NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 KA 0732

STATE OF LOUISIANA

VERSUS

CLIFTON ROBERTSON

Judgment Rendered: November 3, 2006

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On appeal from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Suit Number 368602

Honorable Elaine W. DiMiceli, Presiding

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

Parro, J., concurs.
McClendon, J. concurs with the result reached by the majority.

GUIDRY, J.

The defendant, Clifton Robertson, was charged by bill of information with possession of a Schedule II controlled dangerous substance (cocaine), a violation of La. R.S. 40:967(C). The defendant pled not guilty. The defendant filed motions to suppress the evidence seized and a confession pursuant to an illegal stop. Following a hearing, the trial court denied the motions. The defendant objected to the rulings. Following a jury trial, the defendant was found guilty as charged. The defendant filed motions for new trial and postverdict judgment of acquittal, which were denied. The defendant waived any sentencing delay and was sentenced to five (5) years at hard labor. The defendant filed a motion to reconsider sentence, which was denied.[1] The defendant now appeals, designating the following three assignments of error: the motion to suppress the seized evidence should have been granted, insufficient evidence, and excessive sentence. We reverse the trial court's ruling denying the motion to suppress, vacate the conviction and sentence, and remand to the trial court for further proceedings.

FACTS

On March 26, 2003, Sergeant Doug Sharp of the St. Tammany Parish Sheriff's Office was patrolling West Beach Street in Lacombe, a high-crime area. At about 11:45 p.m., Sergeant Sharp saw the defendant and a white male, whose identity was never revealed, walking down Beach Street. Sergeant Sharp recognized the white male from previous arrests. He initially passed the two men, then made a U-turn and came back toward them. He illuminated them in his bright lights, exited his vehicle and identified himself. Sergeant Sharp asked them if they knew anything about the recent crimes in the area, and they willingly conversed with him.

[1] The motion to reconsider sentence was filed (July 22, 2005) and denied (July 26, 2005) prior to sentencing, which was on October 10, 2005.

At some point, either before or after he initially spoke to the two men, Sergeant Sharp called for back-up. Moments later, Detective Mark Liberto and Detective Jason Bilnoski, both also with the St. Tammany Parish Sheriff's Office, arrived in another police unit. As Sergeant Sharp went to run a computer check on the two men for outstanding warrants, he informed Detective Liberto that the white male appeared to be nervous. Without speaking to the two men, Detective Liberto patted down the defendant and Detective Bilnoski patted down the white male.

Detective Liberto felt an elongated object in the defendant's back pants pocket. He asked the defendant if he would mind removing the object. The defendant removed the object and handed it to Detective Liberto, who identified the object as a crack pipe. Detective Liberto seized the crack pipe and *Mirandized* the defendant. According to Detective Liberto, when he asked the defendant what he was doing with the crack pipe, the defendant told him he had smoked crack earlier that evening with a girl. Detective Liberto issued him a summons for possession of drug paraphernalia. The crack pipe was submitted to the crime lab. The residue on the crack pipe tested positive for cocaine.

SUFFICIENCY OF THE EVIDENCE

The defendant contends the evidence was insufficient to support his conviction. When issues are raised on appeal both as to the sufficiency of the evidence and as to one or more trial errors, the reviewing court should first determine the sufficiency of the evidence. Accordingly, we proceed first to determine whether the entirety of the evidence, both admissible and inadmissible, was sufficient to support the conviction. See State v. Hearold, 603 So.2d 731, 734 (La. 1992).

A conviction based on insufficient evidence cannot stand as it violates due process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. In reviewing claims challenging the sufficiency of the evidence, this Court must consider "whether,

after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. C.Cr.P. art. 821(B); State v. Mussall, 523 So.2d 1305, 1308-1309 (La. 1988). The Jackson standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that, in order to convict, the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. State v. Patorno, 2001-2585, p. 5 (La. App. 1st Cir. 6/21/02), 822 So.2d 141, 144.

Louisiana Revised Statutes 40:967(C) provides in pertinent part:

> It is unlawful for any person knowingly or intentionally to possess a controlled dangerous substance as classified in Schedule II unless such substance was obtained directly or pursuant to a valid prescription or order from a practitioner[.]

The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. The trier of fact's determination of the weight to be given evidence is not subject to appellate review. See State v. Taylor, 97-2261, pp. 5-6 (La. App. 1st Cir. 9/25/98), 721 So.2d 929, 932.

The only witness to testify at the trial about how and where he found the crack pipe was Detective Liberto. According to Detective Liberto, upon patting down the defendant, he discovered a crack pipe in the defendant's back pants pocket. He further testified that the defendant told him that he (the defendant) had smoked crack earlier that day. Also, a Certificate of Scientific Analysis was submitted into evidence, which established that the residue found on the defendant's crack pipe tested positive for cocaine.

It is obvious from the finding of guilt that the jury concluded that the testimony of Detective Liberto was credible. No other witness, including the

defendant, testified to offer conflicting testimony. Conviction for possession of cocaine may rest on the possession of mere traces or residue of cocaine. See State v. McMooain, 95-2103, pp. 5-6 (La. App. 1st Cir. 9/27/96), 680 So.2d 1370, 1373-1374.

After a thorough review of the record, we find that the evidence supports the jury's verdict. We are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of possession of cocaine.

This assignment of error is without merit.

SUPPRESSION OF PHYSICAL EVIDENCE

In this assignment of error, the defendant argues the trial court erred in denying his motion to suppress physical evidence. Specifically, the defendant contends that the investigatory stop of the defendant was unlawful. The evidence found pursuant to that stop was, therefore, illegally seized and should have been suppressed. Because we find merit in this assignment of error, we do not reach the merits of the assignment of error regarding excessive sentence.

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 the 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. 1st Cir.), writ denied, 462 So.2d 191 (La. 1984).

A threshold issue is to determine whether the initial encounter between the police and the 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 La. C.Cr. P. art. 215.1(A).

In State v. Oliver, 457 So.2d 1269, 1271 (La. App. 1st Cir. 1984), we stated:

> The Fourth Amendment protects citizens against unreasonable searches and seizures, but not every encounter between a citizen and a policeman involves a "seizure." Terry v. Ohio, 392 U.S. 1, 19, n. 16, 88 S.Ct. 1868, 1879, n. 16, 20 L.Ed.2d 889 (1968). "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Id. at 16, 88 S.Ct. at 1877. "As long as a reasonable person would feel free to disregard the encounter and walk away, there has been no 'seizure.'" State v. Ossey,[2] 446 So.2d 280, 285 (La.1984 (quoting Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)); State v. Belton, 441 So.2d 1195, 1199 (La. 1983), cert. denied, [466] U.S. [953], 104 S.Ct. 2158, 80 L.Ed.2d 543 (1984). 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 - no seizure within the meaning of the Fourth Amendment - then no constitutional rights have been infringed." Florida v. Royer, 103 S.Ct. at 1324.

Sergeant Sharp testified at both the motion to suppress hearing and the trial[3] that he initially drove past the defendant and a white male walking down Beach Street. Sergeant Sharp made a U-turn, went back toward the men, and illuminated his bright lights on them. He exited his vehicle and identified himself. He had on a badge and a tactical vest with the word "Sheriff" across the front. He asked them if he could speak to them about the recent criminal activity in the area. The two men willingly spoke to him. Sergeant Sharp also called for a back-up unit.[4] Within seconds, Detectives Liberto and Bilnoski arrived.[5] Sergeant Sharp asked the two men for their names and birthdates, went back to his unit, and conducted a

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[2] cert. denied, 469 U.S. 916, 105 S.Ct. 293, 83 L.Ed.2d 228 (1984).

[3] 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).

[4] It is not clear from the record whether Sergeant Sharp called for a back-up unit before or after he initially spoke to the two men.

[5] Detective Bilnoski did not testify at the trial or the motion to suppress hearing.

computer check on them for active warrants.[6] While Sergeant Sharp was talking to the dispatcher on his radio, Detective Liberto patted down the defendant before speaking to him.

Despite the initial encounter with the defendant being described as something less than an investigatory stop by the State and Detective Liberto,[7] we find that the defendant was seized pursuant to an investigatory stop. While the defendant was walking, Sergeant Sharp passed him up, then turned his vehicle around and came back toward the defendant. He illuminated the defendant in his high beams and exited his vehicle. Within moments, there were a total of three officers on the scene. While one officer asked the defendant personal information and ran a computer check on him, another officer patted him down. Thus, while the first few moments of the encounter may have been consented to by the defendant, we find that a reasonable person under these circumstances would not have felt free to disregard the encounter and walk away. See Oliver, 457 So.2d at 1271; see also Chopin, 372 So.2d 1222,1225 (La. 1979).[8] Since the defendant was seized within the meaning of the Fourth Amendment, we must determine whether or not Sergeant Sharp had reasonable suspicion to effect the investigatory stop.

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[6] It appears from the record that neither man had any outstanding warrants:

> Q. I assume you were working the computer; is that correct?
> A. Actually, I was on the radio.
> Q. Did anything come back on either of the two suspects about any outstanding warrants, for example?
> A. I don't recall, sir. If they would have, we would have effected that.
> Q. You would have effected that, you would have arrested them.
> A. Yes.
> Q. Neither of them were arrested at that time?
> A. No, sir.

[7] In his closing argument at the motion to suppress hearing, the prosecutor referred to the stop as a "consensual encounter." Detective Liberto referred to this type of encounter as a "stop and talk," whereby an officer will stop and talk to an individual to see if that individual has information about crime in the area.

[8] In Chopin, this Court found that two police officers effected an intrusion upon the defendant's right to be free from governmental interference when they swung the patrol car around into his path, switched on the bright lights, and braked not more than three or four feet in front of him. Such an approach clearly indicated that some form of official detention was imminent. Chopin, 372 So.2d at 1224-1225.

In State v. Temple, 2002-1895, pp. 4-5 (La. 9/9/03), 854 So.2d 856, 859-860, our supreme court stated:

> Although La.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. See Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 8[8]9 (1968); State v. Andrishok, 434 So.2d 389, 391 (La. 1983). . . . 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. Williams, 421 So.2d 874, 875 (La. 1982).
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> 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.' " State v. Kalie, 96-2650, p. 3 (La. 9/19/97), 699 So.2d 879, 881 (quoting United States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981)). The police must therefore "articulate something more than an " 'inchoate and unparticularized suspicion or "hunch." ' " United States v. Sokolow, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989) (quoting Terry v. Ohio, 392 U.S. at 27, 88 S.Ct. at 1883). . . .
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> 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. State v. Buckley, 426 So.2d 103, 108 (La. 1983) (citing United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975)). . . .

In the instant matter, Sergeant Sharp testified at the trial and the motion to suppress hearing that he observed the defendant and a white male walking at about 11:45 p.m. in a high-crime area in Lacombe. He stated that a lot of crimes occurred in this area, including armed robberies, shootings, and drug dealings.[9] He further testified that the white male was familiar to him from previous narcotics-related arrests.[10]

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[9] Detective Liberto testified at the motion to suppress hearing that they were assigned specifically to Lacombe due to the recent surge in crime.

[10] On cross-examination at the motion to suppress hearing, Sergeant Sharp testified that he could not recall the white male's name, nor could he describe him. At trial, Sergeant Sharp described the white male as "[a]pproximately five foot eight, five foot nine," but could not remember clothing or facial features.

In considering the totality of the circumstances, we find that there was no reasonable cause to justify this investigatory stop. The stop was not based on any reasonable belief by Sergeant Sharp, justified by some conduct on the part of either of the two men, that either man had been, was, or was about to be engaged in criminal conduct. See State v. Smith, 347 So.2d 1127, 1129 (La. 1977). On cross-examination at the motion to suppress hearing, Sergeant Sharp was asked: "When you stopped them at that point in time, you didn't have any idea that Mr. Robertson or the other individual had been involved in any crime, had you?" Sergeant Sharp responded, "No, sir." The mere presence of these two men walking on a street at night in a high-crime area, with nothing more[11] is, of itself, insufficient to justify an investigatory stop. See State v. Fleming, 457 So.2d 1232, 1234-1235 (La. App. 1st Cir.), writ denied, 462 So.2d 191 (La. 1984). See also Temple, 2002-1895 at pp. 5-7, 854 So.2d at 860-861.

While it is true that an 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 the 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. Moreover, even assuming, *arguendo*, that the detention was lawful, we would still find the pat-down of the defendant unlawful. After a lawful investigatory stop, a police officer may frisk the suspect only where a reasonably prudent person would be warranted in the belief that his safety or that of others is in danger. Therefore, the reasonableness of a frisk is governed by an objective standard. The officer's suspicion that he is in danger is not reasonable

[11] For example, aside from Sergeant Sharp's testimony about his recognition of the white male from prior arrests, there is nothing in his testimony that is even suggestive of potentially criminal conduct on the part of either man, 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.

unless the officer can point to particular facts which led him to believe that the individual was armed and dangerous. State v. Sims, 2002-2208, p. 6 (La. 6/27/03), 851 So.2d 1039, 1043-1044.

At trial, Sergeant Sharp testified that after he stopped the two men while they were walking, "[t]he white male appeared to be, for lack of a better word, nervous. He just kind of seemed jumpy."[12] At the motion to suppress hearing, Detective Liberto testified that when he arrived on the scene, Sergeant Sharp mentioned to him that one of the subjects "appeared to be a little nervous."[13] At trial, Detective Liberto testified that when Sergeant Sharp mentioned that one of the subjects "had a nervous demeanor about him," he and his partner "took it a little step further" and patted down the subjects. Detective Liberto patted down the defendant.

Thus, based not on his own observations, but on Sergeant Sharp's observation that the white male appeared "nervous," Detective Liberto frisked the *defendant*. Neither Sergeant Sharp nor Detective Liberto could point to any

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[12] On cross-examination at trial, Sergeant Sharp could point to nothing unusual about the white male's actions:

> Q. What about, was there anything unusual about [the white male's] appearance or his actions?
> A. No, sir.
> Q. When you made a U-turn and came back, you flashed your lights; is that correct?
> A. Yes, sir.
> Q. You indicated that the unknown white male appeared to be nervous?
> A. Yes, sir.
> Q. What about Mr. Robertson?
> A. I focused on the white male at that time.
> Q. Did you notice anything irregular about his actions?
> A. No, sir, I did not.
> Q. Did either the white male or Mr. Robertson attempt to run or flee?
> A. No, sir, they did not.
> Q. When you questioned them, were they cooperative?
> A. Yes, sir.

[13] The nervous suspect was the white male, not the defendant, as indicated by Detective Liberto on cross-examination at the motion to suppress hearing:

> Q. The individual that was nervous was not Mr. Robertson, it was the other individual, correct?
> A. Correct.

particular facts, or suggest any action by the defendant, which precipitated the frisk by Detective Liberto. No court of this state has concluded that nervousness, absent additional aggravating factors, can form the basis for an officer's protective frisk search for weapons. Sims, 2002-2208 at 7, 851 So.2d at 1044.[14] Under the facts of this case, a reasonably prudent man would not have been warranted in the belief that the defendant was armed and dangerous.[15] See Hunter, 375 So.2d at 102.

Accordingly, the State did not establish reasonable grounds for the investigatory stop, or the subsequent protective frisk of the defendant, and the evidence seized pursuant thereto must be suppressed. The trial court erred in denying the motion to suppress. Thus, the denial of the defendant's motion to suppress is reversed, 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 AND CASE REMANDED.

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[14] In Sims, while the supreme court found the frisk of the defendant to be unlawful, the court ultimately affirmed the trial court's denial of the motion to suppress because, following the defendant's arrest for committing a battery upon an officer in an attempt to resist the unlawful frisk, the search incident to the arrest was upheld. In Sims, like in the instant matter, the defendant was walking down the street during the evening in an area that had recently seen an increased amount of crime, namely residence burglaries. Sims, 2002-2208 at 1-12, 851 So.2d at 1041-1047.

[15] We note that even if we had found that the stop of the two men by Sergeant Sharp was something less than an investigatory stop, i.e. "stop and talk" or consensual encounter, so as not to implicate the Fourth Amendment insofar as the stop was concerned, the unlawful protective frisk, as previously discussed, would require the evidence to be suppressed.

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McCLENDON, J., concurs, and assigns reasons.

I concur with the result reached by the majority.