**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 0509

STATE OF LOUISIANA

VERSUS

CHARLES JONES

***DATE OF JUDGMENT: June 8, 2007***

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
(NUMBER 02-04-0400 SEC: VI), PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE DONALD JOHNSON, JUDGE

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| Hon. Doug Moreau, District Attorney<br>Monisa L. Thompson<br>Baton Rouge, Louisiana | Counsel for Plaintiff/Appellee<br>State of Louisiana |
| Bertha M. Hillman<br>Thibodaux, Louisiana | Counsel for Defendant/Appellant<br>Charles Jones |

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**BEFORE: KUHN, GAIDRY, AND WELCH, JJ.**

**Disposition: CONVICTION AND HABITUAL-OFFENDER ADJUDICATION AFFIRMED; SENTENCE AFFIRMED AS AMENDED.**

KUHN, J.

Defendant, Charles Jones, was charged by bill of information with possession with intent to distribute cocaine, a violation of La. R.S. 40:967(A).[1] He pleaded not guilty and, after a trial by jury, was convicted as charged. The State filed a multiple-felony offender bill of information. Following a hearing, the defendant was adjudicated a third-felony habitual offender. The trial court departed from the mandatory-minimum sentence required under the Habitual-Offender Law and sentenced the defendant to imprisonment at hard labor for fifteen years without the benefit of probation, parole or suspension of sentence. The State objected to the trial court's departure from the mandatory-sentencing guidelines and notified the court of its intent to seek supervisory review. The State filed a writ in this court seeking review of the trial court's failure to sentence the defendant as an habitual offender. This court denied the State's writ. ***State v. Jones***, 05-1715 (La. App. 1st Cir. 10/31/05) (unpublished writ action). The State then filed a supervisory-writ application with the Louisiana Supreme Court, which granted the State relief. The Supreme Court vacated the fifteen-year sentence and remanded for resentencing. ***State v. Jones***, 05-2386 (La. 3/31/06), 925 So.2d 1242. On remand, the trial court resentenced defendant, as a third-felony habitual offender, to imprisonment at hard labor for twenty years without benefit of probation, parole or suspension of sentence.

Defendant now appeals, urging in a single assignment of error challenging the trial court's ruling on his motion to suppress. Finding no merit in the assigned

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[1] In his brief, defendant inadvertently lists the charging statute as La. R.S. 40:964, however, the bill of information reflects that the defendant was charged under La. R.S. 40:967(A).

error, we affirm defendant's conviction and habitual-offender adjudication. We amend the sentence and affirm as amended.

## FACTS

On January 13, 2004, at approximately 6:30 p.m., Officer Thomas Morse, Jr., of the Baton Rouge Police Department, was patrolling the Gus Young area when he observed defendant and another individual standing in a parking lot on a corner near N. 48th Street. Officer Morse observed that defendant was drinking from a silver can. Because he believed the beverage defendant was drinking was a Budweiser beer, in violation of the East Baton Rouge Parish open-container law, Officer Morse decided to investigate. Officer Morse exited his marked police vehicle, approached defendant, and requested that he move over to the front of the police vehicle. Defendant did not comply. Instead, defendant looked at Officer Morse, threw down the can he had been drinking from, and ran. A foot chase ensued. As he chased defendant, Officer Morse observed defendant remove a plastic bag from the waistband of his pants, then threw the plastic bag into some bushes. Defendant was ultimately captured and placed under arrest.

The plastic bag was subsequently recovered from the bushes. It contained a rock-like substance later determined to contain cocaine. Examination of the can discarded by defendant revealed that it was a legal, non-alcoholic beverage.

## DENIAL OF MOTION TO SUPPRESS

In his sole assignment of error, defendant contends the trial court erred in denying his motion to suppress the evidence. Specifically, defendant challenges

the initial encounter by Officer Morse.[2] He asserts Officer Morse did not have a reasonable, articulable suspicion to stop him as he stood in a parking lot drinking a soft drink. Defendant urges that since the officer did not have the requisite reasonable suspicion of criminal activity to justify the investigatory stop, the stop was unlawful, and, thus, the resulting evidence should have been suppressed as fruit of the unlawful stop.

The Fourth Amendment to the United States Constitution and Article I, Section 5 of the Louisiana Constitution protect persons against unreasonable searches and seizures. A defendant adversely affected may move to suppress any evidence from use at the trial on the merits on the ground that it was unconstitutionally obtained. La. C.Cr.P. art. 703(A). A trial court's ruling on a motion to suppress the evidence is entitled to great weight, because the trial court had the opportunity to observe the witnesses and weigh the credibility of their testimony. ***State v. Jones***, 01-0908, p. 4 (La. App. 1st Cir. 11/8/02), 835 So.2d 703, 706, ***writ denied***, 02-2989 (La. 4/21/03), 841 So.2d 791.

It is well settled that if property is abandoned without any prior unlawful intrusion into the citizen's right to be free from governmental interference, then such property may be lawfully seized and used in a resulting prosecution. In such cases, there is no expectation of privacy, and, thus, no violation of a person's custodial rights. ***State v. Jones***, 2001-0908 at p. 7, 835 So.2d at 708.

While the Fourth Amendment protects individuals from actual stops, Article I, Section 5 of the Louisiana Constitution also protects individuals from

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[2] Defendant does not challenge any actions of the officer beyond that of the initial encounter.

"imminent actual stops." ***State v. Tucker***, 626 So.2d 707, 712 (La. 1993) (citing ***California v. Hodari D.***, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991)). 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. This degree of certainty may be ascertained by examining the extent of police force employed in attempting the stop. 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." 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. ***State v. Jones***, 01-0908 at pp. 7-8, 835 So.2d at 708.

In this case, Officer Morse's uncontradicted testimony established that he approached defendant in public only to "get a closer look" and to converse with defendant regarding the beverage he was drinking, an encounter for which no justification is required. The officer, acting alone, then simply requested that defendant move to the front of the police vehicle. According to the testimony at

the motion to suppress hearing and at the trial, Officer Morse asked defendant to "please" step over to the front of the vehicle. Defendant responded with flight and abandoned the cocaine as he fled.

Neither an actual nor imminent actual stop took place before defendant turned and fled, abandoning the cocaine in the ensuing foot chase. Officer Morse initially acted alone, thus, defendant was not surrounded at the time the officer attempted to question him. Officer Morse did not have his weapon drawn when he exited his vehicle and approached defendant. The officer chased defendant on foot. The officer's actions of requesting that defendant voluntarily move towards the front of the vehicle to answer some questions did not provide a significant degree of certainty that an actual stop was imminent. Furthermore, even if Officer Morse's initial request to relocate could be considered a "show of authority," defendant did not submit to the show of authority and was not physically contacted until after he abandoned the cocaine. Therefore, the cocaine in question was abandoned without any prior unlawful intrusion into defendant's right to be free from governmental interference and was lawfully seized. Thus, we find no error in the trial court's denial of the motion to suppress. This assignment of error lacks merit.

## REVIEW FOR ERROR

In reviewing the record for error under La. C.Cr.P. art. 920(2), we have discovered a sentencing error in that the trial court ordered defendant's entire sentence to be served "without benefit of probation and parole or suspension of sentence." Defendant was convicted of possession with intent to distribute

cocaine. Thereafter, he was adjudicated a third-felony habitual offender based on prior convictions for possession of cocaine and possession of marijuana, second offense. As a third-felony habitual offender with these prior convictions, defendant's potential term of imprisonment was a minimum of twenty years and a maximum of sixty years at hard labor without benefit of probation or suspension of sentence and with the ***first two years*** without benefit of parole. La. R.S. 15:529.1(A)(1)(b)(i), (G); 40:967(B)(4)(b).

This court may, however, correct the illegal sentence by amendment on appeal, rather than by remand for resentencing, because it is clear from the record, particularly from the fact that the trial court initially deviated from the mandatory-minimum sentence, that the trial court attempted to impose the minimum legal sentence in this matter. Thus, no exercise of sentencing discretion is involved. See La. C.Cr.P. art. 882(A); ***State v. Miller***, 96-2040, p. 3 (La. App. 1st Cir. 11/7/97), 703 So.2d 698, 701, ***writ denied***, 98-0039 (La. 5/15/98), 719 So.2d 459.

For the foregoing reasons, we affirm defendant's conviction and habitual offender-adjudication. The sentence imposed by the trial court is amended to restrict parole eligibility to the first two years of the sentence, and is affirmed as amended.

**CONVICTION AND HABITUAL-OFFENDER ADJUDICATION AFFIRMED; SENTENCE AFFIRMED AS AMENDED.**