

NOT DESIGNATED FOR PUBLICATION

**STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT**

KA 06-606

STATE OF LOUISIANA

VERSUS

TAMMY LAVERGNE

**APPEAL FROM THE
TWENTY-SEVENTH JUDICIAL DISTRICT COURT
PARISH OF ST. LANDRY, NO. 04K0818B
HONORABLE ELLIS J. DAIGLE, DISTRICT JUDGE**

**JOHN D. SAUNDERS
JUDGE**

Court composed of Sylvia R. Cooks, John D. Saunders, and Marc T. Amy, Judges.

Amy, J., concurs and would not consider the merits of the assignment of error as the defendant failed to preserve the right to appeal the denial of the motion to suppress at the time of her plea.

AFFIRMED AS AMENDED.

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SAUNDERS, Judge.

_____ On December 6, 2004, the Defendant, Tammy Lavergne, was charged by bill of information with one count of possession of marijuana, a violation of La.R.S. 40:966, one count of possession of Alprazolam, a violation of La.R.S. 40:964, and one count of possession of cocaine, a violation of La.R.S. 40:964. A written plea of not guilty was filed on January 14, 2005.

On June 13, 2005, the Defendant entered a plea of guilty. At that time, sentencing was deferred and the Defendant was ordered to enroll in and complete the Drug Division Probation Program. The Defendant opted out of the program on July 11, 2005 thereby nullifying her guilty plea.

The Defendant filed a Motion to Suppress on October 7, 2005. The motion was denied at the conclusion of a hearing thereon on November 10, 2005.

The Defendant entered a plea of guilty on February 2, 2006 to possession of marijuana, possession of Alprazolam, and possession of drug paraphernalia, a violation of La.R.S. 40:1033 and La.R.S. 40:1035. On April 13, 2006, the Defendant was sentenced to four months in the parish jail for possession of marijuana, which was suspended, and the Defendant was placed on six months active supervised probation and ordered to pay a fine of two hundred fifty dollars plus court costs. The Defendant was sentenced to three years at hard labor for possession of Alprazolam, which was suspended, and the Defendant was placed on three years active supervised probation. Additionally, the Defendant was sentenced to four months in the parish jail for possession of drug paraphernalia, which was suspended, and the Defendant was placed on six months active supervised probation and ordered to pay a fine of two hundred dollars and court costs. All sentences were ordered to be served concurrently.

At sentencing, defense counsel indicated the Defendant had entered a *Crosby* plea and reserved her right to appeal the outcome of the Motion to Suppress.¹ A “Notice of Appeal, Request for Transcript, and Request for the Appointment of the Louisiana Appellate Project to Handle the Appeal” was filed on April 18, 2006. The Defendant is now before this court asserting one assignment of error. Therein, the Defendant contends the trial court erred in denying her Motion to Suppress. We find that this assignment of error lacks merit.

FACTS:²

On February 26, 2004, Deputy Brandon Harris responded to a complaint involving a shooting on Beard Road in Opelousas at 4:35 a.m. A father reported that one of his sons had shot his other son.³ Deputy Harris was assisted by Deputies Robert Fontenot and Larry Williams.

Upon arriving at the address, Deputy Harris was informed by the father that the shooting occurred at the trailer located next door to his residence. Deputy Harris then went to the trailer and was met by the Defendant, who was standing in the doorway. Deputy Harris asked the Defendant her name, which she gave. The shooting suspect then yelled from his father’s home and the Defendant said, “That’s him right there.” The shooting suspect was arrested, advised of his *Miranda* rights, and placed in a police car. At that time, the shooting suspect advised Deputy Harris that the gun used in the incident was located in the trailer.

¹The court notes there is no mention of *Crosby* during the Defendant’s guilty plea.

²The court finds that the sequence of events in this case is not clear from the record and is presented differently by the State and the Defendant. Accordingly, the facts as set forth may not be entirely accurate.

³The names of the father and sons are not found in the record.

Deputy Harris then went back to the trailer, at which time he spoke to the Defendant and read her *Miranda* rights. At that time, Deputy Harris asked the Defendant what had occurred and she indicated that she did not know. Deputy Harris asked for identification and the Defendant gave her name and date of birth, and Deputy Harris ran it through the system to check for warrants. The house was then cleared and Deputy Fontenot located the gun. The shooting suspect was asked if there were any illegal items in the residence and he indicated there were not. He consented to a search of the residence.

After clearing the house, Deputy Harris asked the Defendant if there was anything illegal in the house. The Defendant indicated there was not and acquiesced in Deputy Harris' request to search the residence. At that time, the Defendant brought the deputies into a bedroom where she emptied the contents of her purse onto a bed and handed the deputies her identification. Deputy Harris testified that inside a cigarette box, in plain view, were three to four joints. The deputies also found a Xanax pill and a glass pipe in the contents of the Defendant's purse.

Deputies were getting ready to obtain permission to search when a lady informed them that the victim of the shooting was located in another trailer on the father's property. The victim was located approximately twenty to twenty-five minutes after the shooting suspect was found.

Deputies Fontenot and Williams testified at the hearing on the motion to suppress and their testimony supported that of Deputy Harris.

ERRORS PATENT:

In accordance with La.Code Crim.P. art. 920, all appeals are reviewed by this court for errors patent on the face of the record. After reviewing the record, we find that there are errors patent.

First, the trial court ordered the Defendant to pay a fine and court costs on count one (possession of marijuana) and on count three (possession of drug paraphernalia). Because the trial court imposed the fine and costs as part of the principal sentence and not as a condition of probation, the fine and costs are payable immediately. La.Code Crim.P. art. 888. The trial court in the present case, however, ordered all costs and fines (excluding a reimbursement to the Indigent Defender Board) “to be paid within one (1) year of this date.” We instruct the trial court to amend the Defendant’s sentences for possession of marijuana and possession of drug paraphernalia by deleting the provision allowing one year to pay the \$200.00 fines and court costs imposed on those sentences. Additionally, we also instruct the trial court to make an entry in the minutes reflecting the amendment.

This court notes an error patent involving the trial court’s imposition of jail time in lieu of the Defendant’s reimbursement to the Indigent Defender Board. The trial court ordered the Defendant “to reimburse the IDB Board for the cost of legal counsel of one hundred dollars (\$100.00) or in lieu thereof, five (5) days in jail.”

Although the trial court does not refer to the jail time as default time, we interpret the jail time as such. Additionally, it appears the Defendant is indigent since she is represented by the Louisiana Appellate Project on appeal. We find this fact is presumptive evidence of indigence. *State v. Devare*, 03-610 (La.App. 5 Cir. 10/28/03), 860 So.2d 191. The subject of imposing default time upon an indigent

defendant has been discussed many times in jurisprudence. We find the following synopsis from a 1991 first circuit case is a good summary of this jurisprudence:

Because defendant was represented by the Public Defender's Office, his status as an indigent has been established. *State v. Williams*, 288 So.2d 319, 321 (La.1974). La.C.Cr.P. art. 884 requires a trial court to include a default term of imprisonment for a specified period not to exceed one year if the sentence imposed includes a fine or costs. Nevertheless, in the case of an indigent defendant, it is impermissible to impose a prison term in lieu of payment of a fine or costs if that would result in the defendant serving a longer term than the statutory maximum for the offense. *State v. Counterman*, 515 So.2d 533, 537 (La.App. 1st Cir.1987) (citing *Williams v. Illinois*, 399 U.S. 235, 243, 90 S.Ct. 2018, 2023, 26 L.Ed.2d 586 (1970)). In *State v. Bohanna*, 491 So.2d 756, 759 (La.App. 1st Cir.1986), we recognized that the Louisiana Supreme Court has taken this rule one step further, so that an indigent defendant may *never* be subjected to confinement in lieu of payment of a fine or costs, even if the additional default sentence does not approach the maximum sentence which the court could have imposed. We based this on our review of the supreme court's granting of writs in two cases: *State v. Garrett*, 480 So.2d 412 (La.App. 4th Cir.1985), *writ granted*, 484 So.2d 662 (La.1986) (sentence amended), and *State v. Williams*, 480 So.2d 432 (La.App. 4th Cir.1985), *writ granted*, 484 So.2d 662 (La.1986) (sentence amended).

Thus, we find merit in defendant's claim that the trial court's imposition of the default term of imprisonment in the instant case was error. We amend the sentence to delete that portion which imposes one year in the parish jail in default of payment of the fine and court costs. *See* La.C.Cr.P. art. 882(A); *Garrett*, 484 So.2d 662.

State v. Seal, 581 So.2d 735, 736-37 (La.App. 1 Cir. 1991).

Since *Seal*, the supreme court has consistently ordered the deletion of default time from sentences imposed upon indigent defendants. *State v. Zabaleta*, 96-2449 (La. 3/7/97), 689 So.2d 1369; *State v. Roebuck*, 94-1127 (La. 6/30/95), 657 So.2d 1009; and *State ex rel. Armstead v. State, Fourth Circuit Court of Appeals, Criminal Dist. Court, Section F*, 589 So.2d 1050 (La.1991). Considering these cases, we find the "in lieu thereof" jail time imposed in the present case must likewise be deleted.

We also instruct the trial court to make an entry in the minutes reflecting the amendment.

Finally, we find the minutes of sentencing are in need of correction. The minutes state that the trial court ordered the Defendant to pay a \$250.00 fine for count one, possession of marijuana. The transcript, however, indicates that the trial court ordered the Defendant to pay a \$200.00 fine for that offense. Thus, we find that the case should be remanded and the trial court instructed to amend the minutes of sentencing to correctly reflect the fine imposed on count one.

ASSIGNMENT OF ERROR:

Pursuant to *State v. Crosby*, 338 So.2d 584 (La.1976), an accused may enter a guilty plea but reserve the right to appellate review of pre-plea assignments of error. The Defendant did not reserve the right to seek review of the denial of her motion to suppress at the time she entered her guilty plea. She did, however, indicate her desire to appeal said denial at the sentencing hearing.

A guilty plea waives all non-jurisdictional pre-plea defects; therefore, this court finds that the Defendant failed to reserve her right to appeal the outcome of her motion to suppress because the request was made at sentencing. *State v. Holder*, 99-1747 (La.App. 3 Cir. 10/11/00), 771 So.2d 780. However, we will address the Defendant's assignment of error in the interest of judicial economy as the issue has not been ruled on by the Louisiana Supreme Court.

In her only assignment of error, the Defendant contends the trial court erred in denying her motion to suppress. The Defendant asserts the issue is whether the evidence found in her home was obtained in violation of her right to privacy.

The Defendant contends she had a right to privacy in her home and the State made no effort to prove any exigent circumstances before entering her home without a warrant, as the home had already been searched for weapons and “cleared.” Additionally, there was no evidence or argument that evidence would be lost or witnesses would flee before a warrant could be obtained.

The Defendant further contends that Deputy Harris’ testimony that he was concerned that she appeared to be on narcotics was, alone, not sufficient probable cause to justify a warrantless intrusion into her home. The Defendant argues that the State’s position that deputies were merely questioning her about the shooting is not supported by the record, as she had previously told them she knew nothing about the shooting, the shooting suspect had been arrested and had confessed, and the weapon used had been recovered. Additionally, there were statements from the victim and the father. The Defendant asserts deputies could not point to one piece of evidence they still needed at that time.

The Defendant next alleges that after the deputies closed the shooting case, they turned their attention to possible criminal acts committed by her. The Defendant asserts that nervousness and “frigidity” do not support a shred of probable cause to invade the privacy of her home.

The Defendant contends, that by going into the home and *Mirandizing* her, she was detained in her own home. Thus, as there were no facts to support probable cause that a crime was committed, her detention was illegal. Therefore, she argues that the illegal detention rendered her consent to search invalid.

The Defendant further contends that the facts do not support an argument that deputies were in the home to identify her when the drugs were in plain view.

The State contends the home searched did not belong to the Defendant. The State alleges the home belonged to the shooting suspect and he gave deputies permission to search the residence. The State further argues that the minimal infringement of the Defendant's rights pales in comparison to the need for an officer to effect thorough and complete investigations. The State asserts, based on Deputy Harris' appreciation of the Defendant's behavior being consistent with narcotic use, the search stemmed from a valid consent.⁴

In her motion to suppress, the Defendant argued that deputies had no "right, reasonable suspicion and/or probable cause to invade mover's privacy." Additionally, she argues that she had a constitutional right to privacy, to be left alone, and to protection from unlawful search by law enforcement personnel.

During arguments at the hearing on the motion to suppress, defense counsel argued that deputies, after having found the shooting suspect, the gun, the victim, and running the Defendant's name through NCIC, had no reasonable suspicion to enhance their investigation to check the Defendant's purse or personal belongings or to question her regarding illegal drug activity. Additionally, defense counsel argued there was no testimony that deputies had reasonable suspicion or probable cause to suspect the Defendant had illegal drugs on her person when she was searched. Therefore, Defendant argues that her constitutional right to be left alone was violated.

The Defendant argues for the first time on appeal that there was a warrantless intrusion into her home, she was illegally detained, and her consent to search was invalid. Accordingly, those issues are not properly before the court and will not be considered by us. Uniform Rules—Courts of Appeal, Rule 1-3. We will now address

⁴Deputy Harris testified that the Defendant appeared to be on some type of narcotic and was "real frigid, real nervous."

whether the Defendant's right to privacy was violated when being questioned by police.

The trial court denied the Defendant's motion to suppress, stating the following:

The Court finds that the -- will deny the defendant's motion and finds that the search and seizure was, in fact, legal and constitutional in that (1) the party who owned the home consented to the search and (2) Ms. Lavergne, who was at the home, consented to the search after being Mirandized and Ms. Lavergne voluntarily emptied her purse or the contents of her purse on the bed at which point in time the contraband was in plain view, and therefore, for those reasons, the motion is denied.

This court discussed the standard of review regarding a motion to suppress in *State v. Slaydon*, 05-794 (La.App. 3 Cir. 2/1/06), 921 So.2d 1199, as follows:

An appellate court must consider the totality of the evidence presented at the suppression hearing when reviewing a trial court's ruling on a motion to suppress. *State v. Bargeman*, 98-617 (La.App. 3 Cir. 10/28/98), 721 So.2d 964, *writ denied*, 99-33 (La.5/28/99), 743 So.2d 658. "The appellate court should not overturn a trial court's ruling, unless the trial court's conclusions are not supported by the evidence, or there exists an internal inconsistency in the testimony of the witnesses, or there was a palpable or obvious abuse of discretion." *Id.* at 967.

Id. at 1204.

In *State v. Kelley*, 05-1905 (La. 7/10/06), ___ So.2d ___, police responded to a complaint regarding a man slouched against the steering wheel of parked car. The officers tapped on the window and the defendant opened the car door. The defendant indicated that he did not need medical attention, was okay, and was "just there." The defendant further explained that the vehicle, which had two flat tires, belonged to a friend and he did not remember how he got to the neighborhood. At the officers' request, he produced a driver's license and a vehicle registration. It was determined that the license had been suspended and the vehicle was registered to someone else.

Officers informed the defendant he was under arrest for operating a vehicle on a suspended license and asked him to step from the car. At that time, an officer saw a clear bag containing white powder and a second bag filled with pills lying in open view on the front seat. The officers then advised the defendant he was under arrest for drug violations.

Although the trial court found the officers did not actually see the defendant operating the vehicle, it denied the motion to suppress finding the officers acted reasonably in approaching the vehicle to investigate the initial complaint and to check the defendant's well-being and that ultimately the contraband had then come into the plain view of the officers, justifying their seizure of the drugs and the defendant's arrest.

The fourth circuit reversed the trial court's ruling. However, the supreme court found the following:

[O]fficers did not need either reasonable suspicion for an investigatory stop or probable cause for an arrest to act on the initial complaint, approach the defendant, inquire why he was in the vehicle parked at the side of the road and whether he needed medical assistance, and then to ask for some identification. *State v. Fisher*, 97-1133, pp. 4-5 (La. 9/9/98), 720 So.2d 1179, 1183 (“[M]ere communications between officers and citizens implicate no Fourth Amendment concerns where there is no coercion or detention.”) (citations omitted). *See also State v. Lewis*, 00-3136, p. 3 (La. 4/26/02), 815 So.2d 818, 820 (“An officer's request for identification does not turn the encounter into a forcible detention unless the request is accompanied by an unmistakable show of official authority indicating to the person that he or she is not free to leave.”) (citations omitted); *State v. McDaniels*, 01-0305, p. 1 (La. 12/7/01), 803 So.2d 966, 967 (same); *State v. Neyrey*, 383 So.2d 1222, 1224 (La.1979) (“Police officers do not need probable cause to arrest or reasonable cause to detain, in order to converse with citizens. . . . Under the circumstances of this case we do not think it was unreasonable for the officers to open the [car] door and shake the defendant awake so that they could talk to him.”).

Id. at 3.

Based on *Kelley*, we find it was proper for deputies to question the Defendant regarding the initial complaint and ask for her identification. When deputies initially questioned the Defendant, she provided them with a name but no identification. It was not until she emptied the contents of her purse that she provided the deputies with her identification.

Deputies were inside the residence with the consent of the shooting suspect. There is nothing in the record that indicates the Defendant owned and/or resided in the trailer at issue. Additionally, the Defendant was never questioned about drugs. Police merely asked both her and the shooting suspect if there were any illegal items in the residence.

We find the Defendant's right to privacy was not violated by police questioning as police have a legitimate interest in questioning potential witnesses at the scene of a crime and conducting thorough investigations.

Accordingly, we find that the trial court did not abuse its discretion when denying the Defendant's motion to suppress.

The Defendant's conviction is affirmed. This court finds the trial court erred in granting the Defendant up to one year to pay the fines and costs ordered as part of the principal sentences imposed for possession of marijuana and possession of drug paraphernalia, and amends the sentences imposed for those offenses to delete such one-year period as it applies to the \$200.00 fines and court costs. We also delete the portion of the Defendant's sentences ordering a five-day jail term in lieu of a \$100.00 reimbursement to the Indigent Defender Board. The trial court is instructed to make a notation in the minutes reflecting each of these amendments. Finally, the trial court is instructed to amend the minutes of sentencing to correctly reflect that the trial court

imposed a \$200.00 fine rather than a \$250.00 fine on count one, possession of marijuana.

AFFIRMED AS AMENDED.

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION. Rule 2-16.3, Uniform Rules, Courts of Appeal.