NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 0565

STATE OF LOUISIANA

VERSUS

KENNETH CHARLES HERNANDEZ

Judgment Rendered: November 9, 2011

* * * * * * *

APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
DOCKET NUMBER 03-09-730

THE HONORABLE RICHARD "CHIP" MOORE, JUDGE

* * * * * * *

Hillar C. Moore, III
District Attorney
and
Dylan C. Alge
Assistant District Attorney
Baton Rouge, Louisiana

Attorneys for Appellee
State of Louisiana

Frederick Kroenke
Louisiana Appellate Project
Baton Rouge, Louisiana

Attorneys for Defendant/Appellant
Kenneth Charles Hernandez

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

Hughes, J., dissents.

McDONALD, J.

The defendant, Kenneth Charles Hernandez, was charged by bill of information with operating a vehicle while intoxicated (DWI, sixth offense), in violation of La. R.S. 14:98. The defendant entered a plea of not guilty and filed several pretrial motions, including a motion to suppress and a motion to quash. After a hearing, the trial court granted the motion to suppress in part. The trial court held a hearing on the motion to quash and took the matter under advisement. Thereafter, the trial court granted the motion to quash as to one of the DWI predicate convictions. Prior to trial, the state amended the bill of information to reflect defendant was charged with DWI, fourth or subsequent offense; the defendant waived formal arraignment and entered a plea of not guilty.

After a jury trial, the defendant was found guilty as charged. The defendant filed a post verdict judgment of acquittal, which was denied by the trial court. The trial court sentenced the defendant to twenty years at hard labor. Thereafter, the defendant filed a motion to reconsider sentence, which was denied.[1]

Defendant now appeals and urges as his sole assignment of error that the trial court erred in denying his motion to suppress and motion for post verdict judgment of acquittal. For the reasons that follow, we affirm the defendant's conviction and sentence.

Facts

State Trooper Jerry Sandifer testified consistently at the motion to suppress hearing and at trial.[2] He stated that shortly after midnight on January 31, 2009, he was dispatched to investigate a single vehicle accident on Highland Road and Old

[1] After the sentence was imposed and the trial court granted the motion for appeal, the defendant filed a motion for new trial. At the hearing on the motion to reconsider sentence, the trial judge stated he no longer had jurisdiction to rule on the motion for new trial.

[2] In determining whether the ruling on the defendant's motion to suppress is correct, we are not limited to the evidence adduced at the hearing on the motion to suppress. Instead, 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).

Perkins Road near the Blue Bayou Water Park in Baton Rouge. When the Trooper arrived at 12:10 a.m., he saw an unoccupied station wagon in a ditch. After looking in the unoccupied vehicle and in the ditch, he observed two persons sitting in another vehicle in a nearby parking lot. Trooper Sandifer approached that vehicle and learned the driver was a "good Samaritan" who had not seen the accident but stopped to help the driver (later identified as the defendant) of the wrecked vehicle.

To investigate the accident, Trooper Sandifer asked the defendant, who was sitting in the passenger seat, if he had been driving the wrecked vehicle. When the defendant answered "yes," the Trooper asked how the accident occurred. The defendant responded that he had been playing with the radio and just ran off the road. While observing the defendant, the Trooper noticed he had a strong odor of alcohol on his person and the front of his pants was wet as if he had spilled something or urinated on himself. When the Trooper asked the defendant if he had anything to drink that evening, the defendant responded he drank four beers. The Trooper testified he asked the question because he was trying to determine what caused the accident. Trooper Sandifer admitted that he was in uniform when he questioned defendant and at that point, the defendant was not free to "walk away" because of the ongoing investigation. He further stated he would have stopped the defendant if he had tried to leave. He admitted he did not see the defendant operate his vehicle and did not know the time period when the defendant was drinking.

After refusing medical attention, the defendant agreed to submit to standardized field sobriety tests. The Trooper explained the tests to the defendant, who indicated he would have difficulty because of a back problem. However, the defendant attempted two of the tests (horizontal gaze nystagmus and walk-and-turn) before stopping because of his back problems. The Trooper explained to the

defendant that the failure to complete the tests would be considered a refusal, and the defendant would be placed under arrest for suspicion of driving while intoxicated. After the defendant refused to continue the tests, Trooper Sandifer concluded that the defendant performed poorly on the two field sobriety tests, was possibly impaired, and placed the defendant under arrest.

At 12:25 a.m., the Trooper informed the defendant of his **Miranda** rights and took him into custody by handcuffing and placing him in the police vehicle. The defendant was transported to the police station, where he refused to submit to a chemical test for intoxication.

The state also presented testimony of the defendant's parole officer and a state police criminal records analyst as to the defendant's prior DWI convictions.

Discussion

The defendant argues that the trial court erred in denying his motion to suppress and in denying his motion for post verdict judgment of acquittal, based on the same ground. The defendant contends that before he was questioned by the Trooper, he was not fully advised that he was being detained, of the reason for his detention or arrest, or of his **Miranda** rights, all as required by La. C.Cr.P. art. 218.1 and the Louisiana Constitution. He further contends that because his constitutional rights were violated, his statements admitting driving the vehicle and drinking alcohol were inadmissible at trial.

The state contends that only those statements made by the defendant before 12:25 a.m. on the date of his arrest are at issue. The state notes the trial court concluded that the defendant had invoked his right to counsel at 12:25 a.m. and granted the motion to suppress in part as to the defendant's statements made after that time. The state also contends the defendant's argument that he was not advised of the reason for the detention was raised for the first time on appeal, and thus, was waived. Alternatively, the state asserts that the record shows that the

Trooper's notification of the reason for the detention was made contemporaneously with the defendant's arrest. In response to the defendant's argument that he was not properly advised of the **Miranda** rights before making the statements, the state argues that the defendant was not detained or placed under arrest until after the statements. Thus, the **Miranda** rights were not required when the Trooper was investigating the accident and prior to the defendant's arrest.

Louisiana Code of Criminal Procedure article 218.1 provides:

> When any person has been arrested or detained in connection with the investigation or commission of any offense, he shall be advised fully of the reason for his arrest or detention, his right to remain silent, his right against self incrimination, his right to the assistance of counsel and, if indigent, his right to court appointed counsel.

See also La. Const. art. I, §13.

The obligation to provide **Miranda** warnings attaches only when a person is questioned by law enforcement after he has been taken "into custody or otherwise deprived of his freedom of action in any significant way." **Miranda v. Arizona**, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966); **State v. Shirley**, 2008-2106 (La. 5/5/09), 10 So.3d 224, 229.

Custody is decided by two distinct inquiries: an objective assessment of the circumstances surrounding the interrogation to determine whether there is a formal arrest or restraint on freedom of the degree associated with formal arrest; and, second, an evaluation of how a reasonable person in the position of the interviewee would gauge the breadth of his freedom of action. **State v. Shirley**, 10 So.3d at 229.

As such, **Miranda** warnings are not required when officers conduct preliminary, noncustodial, on-the-scene questioning to determine whether a crime has been committed, unless the accused is subjected to arrest or a significant restraint short of formal arrest. Thus, an individual's responses to on-the-scene and

non-custodial questioning, particularly when carried out in public, are admissible without Miranda warnings. **State v. Shirley**, 10 So.3d at 229-30.

Similarly, although a motorist stopped for a traffic violation or an individual detained in a **Terry**[3] stop based on reasonable suspicion has had his freedom of movement curtailed in a significant way, until an arrest actually occurs, these Fourth Amendment seizures do not constitute custody for **Miranda** purposes. **State v. Shirley**, 10 So.3d at 230.

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 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**, 2009-1589 (La. 12/1/09), 25 So.3d 746, 751.

Upon being dispatched to investigate the accident, Trooper Sandifer had the legal authority to question the persons, including the defendant, at the scene. However, because the Trooper did not have any information to indicate that a crime had occurred, his initial questioning of the defendant was on-the-scene and non-custodial. The Trooper's questions were asked to determine how the accident occurred. When the defendant responded, a strong odor of alcohol was noticed on his breath. The Trooper's testimony reveals that the defendant was placed under arrest only after the Trooper heard the defendant's answers to the questions and conducted further investigation that included field sobriety tests.

Although Trooper Sandifer testified that he would have stopped the defendant if he had tried to "walk away" from the accident scene, there is no evidence to indicate that defendant was under arrest, was under significant restraint, that his detention was for any lengthy period of time, or that he was even

---

[3] See **Terry v. Ohio**, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

physically restrained at the time he was asked if he had been driving the vehicle or drinking alcohol. Nor is there any evidence to show that the defendant believed he was being detained. The Trooper had not advised the defendant that he was under arrest or being detained, and the defendant did not request that he be allowed to leave the scene. Thus, the defendant's answers to Trooper Sandifer's questions, prior to defendant's arrest and advice of his **Miranda** rights, were admissible.

Moreover, because the defendant's statements prior to advice of rights (that he had been drinking alcohol and driving the vehicle) were made in response to the Trooper's questions during his investigation of the accident and not part of an investigation of an offense, these statements did not violate the provisions of La. Const. art. I, §13 and Art. 218.1 and were admissible. Accordingly, the trial court did not err or abuse its discretion in denying the motion to suppress in part and the post verdict judgment of acquittal.

Sentencing Errors

Pursuant to La. C.Cr.P. art. 920, we note the following sentencing errors.[4] The trial court failed to impose two years of the twenty year sentence without benefit of probation, parole, or suspension of sentence and to impose the mandatory fine for a conviction of DWI, fourth or subsequent offense, as required by La. R.S. 14:98E(1)(a).[5]

Although the failure to impose the fine is error under La. C.Cr.P. art. 920(2), it certainly is not inherently prejudicial to the defendant. Because the trial court's failure to impose the fine was not raised by the state in either the trial court or on

[4] Under 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. See **State v. Price,** 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So.2d 1277.

[5] The defendant's sentence, by virtue of La. R.S. 15:301.1(A), is deemed to contain the provisions relating to the service of his sentence without benefits.

appeal, we are not required to take any action. As such, we decline to correct the illegally lenient sentence. See **State v. Price**, 952 So.2d at 123-25.

SENTENCE AND CONVICTION AFFIRMED.