant is convicted after that date. In **Mayeux**, the Supreme Court took into account several considerations, including the specific language of the 2001 amendments to La. R.S. 14:98, the intent of the legislature, and the social and public policy goals sought to be served ("to embrace treatment measures in preference to incarceration"). **Mayeux**, 820 So.2d at 529.

However, in **Hyde**, the Supreme Court held that **Mayeux** has no application to cases in which the changes in the sentencing law are not ameliorative but increase the severity of sentence by altering the terms and conditions under which the defendant must serve the penalty. **Hyde**, 968 So.2d at 726. The Supreme Court further held that retroactive application of 2005 La. Acts No. 497 to crimes committed before its effective date would raise significant questions under the *ex post facto* clauses of the federal and

state constitutions that may be avoided by application of the general rule, rather than its single narrow exception in **Mayeux**, that the statute in effect at the time of commission of the crime governs the applicable sentence. **Hyde**, 968 So.2d at 726; see **State ex rel. Olivieri v. State**, 2000-0172 (La. 2/21/01), 779 So.2d 735, 744, cert. denied, 533 U.S. 936, 121 S.Ct. 2566, 150 L.Ed.2d 730 (2001) (adopting federal standard for determining ex post facto applications of the law, i.e., "whether the change alters the definition of criminal conduct or increases the penalty").

As a third offender, the defendant was subject to imprisonment with or without hard labor for not less than one year nor more than five years and a fine of two thousand dollars. Thirty days of the sentence of imprisonment shall be imposed without benefit of probation, parole, or suspension of sentence. In accordance with the version of La. R.S. 14:98D(1)(a) in effect at the time of the commission of the instant offense, the remainder of the sentence of imprisonment shall be suspended and the offender shall be placed on supervised probation. By contrast, in accordance with the 2005 amendment to La. R.S. 14:98D(1)(a), the court, in its discretion, may suspend all or any part of the remainder of the sentence of imprisonment.

In imposing sixty days without benefit of suspension, the trial court applied 2005 La. Acts No. 497 retroactively. According to the Supreme Court's holding in **Hyde**, this was a sentencing error. The trial court should have applied the version of La. R.S. 14:98 in effect at the time of the commission of the instant offense. The trial court further erred in placing the defendant on active, supervised probation for a period of five years, upon his release from imprisonment. In accordance with La. R.S. 14:98D(1)(a),

the term of supervised probation shall be equal to the remainder or non-suspended portion of the sentence. In this case, the defendant should have been placed on supervised probation for the remainder of the three-year imprisonment term, to commence on the day after his release from the thirty-day term mandated to be served without suspension. Thus, the sentence imposed by the trial court also is illegally severe as to the term of probation. In the instant case, correction of the sentence lies within the trial court's sentencing discretion; therefore, correction must be by remand for resentencing, rather than by an amendment by this court. See **State v. Haynes**, 2004-1893 (La. 12/10/04), 889 So.2d 224 (per curiam). Accordingly, we vacate the sentence imposed and remand this matter to the trial court for resentencing in accordance with law and the views expressed herein.

CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED FOR RESENTENCING.