

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 0800

STATE OF LOUISIANA

VERSUS

RAYMOND REARDON

Judgment Rendered: December 21, 2011.

* * * * *

On Appeal from the
Twenty-Second Judicial District Court
in and for the Parish of St. Tammany
State of Louisiana
Docket No. 455,673

The Honorable William J. Crain, Judge Presiding

* * * * *

Rachel M. Yazbeck
New Orleans, La.

Counsel for Defendant/Appellant,
Raymond L. Reardon

Walter P. Reed
District Attorney
Covington, La.

Counsel for Appellee,
State of Louisiana

Kathryn Landry
Special Appeals Counsel
Baton Rouge, La.

* * * * *

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

BGC
TMH
RHR

CARTER, C.J.

The defendant appeals his criminal convictions. For the following reasons, we affirm the convictions and habitual offender adjudications on all counts and the sentences on Counts I, II, and III. However, we vacate the illegal sentences imposed on Counts IV and V and remand for resentencing on Counts IV and V.

PROCEDURAL HISTORY

The defendant, Raymond Reardon, was charged by bill of information with:

- Count I: Possession with intent to distribute hydrocodone, a violation of Louisiana Revised Statutes Annotated section 40:968A(1);
- Count II: Possession with intent to distribute methadone, a violation of Louisiana Revised Statutes Annotated section 40:967A(1);
- Count III: Possession with intent to distribute MDMA, a violation of Louisiana Revised Statutes Annotated section 40:966A(1);
- Count IV: Possession with intent to distribute amphetamine, a violation of Louisiana Revised Statutes Annotated section 40:967A(1); and
- Count V: Possession with intent to distribute diazepam, a violation of Louisiana Revised Statutes Annotated section 40:969A(1).

A jury found the defendant guilty as charged on Counts III, IV, and V. On Count I, the jury found the defendant guilty of the responsive offense of possession of hydrocodone, a violation of Louisiana Revised Statutes Annotated section 40:968C, and on Count II, the defendant was found guilty of the responsive offense of possession of methadone, a violation of Louisiana Revised Statutes Annotated section 40:967C.

Thereafter, the State filed a habitual offender bill of information against the defendant, alleging he was a fourth-or-subsequent-felony habitual offender on all counts, and following a hearing, he was so adjudicated. The trial court sentenced the defendant on the original bill for all five counts, then vacated those sentences, and sentenced the defendant as a fourth-or-subsequent-felony habitual offender. On each of Counts I and II, the defendant was sentenced to thirty-five years at hard labor without benefit of probation or suspension of sentence. On each of Counts III, IV, and V, the defendant was sentenced to thirty-five years at hard labor, two years of which were to be served without benefit of parole, probation, or suspension of sentence, with the remainder of the sentences to be served without benefit of probation or suspension of sentence. The trial court ordered that all of the sentences run concurrently with each other and with all sentences the defendant was currently serving.

The defendant appeals, contending: (1) his state and federal constitutional rights were violated by an illegal search and seizure; (2) his state and federal constitutional rights were violated by an illegal inventory search; and (3) the evidence presented at trial was insufficient to support the jury's verdicts of possession with intent to distribute controlled dangerous substances (Counts III, IV, and V).

MOTION TO SUPPRESS

In assignment of error number one, the defendant argues the trial court erred in denying his motion to suppress because the drugs recovered from his pocket were the result of an illegal search and seizure.

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*, 05-2517 (La. App. 1 Cir. 6/9/06), 938 So. 2d 147, 154, *writ denied*, 06-2466 (La. 4/27/07), 955 So. 2d 684.

At the second tier, the investigatory stop recognized by the United States Supreme Court in *Terry*,¹ 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. *Caples*, 938 So. 2d at 154. Louisiana Code of Criminal Procedure 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. However, reasonable suspicion is insufficient to justify a custodial interrogation even though the interrogation is investigative. *Caples*, 938 So. 2d at 154.

Lastly, at the third tier, a custodial "arrest," the officer must have "probable cause" to believe that the person has committed a crime. *Caples*, 938 So. 2d at 154. Louisiana Code of Criminal Procedure article 213(3) uses the phrase "reasonable cause."² 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. *Caples*, 938 So. 2d at 154.

¹ *Terry v. Ohio*, 392 U.S. 1 (1968).

² The "reasonable cause" standard of Article 213(3) is equivalent to "probable cause" under the general federal constitutional standard. *Caples*, 938 So. 2d at 154 n.3. To read Article 213 as allowing an arrest on less than probable cause would put the article afoul of the Fourth Amendment. *Caples*, 938 So. 2d at 154 n.3.

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 154-55.

As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. *State v. Waters*, 00-0356 (La. 3/12/01), 780 So. 2d 1053, 1056 (per curiam). The standard is a purely objective one that does not take into account the subjective beliefs or expectations of the detaining officer. *Waters*, 780 So. 2d at 1056. Although they may serve, and often appear intended to serve, as the prelude to the investigation of much more serious offenses, even relatively minor traffic violations provide an objective basis for lawfully detaining the vehicle and its occupants. *Waters*, 780 So. 2d at 1056. Further, when an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, the officer may conduct a pat-down search to determine whether the person is in fact carrying a weapon. *See Terry*, 392 U.S. at 24-27.

Prior to trial, the defense unsuccessfully moved to suppress the narcotics found in the defendant's pocket, alleging the search was illegal and not incident to

arrest. St. Tammany Parish Sheriff's Office Detective Jason Michael Mire testified at the hearing on the motion to suppress and before the jury at trial.³ On May 2, 2008, at approximately 11:15 p.m., while driving east on U.S. Highway 190 in Slidell, Deputy Mire⁴ was almost struck by a Toyota Corolla, illegally driving west in the center turn lane. Deputy Mire followed the Toyota, signaling with his lights and siren for the vehicle to pull over.

The driver of the Toyota, later identified as the defendant, pulled over and threw a white object out of the open driver-side window and into a drainage ditch.⁵ Deputy Mire approached the defendant and detected the odor of burned marijuana. Deputy Mire advised the defendant of his *Miranda*⁶ rights and asked him to exit the vehicle and put his hands on his head. The defendant had no identification on his person. He indicated he was on parole.⁷ The area was very dark, and Deputy Mire was the only police officer at the scene. According to Deputy Mire, the defendant acted "very nervous," and his mood alternated between being calm and being angry. Deputy Mire felt the mood swings could be the result of the defendant being under the influence of narcotics or alcohol. Based on the time of day, the location of the stop, the fact that it was dark, the fact that he was alone, and his concerns about the

³ In determining whether the ruling on the defendant's motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may also consider all pertinent evidence given at the trial of the case. *State v. Chopin*, 372 So. 2d 1222, 1223 n.2 (La. 1979).

⁴ Detective Mire was a patrol deputy at the time of the incident.

⁵ The object was never recovered. At trial, Deputy Mire testified the defendant later told him the object was a "roach" from a marijuana cigarette.

⁶ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁷ This fact was not revealed to the jury.

mental state of the defendant, Deputy Mire decided to pat-down the defendant to locate any possible weapons.

During the pat-down, Deputy Mire felt an abnormal bulge in the defendant's right-front pocket. Deputy Mire retrieved a black vinyl pouch from the defendant's pocket and, because he thought it might contain a blade or a razor blade, opened the pouch. Deputy Mire explained that it was common for narcotics users to carry knives or razor blades. The pouch contained six hydrocodone tablets and seven methadone tablets. The defendant also had \$1,078 in a wad in his pants pocket. The money was mostly in denominations of twenties, tens, and fives. Deputy Mire arrested the defendant for the drug and traffic offenses.

The trial court correctly denied the motion to suppress. The traffic stop of the defendant's vehicle and his temporary detention were supported by probable cause, based upon Deputy Mire's personal observation, that the defendant had violated Louisiana Revised Statutes section 32:79 (proper lane usage). *See Whren v. United States*, 517 U.S. 806, 810 (1996) (stopping vehicle is reasonable if police have probable cause to believe a traffic violation has occurred). The defendant's throwing of an unidentified object from his vehicle, the odor of marijuana coming from the vehicle, the defendant's possible drug-related mood swings, and the fact that it was a common occurrence for narcotics users to carry knives or razor blades, justified the pat-down search of the defendant for weapons. The tactile discovery of the vinyl pouch in the defendant's pocket was pursuant to the lawful pat-down of the defendant. Thereafter, Deputy Mire's concern for his own safety justified the opening of the pouch as part of a protective weapons search based upon his reasonable belief that the defendant might have been armed and dangerous. *See*

State v. Sylvester, 01-0607 (La. 9/20/02), 826 So. 2d 1106, 1109 (per curiam).

This assignment of error is without merit.

INVENTORY SEARCH

In assignment of error number two, the defendant argues the trial court erred in denying the motion to suppress because an inventory search was used as a subterfuge for a warrantless search to secure incriminating evidence without probable cause.

As a general rule, a search warrant is required in order for a search to be constitutionally permissible. *State v. Escoto*, 09-2581 (La. 7/6/10), 41 So. 3d 1160, 1162. However, several exceptions to the warrant requirement have developed over time. One such exception exists for inventory searches of automobiles pursuant to standard police procedures. *Escoto*, 41 So. 3d at 1162-63. Police intrusions into automobiles impounded or otherwise in lawful police custody have been consistently sustained where the process is aimed at securing or protecting the car and its contents. *Escoto*, 41 So. 3d at 1163. These inventory procedures developed in response to three distinct needs: the protection of the owner's property while it remains in police custody; the protection of the police against claims or disputes over lost or stolen property; and the protection of the police from potential danger. *Escoto*, 41 So. 3d at 1163.

An essential requirement to a valid inventory search is that the police must have acted in good faith in conducting the inventory search and must not have used the inventory procedure as a subterfuge for a warrantless search. *Escoto*, 41 So. 3d at 1163. The Louisiana Supreme Court examines inventory searches under the totality of the circumstances to determine if a valid inventory search has taken place.

Escoto, 41 So. 3d at 1163. Traditionally, the court has considered the following factors in determining whether a true inventory search has taken place: (1) whether the vehicle could not have remained safely where it was located; (2) whether the search was conducted in the field; (3) whether a tow truck was called before the search commenced; (4) whether formal impoundment procedures were followed; (5) whether the vehicle operator was asked if he consented to a search, if the car contained any valuables, or if he would consent to a waiver of the protections afforded by an inventory search; and (6) whether the operator was given an opportunity to make arrangements for someone to pick up the vehicle for him. *Escoto*, 41 So. 3d at 1163.

In regard to the inventory search, Deputy Mire testified that after arresting the defendant for the drug and traffic offenses, he made arrangements to conduct an inventory of the Toyota. He contacted a narcotics deputy to prepare the paperwork for seizure of the vehicle. He also contacted dispatch and requested a wrecker. He then conducted an inventory of the Toyota to protect any personal property in the vehicle. According to Deputy Mire, inventorying was part of the seizure process to make sure that no weapons, narcotics, or contraband would be turned over to a third-party purchaser if the vehicle was sold at auction.

During the inventory search, Deputy Mire discovered a cigarette box in the open center console containing marijuana; two partially-burned, white, hand-rolled marijuana cigarettes; and a bag of suspected marijuana. He also recovered an unlabeled blue pill bottle, containing fourteen Adderall (amphetamine) tablets and eleven Valium (diazepam) tablets, and a bag containing approximately five MDMA tablets. Deputy Mire arrested the defendant for the additional drug offenses. After

the wrecker arrived, the vehicle was towed, seized, and forfeited to the State of Louisiana.

Reviewing the instant case under the totality of the circumstances and in light of the factors listed above, we find the inventory search was a valid safeguarding procedure and not a subterfuge for a warrantless search without probable cause. In response to questioning at the hearing on the motion to suppress, Deputy Mire indicated the defendant did not consent to a search of the Toyota. He testified that the area in which the defendant pulled over was very dark. Leaving the vehicle at the scene would have posed potential danger for traffic. Although the inventory was conducted in the field, Deputy Mire requested a wrecker prior to beginning the inventory. He also contacted a narcotics deputy to prepare the paperwork for seizure of the vehicle prior to beginning the inventory. The inventory search in this case was conducted in good faith and according to procedure.

We also find Deputy Mire did not exceed the scope of a valid inventory search by opening the unlabeled blue pill bottle. Deputy Mire initiated formal forfeiture proceedings for seizure of the Toyota prior to conducting the inventory search and stated that an inventory of the vehicle to make sure no weapons, narcotics, or contraband were turned over to a third-party purchaser was part of the seizure process. It is not unreasonable for a police department to search any and all containers pursuant to an inventory search of a person's belongings, as long as it was part of routine procedure or policy. *See Escoto*, 41 So. 3d at 1165-67.

This assignment of error is without merit.

SUFFICIENCY OF THE EVIDENCE

In assignment of error number three, the defendant argues that there was insufficient evidence to support the verdicts of possession with intent to distribute controlled dangerous substances on Counts III, IV, and V.

The standard of review for sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. *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 and 00-0895 (La. 11/17/00), 773 So. 2d 732. In conducting this review, we are mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove, in order to convict," every reasonable hypothesis of innocence is excluded. *Wright*, 730 So. 2d at 486 (quoting La. Rev. Stat. Ann. § 15:438).

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. *Wright*, 730 So. 2d at 487. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. *Wright*, 730 So. 2d at 487.

It is well-settled that intent to distribute may be inferred from the circumstances. *State v. Smith*, 03-0917 (La. App. 1 Cir. 12/31/03), 868 So. 2d 794,

800. Factors useful in determining whether the State's circumstantial evidence is sufficient to prove intent to distribute include: (1) whether the defendant ever distributed or attempted to distribute illegal drugs; (2) whether the drug was in a form usually associated with distribution; (3) whether the amount was such to create a presumption of intent to distribute; (4) expert or other testimony that the amount found in the defendant's actual or constructive possession was inconsistent with personal use; and (5) the presence of other paraphernalia evidencing intent to distribute. *Smith*, 868 So. 2d at 800. For mere possession to establish intent to distribute, the State must prove that the amount of the drug in the possession of the accused, and/or the manner in which it was carried, is inconsistent with personal use. *Smith*, 868 So. 2d at 800. The presence of large sums of cash also is considered circumstantial evidence of intent to distribute. *Smith*, 868 So. 2d at 800.

Deputy Mire testified that inside the Toyota was an unlabeled blue pill bottle containing fourteen Adderall (amphetamine) tablets and eleven Valium (diazepam) tablets, and a "baggy" containing approximately five MDMA (green Ecstasy) tablets. In the past, Deputy Mire had seen pills similarly stored for resale in defaced bottles to prevent tracking of the bottle. The defendant had \$1,078 in cash in his pants pocket, mostly in denominations of twenties, tens, and fives.

St. Tammany Parish Sheriff's Office Captain Barney Tyrney also testified and was accepted as an expert in the packaging and resale of drugs. He too had seen drugs similarly packaged for resale, or for distribution, placed in defaced prescription pill bottles. He indicated Adderall was a form of amphetamine, and on the secondary market, a single pill sold for eight to twelve dollars. Captain Tyrney

stated that diazepam was the chemical name for Valium, and the drug had a significant secondary market.

Captain Tyrney stated that drug addicts build up immunity to the drugs they use, and as time passes, they need greater quantities of the drug. Because of the need to buy drugs, addicts are "constantly running shy on cash," and it is uncommon for a drug addict to have the sum of money found on the defendant. Captain Tyrney testified that the most commonly used denominations in narcotics purchases were twenty dollar bills.

The defendant also testified at trial. He conceded that he had prior convictions for bank fraud, possession of methadone, possession of amphetamine, possession of hydrocodone, possession of Temezepan, residence burglary, and forgery. He also conceded ownership of the drugs recovered from the pouch in his pocket but claimed the quantity represented a two-day, personal supply. The defendant denied any knowledge of the drugs in the Toyota, except for the marijuana in the cigarette box. He claimed the vehicle belonged to his father, who was an alcoholic and a drug addict. He also offered that the drugs might have belonged to his girlfriend's daughter.

The defendant stated that at the time of the incident, he had only recently been released from prison and was working with his brother and also in the roofing industry. According to the defendant, he was going to use the money recovered from his pocket to repay his father for the Toyota or to repay him for a loan. He claimed the money was not in as many ten and twenty denominations as claimed by the State, noting there also were hundred dollar bills.

After a thorough review of the record, we are convinced that any rational trier of fact, viewing the evidence presented in this case in the light most favorable to the State, could find that the evidence proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, all of the elements of possession with intent to distribute MDMA, possession with intent to distribute amphetamine, and possession with intent to distribute diazepam, as well as the defendant's identity as the perpetrator of those offenses. The verdicts returned on Counts III, IV, and V indicate the jury rejected the defendant's claim that he had no knowledge of the presence of the drugs in the Toyota. When a case involves circumstantial evidence, and the jury reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. *State v. Captville*, 448 So. 2d 676, 680 (La. 1984). No such hypothesis exists in the instant case. Further, this court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. *State v. Lofton*, 96-1429 (La. App. 1 Cir. 3/27/97), 691 So. 2d 1365, 1368, *writ denied*, 97-1124 (La. 10/17/97), 701 So. 2d 1331. When there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. *Lofton*, 691 So. 2d at 1368.

The verdicts returned on Counts III, IV, and V also indicate the jury accepted the testimony concerning the defendant's intent to distribute. The State did not rely on mere possession to establish intent to distribute; it presented expert

testimony concerning the storage of the drugs and the significance of the quantity and denominations of money recovered from the defendant's pocket. In reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. *State v. Calloway*, 07-2306 (La. 1/21/09), 1 So. 3d 417, 418 (per curiam).

This assignment of error is without merit.

REVIEW FOR ERROR

Our review for error is pursuant to Louisiana Code of Criminal Procedure article 920, which provides that the only matters to be considered on appeal are errors designated in the assignments of error and errors that are "discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." La. Code Crim. Proc. Ann. art. 920(2).

In regard to Counts III, IV, and V, the habitual offender sentences were illegal. For Count III, the trial court failed to impose a sentence in conformity with the reference statute, which required that at least five years of the sentence be imposed without benefit of parole.⁸ *See* La. Rev. Stat. Ann. § 40:966B(2). Although the failure to restrict parole eligibility for five years is error under Article 920(2), it certainly is not inherently prejudicial to the defendant. Because the trial court's failure to restrict parole eligibility for five years on Count III was

⁸ The conditions imposed on the sentence are those called for in the reference statute. *State v. Bruins*, 407 So. 2d 685, 687 (La. 1981).

not raised by the State in either the trial court or on appeal, we are not required to take any action. As such, we decline to correct the illegally lenient sentence. *See State v. Price*, 05-2514 (La. App. 1 Cir. 12/28/06), 952 So. 2d 112, 123-25 (en banc), *writ denied*, 07-0130 (La. 2/22/08), 976 So. 2d 1277.

In regard to Counts IV and V, the defendant was not ineligible for parole under either the habitual offender law or the reference statutes. *See* La. Rev. Stat. Ann. §§ 15:529.1G; 40:967B(1); 40:969B(2). Correction of both of these sentences lies within the trial court's sentencing discretion; therefore, correction must be by remand for resentencing rather than by amendment by this court. *See State v. Haynes*, 04-1893 (La. 12/10/04), 889 So. 2d 224, 224 (per curiam). Accordingly, we vacate the sentences on Counts IV and V and remand to the district court for resentencing on Counts IV and V.

CONCLUSION

For the foregoing reasons, the defendant's convictions and habitual offender adjudications on Counts I, II, III, IV, and V, and the sentences imposed on Counts I, II, and III are affirmed. The sentences imposed on Counts IV and V are vacated, and this matter is remanded to the trial court for resentencing on Counts IV and V.

**CONVICTIONS AND HABITUAL OFFENDER ADJUDICATIONS
AFFIRMED ON ALL COUNTS; SENTENCES ON COUNTS I, II, AND III
AFFIRMED; SENTENCES ON COUNTS IV AND V VACATED;
REMANDED FOR RESENTENCING ON COUNTS IV AND V.**