NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 KA 0170

STATE OF LOUISIANA

VERSUS

TYREE YOUNG

Judgment Rendered: JUN 26 2008

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Trial Court Number 370037

Honorable Elaine W. DiMiceli, Judge

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BEFORE: WHIPPLE, GUIDRY AND HUGHES, JJ.

Hughes, J., concurs.

GUIDRY, J

Defendant, Tyree Young, was originally charged by bill of information with possession of cocaine, a violation of La. R.S. 40:967(C) (Count 1), and possession of methylenedioxymethamphetamine (MDMA, commonly known as "Ecstasy"), a violation of La. R.S. 40:966(C) (Count 2). Defendant was convicted of both counts and was adjudicated a fourth felony habitual offender based on his conviction for Count 2. The trial court sentenced defendant to five years at hard labor for his conviction on Count 1 and twenty years at hard labor for his adjudication as a fourth felony habitual offender on Count 2, to run concurrently with the sentence imposed under Count 1.

In defendant's first appeal of this matter, State v. Young, 06-0234, p. 9 (La. App. 1st Cir. 9/15/06), 943 So. 2d 1118, 1124, writ denied, 06-2488 (La. 5/4/07), 956 So. 2d 606, his conviction and sentence on Count 1 (possession of cocaine) were affirmed. However, for Count 2, defendant had been tried before a six-person jury when the penalty provision dictated he be tried before a twelve-person jury. As a result, this Court vacated defendant's conviction on Count 2, vacated his habitual offender adjudication and sentence, and remanded the matter to the district court for further proceedings.

Following the remand to the district court, the State filed another habitual offender bill seeking to have defendant adjudicated a fourth felony habitual offender based on his conviction for possession of cocaine (Count 1). After a hearing, defendant was adjudicated a fourth felony habitual offender. The trial court vacated defendant's previous sentence on Count 1 and resentenced him to twenty years at hard labor. In defendant's second appeal, State v. Young, 07-0900 (La. App. 1st Cir. 11/2/07), 966 So. 2d 1245 (unpublished opinion), defendant's habitual offender adjudication and sentence enhancement for Count 1 were affirmed.

Meanwhile, on October 16, 2007, defendant was tried and convicted for possession of MDMA (Count 2). In exchange for the State not enhancing this conviction under the Habitual Offender Law, defendant agreed to a sentence of ten years at hard labor to be served consecutive to the twenty-year sentence he is currently serving for his possession of cocaine conviction (Count 1).

Defendant now appeals his conviction for possession of MDMA (Count 2) assigning the following as error:

1. The trial court erred in denying the defense motion to quash.

2. The trial court erred and/or abused its discretion in denying the defense motion to suppress.

FACTS

On July 23, 2003, Officer Michael Phelps of the Louisiana Department of Probation and Parole arrested defendant for possession of cocaine (Count 1) at a residence located at 1495 West Hall Street in Slidell. Officer Phelps contacted the St. Tammany Parish Sheriff's Office for assistance in transporting defendant for processing.

Deputy Steven Ingargiola was dispatched to assist Officer Phelps. Upon his arrival, Deputy Ingargiola observed Officer Phelps conduct a pat down of defendant. Deputy Ingargiola also read defendant his Miranda rights, then placed defendant into the back of the police unit. Deputy Ingargiola testified that he usually advised an arrestee prior to transport that the introduction of any contraband into a correctional facility is a felony, and if the arrestee had any such contraband on his person, it would be best to let him know. According to Deputy Ingargiola, after he so advised the defendant, defendant said nothing.

As Deputy Ingargiola turned onto Production Drive in Slidell, where the law enforcement complex was located, defendant told him that he had a pill in his shoe. Deputy Ingargiola pulled into the parking lot, and he and Sergeant Doug Sharp

retrieved the pill from inside defendant's shoe. The pill was subsequently tested and found to be MDMA. Deputy Ingargiola denied he threatened, coerced, or made any inducements or promises to defendant in order to get defendant to reveal the existence of the pill.

While at the law enforcement complex, defendant told Officer Phelps that he had been snorting cocaine and using Ecstasy for two days. Officer Phelps testified he located $585.00 on defendant during his initial search.

Defendant did not testify.

MOTION TO QUASH

In defendant's first assignment of error, he argues the trial court erred in denying his motion to quash. We note that the defendant's motion to quash is not contained in the record; however, it is evident from the transcript that the motion was considered by the trial court and was openly discussed by the trial court, prosecutor, defense counsel, and defendant. Despite the absence of the motion in the record, we will review the argument raised by the defendant and considered by the trial court.[1]

On appeal, defendant argues the State failed to timely bring him to trial following the vacating of his conviction on Count 2. In support of this contention, defendant argues that his conviction on Count 2 was vacated by this Court on September 15, 2006, but defendant was not tried until October 16, 2007, which was more than a year after the conviction had been vacated.

Louisiana Code of Criminal Procedures article 582 provides:

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[1] Defendant also argued at the hearing on his motion to quash that the Double Jeopardy Clause prevented him from being prosecuted again on Count 2. Defendant does not raise this argument on appeal. Moreover, we note that La. C.Cr.P. art. 595(1) provides that a person shall not be considered as having been in jeopardy in a trial in which the court was illegally constituted. Defendant's original conviction for Count 2 was vacated on the basis that he should have been tried before a twelve-person jury as opposed to a six-person jury for this offense. Thus, the court was illegally constituted and jeopardy never attached. See State v. Jones, 05-0226, pp. 6-7 (La. 2/22/06), 922 So. 2d 508, 513.

> When a defendant obtains a new trial or there is a mistrial, the state must commence the second trial within one year from the date the new trial is granted, or the mistrial is ordered, or within the period established by Article 578, whichever is longer.

In State v. Brown, 451 So. 2d 1074, 1080 (La. 1984), the Louisiana Supreme Court interpreted Article 582 to mean that the one year begins to run from the date when the order of a new trial "becomes final." See also State v. Bennett, 610 So. 2d 120, 125 (La. 1992). Finality of judgments are addressed in La. C.Cr.P. art. 922. Specifically, La. C.Cr.P. art. 922(D) provides:

> If an application for a writ of review is timely filed with the supreme court, the judgment of the appellate court from which the writ of review is sought becomes final when the supreme court denies the writ.

An argument similar to the one raised by the defendant herein was addressed by the Louisiana Supreme Court in State v. Washington, 02-1346 (La. 5/20/03), 846 So. 2d 723. In that case, the defendant was charged in a single bill of information with three counts of armed robbery and one count of aggravated rape. As part of a plea bargain, the defendant plead guilty to an amended charge of forcible rape and three counts of armed robbery (both crimes were committed as part of a single act). Following sentencing, the defendant filed an application for post-conviction relief. The trial court granted the defendant's application in part and set aside the defendant's plea on the **forcible rape count only** because during the defendant's Boykin examination, the court failed to advise him of the sex offender notification law. That ruling was rendered on June 21, 2000. Washington, 02-1346 at 1-2, 846 So. 2d at 724.

The defendant then applied for writs to the Louisiana Third Circuit Court of Appeal to have his guilty plea for the three counts of armed robbery set aside. On May 29, 2001, the Third Circuit granted the defendant's writ application and set aside the plea as to the three counts of armed robbery, holding that when one part of a plea agreement is set aside, the whole agreement must be set aside. Again,

this decision was rendered on May 29, 2001. Washington, 02-1346 at 4-5, 846 So. 2d at 726.

On July 6, 2001, the defendant filed a motion to quash the rape count, arguing that the State had one year from the date the trial court set aside the forcible rape count, or from June 21, 2000, to commence a new trial on the rape count. The trial court denied the motion to quash, but the Third Circuit reversed and granted the motion. Washington, 02-1346 at 2-3, 846 So. 2d at 724-725.

On review, the Louisiana Supreme Court reversed the Third Circuit, stating:

> The error in the appellate court's reasoning is that it used the date of the trial court's ruling vacating Washington's guilty plea on the forcible rape charge instead of the date of its own order setting aside the pleas as to each of the three counts of armed robbery. Because of the joinder of the [rape and armed robbery counts] in the indictment by operation of law and because of the "joining" by the parties of the four counts in the plea agreement, the trial court's ruling of June 21, 2000, did not become final until the pleas to the armed robberies were set aside by the appellate court on May 29, 2001. Thus, the one year time period allowed for the State to commence trial had not elapsed when Washington filed his motion to quash in July 2001.

Washington, 02-1346 at 5-6, 846 So. 2d at 727.

In the present case, the record reveals that the defendant was charged in a single felony bill of information with one count of possession of cocaine (Count 1) and one count of possession of MDMA (Count 2), effectively "joining" the two counts. This court's judgment vacating defendant's conviction on Count 2 (and affirming the trial court's denial of defendant's motion to suppress evidence with respect to Count 1) was rendered, and notice of the judgment mailed, on September 15, 2006. Defendant then filed a writ application seeking review of this court's decision affirming the trial court's denial of his motion to suppress evidence with respect to Count 1. The writ application was postmarked October 16, 2006.[2] The

[2] This information was received from the Louisiana Supreme Court Clerk's Office.

writ application was timely, having been filed within thirty days of the mailing of the notice of judgment of the court of appeal.[3]

Defendant's writ application to the Louisiana Supreme Court was denied on May 4, 2007, State v. Young, 06-2488 (La. 5/4/07), 956 So. 2d 606, thereby making the judgment final. Thus, in accordance with State v. Washington, 02-1346 (La. 5/20/03), 846 So. 2d 723, the State had one year from that date to commence defendant's trial on Count 2 (possession of MDMA). Defendant's trial commenced on October 16, 2007, within a year of the judgment becoming final.

Accordingly, defendant's trial on Count 2 (possession of MDMA) was timely commenced. This assignment of error is without merit.

MOTION TO SUPPRESS

In defendant's second assignment of error, he argues that the trial court erred in denying his motion to suppress the MDMA pill recovered from his shoe. Defendant contends he was "tricked" into abandoning his right to remain silent, and as a result, he confessed to having the single pill of Ecstasy in his shoe. Defendant further argues there was no evidence that discovery of the pill was inevitable.

The trial court heard the defendant's motion to suppress on May 9 and May 12, 2005. In considering defendant's first appeal, this Court declined to consider this assignment of error with respect to Count 2 because of the error requiring the conviction to be vacated. We now consider the propriety of the trial court's denial of defendant's motion to suppress with respect to Count 2.

Trial courts are vested with great discretion when ruling on a motion to suppress. Consequently, the ruling of a trial judge on a motion to suppress will not be disturbed absent an abuse of that discretion. State v. Leger, 05-0011, p. 10 (La.

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[3] Supreme Court Rules Practice and Procedure, Rule X, § 5(a). We also note that October 15, 2006 was a Sunday; thus, the deadline would have been extended to the next business day, Monday, October 16, 2006.

7/10/06), 936 So. 2d 108, 122, cert. denied, ___ U.S. __ , 127 S.Ct. 1279, 167 L.Ed.2d 100 (2007). In determining whether the ruling on defendant's motion to suppress evidence 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).

For a confession or inculpatory statement to be admissible into evidence, the State must affirmatively show that it was freely and voluntarily given without influence of fear, duress, intimidation, menaces, threats, inducements or promises. La. R.S. 15:451. Whether or not a showing of voluntariness has been made is analyzed on a case-by-case basis with regard to the facts and circumstances of each case. State v. Benoit, 440 So. 2d 129, 131 (La. 1983). The trial court must consider the totality of the circumstances in deciding whether a statement or confession is admissible. State v. Plain, 99-1112, p. 6 (La. App. 1st Cir. 2/18/00), 752 So. 2d 337, 342.

Officer Phelps testified at trial that prior to transporting the defendant to the processing center, he advised defendant of his Miranda rights. Deputy Ingargiola testified that he also read defendant his Miranda rights prior to placing defendant into the police unit for transport to the processing center.

Deputy Ingargiola testified that prior to transporting the defendant, he informed him that the introduction of any contraband into a correctional facility was a felony and that if defendant had any other contraband, including drugs, on him, it would be "best" for him to come forward at that point. Defendant did not reveal the existence of the pill in his shoe until Deputy Ingargiola turned onto Production Drive, where the processing center was located. Deputy Ingargiola denied that he threatened, coerced, promised, or induced defendant in any manner into revealing the existence of the pill in his shoe. Moreover, Deputy Ingargiola specifically denied he told defendant he would not be charged with any additional

offenses if he admitted to having any more contraband not discovered during Officer Phelps's pat down.

Officer Phelps testified that at the processing center, defendant told him he had been snorting cocaine and using Ecstasy for two days. However, Officer Phelps testified that he did not observe defendant exhibiting any signs of fatigue or exhaustion.

Considering the totality of the circumstances, we find the State proved that defendant's statement revealing the existence of the pill in his shoe was freely and voluntarily given. Moreover, even accepting defendant's contention that Deputy Ingargiola's statement that it would be "best" for him to reveal the existence of any more contraband somehow "tricked" defendant into waiving his right to remain silent, there is still no error in the trial court's denial of defendant's motion to suppress the evidence.

In Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984), the United States Supreme Court adopted the "inevitable discovery" doctrine, holding that evidence found as a result of a violation of a defendant's constitutional rights would be admissible if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered. The so-called inevitable discovery doctrine has been followed by Louisiana courts. State v. Lee, 05-2098 (La. 1/16/08), 976 So. 2d 109; State v. Harris, 510 So. 2d 439, 445 (La. App. 1st Cir.), writ denied, 516 So. 2d 129 (La. 1987); State v. Brumfield, 560 So. 2d 534, 537 (La. App. 1 Cir.), writ denied, 565 So. 2d 942 (La. 1990); cf. State v. Aucoin, 613 So. 2d 206, 210 (La. App. 1st Cir. 1992).

At the time defendant revealed the existence of the pill in his shoe, he was already under arrest for possession of cocaine and was being transported to the processing center. At the hearing on the motion to suppress, Deputy Ingargiola

testified that the booking process involves a thorough search of a prisoner's body incidental to arrest. As part of the search conducted during the booking process, an arrestee's shoes, insoles, and socks are removed. This testimony regarding the booking process was sufficient evidence to support the trial court's finding that it was inevitable that the pill in defendant's shoe would have been discovered during the booking-process search.

Accordingly, even if defendant was "tricked" into waiving his right to remain silent, the pill in his shoe was certain to have been discovered by lawful means during the search conducted as part of the booking process. Thus, there is no error in the trial court's denial of defendant's motion to suppress. We therefore find that the trial court did not err in denying the pre-trial motions filed by the defendant and affirm the judgment of the trial court.

CONVICTION AND SENTENCE FOR POSSESSION OF MDMA (COUNT 2) AFFIRMED.