NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 KA 0220

STATE OF LOUISIANA

VERSUS

CLENIVES LEWIS

Judgment Rendered: June 8, 2007.

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On Appeal from the
22nd Judicial District Court,
In and for the Parish of Washington,
State of Louisiana
Trial Court No. 04-CR8-91149

Honorable Larry Green, Judge Presiding

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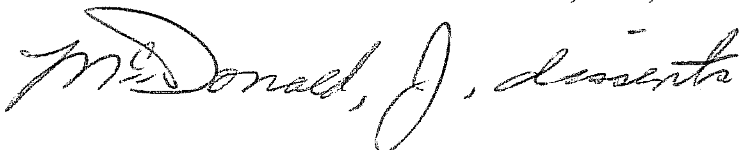
* * * * *

BEFORE: CARTER, C.J., WHIPPLE AND MCDONALD, JJ.



CARTER, C.J.

The defendant, Clenives Lewis, was charged by bill of information with one count of possession with intent to distribute cocaine (count I), a violation of LSA-R.S. 40:967A(1), and with one count of possession of a firearm by a convicted felon (count II), a violation of LSA-R.S. 14:95.1. He pled not guilty on both counts. The defendant moved to suppress the evidence seized, but the motion was denied. He moved for appointment of a sanity commission and a sanity commission was appointed. Following a jury trial, on count I, the defendant was found guilty of the responsive offense of possession of cocaine, a violation of LSA-R.S. 40:967C; and on count II, he was found guilty as charged. The defendant moved for arrest of judgment, for a new trial, and for a post-verdict judgment of acquittal, but the motions were denied.

On count I, the defendant was sentenced to five years at hard labor. On count II, the defendant was sentenced to fifteen years at hard labor without benefit of parole, probation, or suspension of sentence. The trial court ordered that the sentences imposed on counts I and II would run concurrently with each other. The defendant now appeals, designating two assignments of error. We conditionally affirm the convictions and sentences on counts I and II and remand with instructions.

ASSIGNMENTS OF ERROR

1. The conviction must be reversed because the trial court failed to rule on the defendant's competency to proceed to trial, despite having ordered a competency evaluation.

2. The conviction must be reversed because the trial court erred in failing to suppress the evidence.

FACTS

In response to numerous complaints of excessive traffic visiting the defendant's home, Varnado Police Officer Louis Adams conducted intermittent surveillance of the home for approximately two weeks. Surveillance confirmed excessive traffic to the defendant's home and also indicated that the defendant lived in the home alone. During surveillance of the defendant's home, Officer Adams saw Jody Amacker visit the defendant's home and saw the defendant and Amacker "passing" something to each other. Officer Adams learned that there was an outstanding warrant for Amacker and stopped his vehicle as it left the defendant's home. Officer Adams recovered a rock of suspected crack cocaine from a cigarette box Amacker "dropped" as he exited his vehicle. Thereafter, Officer Adams applied for, and obtained, a search warrant for the defendant's home.

On August 30, or August 31, 2004, Officer Adams and certain Washington Parish Sheriff's Deputies executed the search warrant on the defendant's home in Washington Parish. The defendant was apprehended "heading" into the bathroom and throwing the contents of an ashtray into the toilet. Eight pieces of crack cocaine were recovered from the floor of the bathroom and the rim of the toilet, and one piece of crack cocaine was recovered from the toilet. Additionally, a .38 caliber revolver was recovered from under some clothes on a shelf in the master bedroom of the defendant's home. The defendant had previously been convicted of simple burglary of an inhabited dwelling, a violation of LSA-R.S. 14:62.2. He had also previously pled guilty to possession of cocaine, a violation of La. R.S. 40:967C.

CAPACITY TO PROCEED

In assignment of error number 1, the defendant argues the trial court failed to rule on the defense motion for a hearing to determine the defendant's competency, and thus, the convictions must be reversed. The State alleges, "[t]he

Assistant District Attorney who handled the trial of this matter believes that there was a stipulation reached in chambers regarding the competency issue[,]" but acknowledges that the record does not contain a ruling regarding a competency determination.

A defendant does not have an absolute right to the appointment of a sanity commission simply upon request. A trial judge is only required to order a mental examination of a defendant when there are reasonable grounds to doubt the defendant's mental capacity to proceed. LSA-C.Cr.P. art. 643. It is well established that "reasonable grounds" exist where one should reasonably doubt the defendant's capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense. To determine a defendant's capacity, we are first guided by LSA-C.Cr.P. arts. 642, 643, and 647. **State ex rel. Seals v. State**, 00-2738 (La. 10/25/02), 831 So.2d 828, 832.

As a general matter, LSA-C.Cr.P. art. 642 allows "[t]he defendant's mental incapacity to proceed [to] be raised at any time by the defense, the district attorney, or the court." The Article additionally requires that "[w]hen the question of the defendant's mental incapacity to proceed is raised, there shall be no further steps in the criminal prosecution ... until the defendant is found to have the mental capacity to proceed." LSA-C.Cr.P. art. 642. Next, LSA-C.Cr.P. art. 643, provides, in pertinent part, "The court shall order a mental examination of the defendant when it has reasonable ground to doubt the defendant's mental capacity to proceed." Last, if a defendant's mental incapacity has been properly raised, the proceedings can only continue after the court holds a contradictory hearing and decides the issue of the defendant's mental capacity to proceed. See LSA-C.Cr.P. art. 647. **State ex rel. Seals**, 831 So.2d at 831-32.

Questions regarding a defendant's capacity must be deemed by the court to be *bona fide* and in good faith before a court will consider if there are "reasonable grounds" to doubt capacity. Where there is a *bona fide* question raised regarding a defendant's capacity, the failure to observe procedures to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial. At this point, the failure to resolve the issue of a defendant's capacity to proceed may result in nullification of the conviction and sentence under **State v. Nomey**, 613 So.2d 157, 161-62 (La. 1993), or a nunc pro tunc hearing to determine competency retrospectively under **State v. Snyder**, 98-1078 (La. 4/14/99), 750 So.2d 832. **State ex rel. Seals**, 831 So.2d at 833. (Emphasis in original).

In certain instances, a nunc pro tunc hearing on the issue of competency is appropriate "if a meaningful inquiry into the defendant's competency" may still be had. In such cases, the trial court is again vested with the discretion of making this decision as it "is in the best position" to do so. This determination must be decided on a case-by-case basis, under the guidance of **Nomey**, **Snyder**, and their progeny. The State bears the burden in the nunc pro tunc hearing to provide sufficient evidence for the court to make a rational decision. **State ex rel. Seals**, 831 So.2d at 833.

In the instant case, on October 7, 2005, the defense moved for a hearing to determine the defendant's mental condition, alleging both that the defendant was insane at the time of the offense and that he was mentally defective or deficient to the extent that he was unable to understand the proceedings against him and unable to assist counsel in trial preparation. By order dated October 10, 2005, the trial court appointed Drs. Salcedo and Thompson to examine the present mental condition of the defendant and his mental condition at the time of the offense, and

to report their findings to the court within thirty days. On December 19, 2005, a sanity hearing was set for "trial week of January 9, 2006." On January 9, 2006, the trial was continued, "pending sanity," until April 24, 2006. The record does not contain a minute entry for April 24, 2006, but indicates trial commenced on April 25, 2006. The record contains the reports of Drs. Salcedo and Thompson, but does not contain any ruling on the sanity issue by the trial court.

Therefore, we conditionally affirm the convictions and sentences of the defendant, and remand to the trial court for the purpose of determining whether a stipulation had been reached on this issue, and if not, whether a nunc pro tunc competency hearing may be possible. Absent a stipulation or other disposition of this issue, if the trial court believes that it is still possible to determine the defendant's competency at the time of the trial on the charges, the trial court is directed to hold an evidentiary hearing. If the defendant was competent, no new trial is required. If the defendant is found to have been incompetent at the time of trial, or if the inquiry into competency is found to be impossible, the defendant is entitled to a new trial. Defendant's right to appeal is reserved. See **Snyder**, 750 So.2d at 855-56 & 863; **State v. Mathews**, 00-2115 (La. App. 1 Cir. 9/28/01), 809 So.2d 1002, 1016, writs denied, 01-2873 (La. 9/13/02), 824 So.2d 1191, 01-2907 (La. 10/14/02), 827 So.2d 412.

This assignment of error has merit, in part.

MOTION TO SUPPRESS EVIDENCE

In assignment of error number 2, the defendant argues the trial court erred in denying the motion to suppress evidence because: (a) the affiant of the search warrant, Varnado Police Officer Louis Adams, obtained a search warrant for a residence outside of his jurisdiction; and (b) the activity observed by Officer Adams did not rise to the level of probable cause. Additionally, the defendant contends, and

the record indicates, the search warrant and the affidavit in support thereof were neither introduced into evidence nor presented to the trial court prior to the ruling on the motion to suppress. The State does not address its failure to introduce into evidence the search warrant and the affidavit in support thereof.

A search warrant may issue only upon probable cause established to the satisfaction of a judge, by the affidavit of a credible person, reciting facts establishing the cause for issuance of the warrant. LSA-Const. art. I, § 5; LSA-C.Cr.P. art. 162. Probable cause exists when the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient to support a reasonable belief that an offense has been committed and that the evidence or contraband may be found at the place to be searched. The facts establishing probable cause for a search warrant must be contained within the four corners of the affidavit. LSA-C.Cr.P. art. 162. The judicial officer must be supplied with enough information to support an independent judgment that probable cause exists for the issuance of a warrant. **State v. Fugler**, 97-1936 (La. App. 1 Cir. 9/25/98), 721 So.2d 1, 19, rehearing granted and amended in part on other grounds, 97-1936 (La. App. 1 Cir. 5/14/99), 737 So.2d 894, writ denied, 99-1686 (La. 11/19/99), 749 So.2d 668.

An affidavit supporting a search warrant is presumed to be valid. When a defendant proves that an affidavit contains false statements, it should be determined whether the misrepresentations are intentional or unintentional. Defendant must prove by a preponderance of the evidence that the affidavit contains intentional misrepresentations. **Fugler**, 721 So.2d at 19.

Affidavits, by their nature, are brief, and some factual details must be omitted. Unless the omission is willful and calculated to conceal information that would indicate that there is not probable cause or would indicate that the source of

other factual information in the affidavit is tainted, the omission will not change an otherwise good warrant into a bad one. In matters relating to the possibility that a warrant contains intentional misrepresentations, the question of the credibility of the witnesses is within the sound discretion of the trier of fact. Factual determinations are entitled to great weight and will not be disturbed unless clearly contrary to the evidence. The harsh result of quashing a search warrant, when the affidavit supports a finding of probable cause, should obtain only when the trial judge expressly finds an intentional misrepresentation to the issuing magistrate. **Fugler**, 721 So.2d at 19.

An appellate court may remand a case for a reopened suppression hearing in order to cure an erroneous ruling or order such a remand when the evidence introduced at an original hearing on a motion to suppress is incomplete or ambivalent. **State v. Fitch**, 572 So.2d 677, 681 (La. App. 1 Cir. 1990). In the instant case, without introduction of the search warrant and affidavit in support thereof, the evidence introduced at the original hearing on the motion to suppress was incomplete.

Accordingly, we find appropriate the procedure of a remand for a reopened hearing on the motion to suppress. Specifically, we remand for a reopened hearing on the motion to suppress for the trial court to receive into evidence the search warrant and affidavit in support thereof, and for it to make its ruling on the motion in light thereof. If the trial court finds, in accordance with the views expressed in this opinion, that the challenged evidence should have been suppressed, the trial court is directed to grant the defendant a new trial (and the present appeal will be mooted); if, on the other hand, the trial court reinstates its denial of the motion to suppress, it is ordered to transmit to this court its ruling and the record of the reopened hearing on the motion to suppress, in order that this court may complete

its review of the issue under assignment of error number 2 and any further assignments of error made as a result of the rulings at the reopened hearing. See **State v. Jackson**, 424 So.2d 997, 1001 (La. 1982); see also **State v. Landry**, 98-0188 (La. 1/20/99), 729 So.2d 1019, 1021 (per curiam).[1]

Accordingly, we pretermit further review of this assignment of error due to the incomplete record.

REVIEW FOR ERROR

The defendant asks that this court examine the record for error under LSA-C.Cr.P. art. 920(2). This court routinely reviews the record for such errors, whether or not such a request is made by a defendant. Under LSA-C.Cr.P. art. 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.

In regard to count II, the trial court failed to impose the mandatory fine of not less than one thousand dollars nor more than five thousand dollars in this matter. See LSA-R.S. 14:95.1B. Although the failure to impose the fine is error under LSA-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 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, 124-125 (en banc).

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[1] **Landry** involved the granting of a motion to suppress videotaped statements for violation of the rule of **Payton v. New York**, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), the trial court's failure to consider the **New York v. Harris**, 495 U.S. 14, 21, 110 S.Ct. 1640, 1644-45, 109 L.Ed.2d 13 (1990), exception to the exclusionary rule for **Payton** violations where the police had probable cause to arrest the suspect, and the State's failure to introduce evidence pertinent to the question of probable cause at the suppression hearing. **Landry**, 729 So.2d at 1020-22. The court in **Landry** vacated the ruling on the motion to suppress and remanded for retrial of the motion to suppress as to the issue of probable cause. **Landry**, 729 So.2d at 1021-22.

DECREE

For the foregoing reasons, we remand this case to the trial court for the initial purpose of determining whether a stipulation had been reached on the sanity issue (and to supplement the record accordingly), and if not, to determine whether a nunc pro tunc competency hearing may be possible and to conduct the hearing. Additionally, if the defendant is found to have been competent to stand trial, on remand, the motion to suppress hearing shall be reopened to allow for the trial court to receive at the reopened hearing the search warrant and affidavit in support thereof, and for it to make its ruling on the motion in light thereof. In accordance with and subject to the directions expressed by this opinion, this court conditionally affirms the defendant's convictions and sentences and otherwise retains jurisdiction of this appeal.

CONVICTIONS AND SENTENCES ON COUNTS I AND II CONDITIONALLY AFFIRMED; REMANDED WITH INSTRUCTIONS.