NOT DESIGNATED FOR PUBLICAITON

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 1073

STATE OF LOUISIANA

VERSUS

KELTON L. SPANN

Judgment Rendered: December 22, 2010

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Appealed from the
22nd Judicial District Court
In and for the Parish of Washington
State of Louisiana
Case No. 08 CR3 97696

The Honorable Raymond Childress, Judge Presiding

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Walter P. Reed **District Attorney** **Kathryn Landry** **Special Appeals Counsel** **Baton Rouge, Louisiana**	**Counsel for Appellee** **State of Louisiana**
Frank Sloan **Mandeville, Louisiana**	**Counsel for Defendant/Appellant** **Kelton L. Spann**
Kelton L. Spann **Rayville, Louisiana**	**Defendant/Appellant** **In Proper Person**

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

Carter, C.J. dissents with reasons

GAIDRY, J.

The defendant, Kelton L. Spann, was charged by bill of information with possession of cocaine with intent to distribute, a violation of La. R.S. 40:967(A)(1). He pled not guilty. The defendant filed a motion to suppress the evidence. Following a hearing, the trial court denied the motion. Thereafter, the defendant withdrew his former not guilty plea and pled guilty as charged pursuant to *State v. Crosby*, 338 So.2d 584 (La. 1976), reserving his right to challenge the trial court's ruling on the motion to suppress. Following a *Boykin* examination, the trial court accepted the defendant's guilty plea and sentenced him to imprisonment at hard labor for twelve years. The court ordered that the first two years of the sentence be served without the benefit of probation, parole or suspension of sentence. The defendant now appeals, urging the following assignments of error by counseled and pro se briefs:

Counseled:

1. The trial court's denial of the defendant's motion to suppress the evidence should be reversed.

2. The trial court misinformed the defendant of the delays for applying for post conviction relief.

Pro se:

1. Lieutenant Goings's testimony was insufficient for the trial court to justify reasonable suspicion under the Louisiana jurisprudence to conduct an investigatory stop of the defendant.

2. If this honorable court considers the testimony justified the investigatory detention, did the testimony justify the frisk under Article 215.1(B) and Louisiana jurisprudence?

For the following reasons, we reverse the trial court's denial of the motion to suppress and enter an order granting the motion. We vacate the defendant's

guilty plea and sentence and remand the matter to the trial court for further proceedings.

FACTS

The following facts were derived from the testimony adduced at the hearing on the motion to suppress.

On September 5, 2007, Lieutenant Brent Goings and Detective Robert Harris of the Washington Parish Drug Task Force were conducting a narcotics investigation in Washington Parish. Shortly after midnight, the officers were approaching the intersection of Second Avenue and Fourth Street in Bogalusa (an area known for drug activity) when Lieutenant Goings observed four black males standing outside of a parked vehicle. Upon observing a hand-to-hand transaction between the defendant and one of the men, the officers approached to investigate. They exited the unmarked vehicle and identified themselves as police officers. As the officers were walking toward the group, the defendant opened the door of the vehicle and sat down. Lieutenant Goings instructed the defendant to get out of the vehicle and place his hands on top of it. The defendant complied. Lieutenant Goings asked if the defendant had any weapons or narcotics on his person and told him he was going to conduct a pat down for officer safety. During the pat down, the defendant removed his left hand from the vehicle and attempted to put it into his left pocket. The attempt was unsuccessful because Lieutenant Goings grabbed the defendant's hand and told him to place it back on the vehicle. Lieutenant Goings again asked the defendant if he had "anything." The defendant turned the left side of his body towards the vehicle and spoke to Lieutenant Goings over his right shoulder. Lieutenant Goings instructed the defendant to face the vehicle and conducted the pat down, during which he felt a bulge in the defendant's front left pocket. According to Lieutenant Goings, when asked what the object was

that created the bulge, the defendant replied that "some dude had just put that in his pocket." Lieutenant Goings removed the object (a plastic pill bottle) from the defendant's pocket. He opened the bottle and found crack cocaine and a small plastic wrap containing powdered cocaine. The defendant was advised of his *Miranda* rights and placed under arrest.

The defendant filed a motion to suppress the evidence. At the hearing, Lieutenant Goings testified that he removed the pill bottle from the defendant's pocket after the defendant indicated that someone else put something there. Lieutenant Goings explained that he interpreted the defendant's disclaimer as an abandonment of the object.

DENIAL OF MOTION TO SUPPRESS

On appeal, the defendant argues the trial court erred in failing to grant his motion to suppress the evidence. Specifically, he asserts that the evidence seized from the plastic pill bottle found inside his pocket was obtained as a result of an illegal search that cannot be justified under any exception to the warrant requirement. In his counseled brief, the defendant challenges Lieutenant Goings's actions of removing and opening the pill bottle under the mistaken belief that it had been abandoned as unconstitutional. In his pro se brief, the defendant also argues that Lieutenant Goings lacked reasonable suspicion of criminal activity to justify the investigatory stop. In response, the state asserts the search was lawful because the officers had probable cause to arrest the defendant based upon the observance of the hand-to-hand transaction in a high-crime area after midnight. Alternatively, the state argues that by disclaiming ownership of the item in his pocket, the defendant abandoned the item and forfeited any rights to challenge the search of it.

In denying the motion to suppress, the trial court reasoned:

> After having listened to the testimony of the witnesses, the Court finds that the officer had reasonable suspicion to interact with this defendant. And based upon his testimony concerning him having witnesses [*sic*] what appeared to be a hand-to-hand transaction between the defendant and another party; after having come into contact with the defendant, also, the officer testified that, upon approaching the defendant, the defendant got into his vehicle and the officer had to tell the defendant to get out of the vehicle, which the defendant did comply with.
>
> But the officer, in doing so, this Court finds had a reasonable grounds in which to conduct a *Terry* stop, the pat search; the defendant tells the officer – based upon the officer's testimony – that this item in his pocket was not his and somebody else had placed it there. Upon its removal, he finds the drugs.
>
> I'm denying the motion to suppress.

When the constitutionality of a warrantless search or seizure is placed at issue by a motion to suppress the evidence, the state bears the burden of proving the admissibility of any evidence seized without a warrant. La. Code Crim. P. art. 703(D). When a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, i.e., unless such ruling is not supported by the evidence. See *State v. Green*, 94-0887, p. 11 (La. 5/22/95), 655 So.2d 272, 280-81. However, a trial court's legal findings are subject to a *de novo* standard of review. See *State v. Hunt*, 2009-1589, p. 6 (La. 12/1/09), 25 So.3d 746, 751.

Investigatory Stop

The Fourth Amendment to the United States Constitution and La. Const. art. I, § 5, protect people against unreasonable searches and seizures. However, the right of law enforcement officers to stop and interrogate one reasonably suspected of criminal conduct is recognized by La. Code Crim. P. art. 215.1, as well as by both federal and state jurisprudence. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Belton*, 441 So.2d 1195, 1198 (La. 1983), cert. denied, 466 U.S. 953, 104 S.Ct. 2158, 80

L.Ed.2d 543 (1984). The right to make an investigatory stop and question the particular individual detained must be based on reasonable suspicion to believe that he has been, is, or is about to be engaged in criminal conduct. *State v. Thomas*, 583 So.2d 895, 898 (La. App. 1st Cir. 1991). 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 person stopped of criminal activity. The police must therefore articulate something more than an inchoate and unparticularized suspicion or hunch. This level of suspicion, however, need not rise to the probable cause required for a lawful arrest. The police need only have some minimal level of objective justification. A reviewing court must take into account "the totality of the circumstances– whole picture," giving deference to the inferences and deductions of a trained police officer "that might well elude an untrained person." *State v. Huntley*, 97-0965, p. 3 (La. 3/13/98), 708 So.2d 1048, 1049 (per curiam) (quoting *United States v. Cortz*, 449 U.S. 411, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981).

In the instant case, Lieutenant Goings testified that he was patrolling after midnight when he personally observed the defendant engage in a hand-to-hand transaction with another male, in an area known for drug activity. An officer's knowledge that a certain area is one of frequent criminal activity is a legitimate, recognized factor that may be used to judge the reasonableness of a detention. Such so-called "high crime" areas are places in which the character of the area gives color to conduct that might not otherwise arouse the suspicion of an officer. *State v. Nixon*, 95-0740, p. 3 (La. App. 1st Cir. 4/4/96), 672 So.2d 402, 404, writ denied, 96-1118 (La. 10/4/96), 679 So.2d 1378. Herein, Lieutenant Goings's knowledge that the area was a high drug-crime area, combined with the observed hand-to-hand

transaction between the two men at such a late hour, created reasonable suspicion to stop the defendant for questioning in accordance with La. Code Crim. P. art. 215.1. Contrary to the defendant's assertions in his brief, these circumstances supported a reasonable suspicion that the defendant may have been involved in criminal activity, and thus, a brief intrusion for questioning was not unreasonable.

Safety Pat Down

The defendant argues Lieutenant Goings was not justified in conducting a pat down for weapons because the circumstances did not suggest that the defendant was armed or dangerous. La. Code Crim. P. art. 215.1(B) permits law enforcement officers to conduct a pat down frisk for weapons if the police officer reasonably believes he is in danger or that the suspect is armed. It is sufficient that an officer establish a "substantial possibility" of danger by pointing to particular facts that support such a reasonable inference. *State v. Bolden*, 380 So.2d 40, 42 (La.), cert. denied, 449 U.S. 856, 101 S.Ct. 153, 66 L.Ed.2d 70 (1980). It is well settled that drug traffickers and users have a violent lifestyle and are generally armed due to the nature of their illicit business. Thus a police officer should be permitted to frisk a suspect who reasonably appears to be dealing drugs. See *State v. Curtis*, 96-1408 (La. App. 4th Cir. 10/2/96), 681 So.2d 1287, 1292. La. Code Crim. P. art. 215.1(B) also provides, "[i]f the law enforcement officer reasonably suspects the person possesses a dangerous weapon, he may search the person."

In this case, Lieutenant Goings testified that the defendant responded to the approach of the officers by sitting down in his vehicle. Later, although he was asked to keep his hands on the vehicle, the defendant attempted to put his left hand into his pocket. Given these observations, the

nature of the area, lateness of the hour, and the close association of weapons and drug trafficking, we find Lieutenant Goings had reasonable circumstances to justify a protective frisk for weapons.

Removal and Search of Pill Bottle

Having found that Lieutenant Goings was reasonable in stopping and frisking the defendant, we must now determine if he was lawful in removing the object from the defendant's pocket. Initially, we note that we do not find that the removal of the object was justified under the abandonment exception to the warrant requirement. While abandoned property is always subject to seizure, proof of intent to discard and abandon must be shown. We do not find that mere denial of ownership of an item in one's possession is sufficient proof of intent of disassociation to prove abandonment. Compare *State v. Stephens*, 40,343 (La. App. 2d Cir. 12/14/05), 917 So.2d 667, writ denied, 2006-0441 (La. 9/22/06), 937 So.2d 376. The pill bottle in question was not discarded by the defendant. When questioned by Lieutenant Goings, the defendant only denied ownership, not possession of the item. In our view, the denial of ownership of property discarded on a public street (where no possession is claimed) is to be differentiated from the denial of ownership of property in an individual's pocket (where possession is conceded). For these reasons, we find no abandonment in this case.

Seizures of contraband may be warranted under the "plain feel" exception to the warrant requirement recognized by the United States Supreme Court in *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993). In that case, the U.S. Supreme Court ruled that officers may seize contraband detected by touch during a pat down search if the search remains within the bounds of a *Terry* pat down search. As to tactile discoveries of contraband, the court found that if an officer lawfully

pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons. *Minnesota v. Dickerson*, 508 U.S. at 375-76, 113 S.Ct. at 2137.

The Supreme Court in *Dickerson* found that the pat down search exceeded its lawful bounds since the small amount of drug was not immediately identifiable by the officer's sense of touch. The court noted that when the officer felt a lump in the defendant's jacket, the officer never thought it was a weapon and did not immediately recognize it as cocaine. It was only after squeezing, sliding and otherwise manipulating the pocket's contents that the officer determined the lump was cocaine. *Minnesota v. Dickerson*, 508 U.S. at 378, 113 S.Ct. at 2138.

Similarly, in *State v. Boyer*, 2007-0476, pp. 22-24 (La. 10/16/07), 967 So.2d 458, 472-73, the Louisiana Supreme Court found that the search of the defendant in that case, pursuant to a *Terry* pat down for weapons, exceeded its scope where the officer could not identify two small objects he felt in the defendant's pocket, and did not think they were weapons, but nevertheless, reached into the pocket and removed the items to make a visual inspection.

In the instant case, although Lieutenant Goings was lawfully in a position to feel the lump in the defendant's pocket because *Terry* entitled him to place his hands upon the defendant's outer clothing, we do not find that the incriminating character of the object was immediately apparent to him. Lieutenant Goings candidly testified that he was not sure what the item was when he felt it through the defendant clothing. He never testified that he thought the object was a weapon or that he believed it to be contraband simply by its feel. His sole justification for removing the object was his belief that the defendant abandoned it. Lieutenant Goings

determined that the item contained illegal drugs only after conducting a further search of the defendant's person. This further search of the defendant's person was constitutionally invalid under *Dickerson*, and thus, the removal of the object from the defendant's pocket cannot be upheld via the plain-feel doctrine. The entry into the defendant's pocket and retrieval of the object exceeded the scope of a valid *Terry* pat down for weapons for officer safety.

Moreover, even if we were to find that, based on the defendant's actions of attempting to put his hand into his pocket during the pat down, Lieutenant Goings was justified in removing the plastic pill bottle from the defendant's pocket in connection with the weapons search, we find no justification for the opening of the bottle, which was not immediately apparent to be or contain contraband. Lieutenant Goings testified that the container had a top on it and he was unsure what was inside of it after he pulled it out. He had to open the container before determining that its contents were contraband. There was absolutely no justification for opening the plastic pill bottle, which is not so peculiarly associated with drug trafficking that the plain feel or view of its outer surfaces is the functional equivalent of the plain view or feel of its contents. See *State v. James*, 99-3304, p. 6 (La. 12/8/00), 795 So.2d 1146, 1149 (per curiam) (seizure of film canister impermissible).

We find no merit in the state's argument that the officers had probable cause to arrest the defendant based upon the mere observance of a hand-to-hand transaction in a high-crime area after midnight. These circumstances, while sufficient to constitute reasonable suspicion of criminal activity, are insufficient to establish probable cause to arrest. At the suppression hearing, Lieutenant Goings admitted that he did not observe the defendant commit a

crime before his investigatory stop. He candidly explained that from his observation, he could not determine with certainty the nature of the hand-to-hand transaction (which he admitted could have been a handshake). Lieutenant Goings also testified that he did not determine the illegal nature of the contents of the pill bottle until after he opened it. It is axiomatic that an incident search may not precede an arrest and serve as part of its justification. *Sibron v. New York*, 392 U.S. 40, 63, 88 S.Ct. 1889, 1902, 20 L.Ed.2d 917 (1968).

The trial court erred in denying the defendant's motion to suppress.

INCORRECT ARTICLE 930.8 ADVICE

In his second counseled assignment of error, the defendant asserts that at the time of sentencing, the trial court failed to properly advise him of the two-year time limitation contained in La. Code Crim. P. art. 930.8(A) for the filing of post-conviction relief applications. The record reflects that upon imposition of sentence, the trial court advised the defendant, "pursuant to Article 930.8 of the Code of Criminal Procedure, you have 2 years from the date that your sentence becomes final to file for post-conviction relief. You've entered a guilty plea, giving up your right to trial. By giving up your right to trial, you gave up your right to appeal, so the sentence is final and your two years begins to run now." However, La. Code Crim. P. art. 930.8(A) provides, in pertinent part: "[n]o application for post-conviction relief, including applications which seek an out-of-time appeal, shall be considered if it is filed more than two years *after the judgment of conviction and sentence has become final*[.]" (Emphasis added.) La. Code Crim. P. art. 930.8(A) directs that finality of the judgment of conviction and sentence is determined under the provisions of Article 914 or 922. A motion to appeal must be filed no later than 30 days after the rendition of the judgment or 30

days from the ruling on a motion to reconsider sentence, should such a motion be filed. La. Code Crim. P. art. 914(B). A judgment rendered by the Supreme Court or other appellate court becomes final when the delay for applying for a rehearing has expired and no application for rehearing has been made. La. Code Crim. P. art. 922(B); see *State ex rel. Hensley v. State*, 2003-1691 (La. 6/4/04), 876 So.2d 78. Under Article 922(B), the date of finality is the 14th day after the date of the appeal decision.

In the instant case, although the defendant entered a plea of guilty, he specifically reserved his right to appeal the trial court's ruling on his motion to suppress. Thus, we concur in the defendant's observation that the trial court incorrectly informed him of the Article 930.8 prescriptive period. However, because we vacate the defendant's guilty plea and sentence, no further action is needed regarding this error.

DENIAL OF MOTION TO SUPPRESS REVERSED; MOTION TO SUPPRESS GRANTED; GUILTY PLEA AND SENTENCE VACATED; REMANDED TO THE TRIAL COURT FOR FURTHER PROCEEDINGS.

STATE OF LOUISIANA

VERSUS

KELTON J. SPANN

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1073

BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

Carter, C.J., dissenting.

I respectfully dissent from the majority's reversal of the trial court's denial of the motion to suppress. A trial court's decision relative to the suppression of evidence is afforded great weight and will not be set aside unless there is an abuse of that discretion. *State v. Wells*, 08-2262 (La. 7/6/10); 45 So. 3d 577, 581 (Appellate court errs in substituting "its decision for the trial court's decision without any explanation regarding why.") Under the facts of this case, I do not believe the trial court abused its discretion in denying the motion to suppress.

I respectfully disagree with the majority's conclusion that mere denial of ownership of an item in one's possession is insufficient proof of intent to disassociate. I do not think it necessary that an item be discarded by a defendant in order for the item to be deemed abandoned, and the majority cites no authority for this legal conclusion. Abandonment for purposes of the Fourth Amendment differs from abandonment in property law; here, the analysis examines the individual's reasonable expectation of privacy, not his property interest in the item. *State v. Stephens*, 40,343 (La. App. 2 Cir. 12/14/05); 917 So. 2d 667, 673, *writ denied*, 06-0441 (La. 9/22/06); 937 So. 2d 376. I respectfully submit that discarding or throwing an item is only

one form of abandonment. The Fourth Amendment does not require a person to physically remove himself from an item in order for that item to be deemed abandoned. *United States v. Fulani*, 368 F.3d 351, 355 (3rd Cir. 2004). "A voluntary denial of ownership demonstrates sufficient intent of disassociation to prove abandonment." *Stephens*, 917 So. 2d at 673.