

At 9:46 p.m., based on the anonymous call, a police dispatcher broadcasted a "flash" report over the 25th District Police Radio band as follows¹:

... Stand by ... 25th District, 13th and Allegheny ... Report of person with gun. It's gonna be a black male with heavy build and black male, tall, thin inside of a blue car and a gray car with tinted windows shooting at a male on Park Avenue. Repeating in 25th District, 13th and Allegheny, person with a gun. I have two black males. The one that is inside of a blue car is heavy built, one is tall and thin is out of a gray vehicle with tinted windows shooting at a male on Park Avenue.

Officer David Pinkerton, a member of the NSF patrolling the 25th District that night, was the first officer to respond to the flash. After inquiring whether there was any further information about the car, the dispatcher repeated, "One male is supposed to be in a blue car, one male is supposed to be in a gray car with tinted windows." Officer Pinkerton stated that he would make his way to the location, as did another member of the NSF, Officer John Callahan.

Neither Officer Pinkerton nor Officer Callahan ultimately reached 13th and Allegheny because at 9:47 p.m. a fellow member of the NSF, Officer Gina Jackson, announced over the band that she and her partner had arrived at the scene and did not see anything untoward. At 9:48 p.m. Officer Jackson declared the report of the shooting to be "unfounded," a police

1. Both the taped recordings of the call and dispatches, as well as a transcript were authenticated and admitted into evidence at the hearing.

term signifying that an officer was unable to find any immediate evidence in support of the report. The dispatcher reiterated over the band that the information about a person with a gun at 13th and Allegheny was unfounded and instructed all units to cease any response to it.

Officer Callahan resumed his patrol. Minutes later, while driving east on Erie Avenue, he witnessed a blue-green Dodge Intrepid travel northbound on Elder Street and disregard a stop sign before making a right turn onto Erie Avenue. Erie Avenue is a main thoroughfare divided by trolley tracks which runs parallel to Allegheny Avenue in North Philadelphia. Elder is a narrow one-way northbound street that runs diagonally between Venango Street and Erie Avenue, a distance of only one block. The intersection of Erie and Elder is approximately six blocks north of 13th and Allegheny.

Upon observing the traffic violation, Officer Callahan turned on his police lights and pulled over the offending vehicle a few car lengths east of the intersection. At 9:51 p.m. he notified police radio that he had made a car stop and relayed a description of the car and its license number. As he was waiting for a response, Officers Pinkerton and Michael Collins arrived as back-up. At 9:52 p.m. the dispatcher reported to Officer Callahan that the car was registered to a Jerome Bouie at 1308 Erie Avenue, approximately the address where the vehicle halted.

Officer Callahan then approached the driver's side of the car as Officers Pinkerton and Collins took positions on the

passenger side. Officer Callahan observed two occupants, both black males. The driver was the defendant Bouie, who appeared to him to be heavysset while the passenger, later identified as Michael Johnson, seemed to be young, tall, and thin. Officer Callahan told Bouie that he had failed to stop at the stop sign and asked to see his driver's license, vehicle registration, and proof of insurance. Bouie produced these items, all of which were valid. During this exchange, Bouie conducted himself as a "perfect gentleman": he was not argumentative, was apologetic, and did not challenge the reason for the stop.

During the course of his review of Bouie's documents, Officer Callahan recalled the recent police radio report about a shooting incident at 13th and Allegheny some six blocks away. Bouie's car was heading in a direction away from that location. He asked Bouie and Johnson to remain in the car and as is his normal procedure requested Bouie to keep his hands on the steering wheel. Officer Callahan returned to his police vehicle to confirm the flash information. The dispatcher responded, "Black male heavy build, another black male, tall and thin, they were inside of a blue car and a gray car with tinted windows."

With this confirmation, Officer Callahan decided to pat down Bouie and his passenger. When he returned to Bouie's car, Bouie's hands were still on the steering wheel as directed. Officer Callahan commanded Bouie and Johnson to step out of the car for pat downs. They complied. Officer Callahan informed Bouie that he was going to frisk him because he fit the

description of someone involved in a shooting at 13th and Allegheny. During the course of the pat down search Bouie was nervous and agitated, and Officer Callahan could feel his muscles tensing.² According to Officer Callahan, although it is normal for individuals to be nervous in this type of situation, Bouie was more nervous and agitated than is usually the case.

As Officer Callahan moved his hand along the outside of Bouie's right pant pocket he felt a bulge which he immediately knew from his experience to be vials used to package crack cocaine. After handcuffing Bouie, Officer Callahan removed what turned out to be 56 tiny vials of crack. While he was removing the vials, Officer Callahan asked Bouie if there was anything else on him that could cause the officer harm such as needles or razors. For safety reasons this is a question he generally asks a suspect being searched. Bouie replied that he had a gun under the seat of his car. He was placed under arrest once the weapon was recovered.³ Before he was transported to the station house for processing, Officer Callahan issued him a traffic citation for running the stop sign. Officer Callahan testified that, absent the contraband from the search, he was uncertain whether he would have given Bouie a ticket.

2. The government has not proven by a preponderance of the evidence that Bouie became nervous and agitated prior to the initiation of the pat down search.

3. After Bouie was placed under arrest \$1,675 was also recovered from the pockets of his pants.

Bouie was subsequently indicted in this court for possession with intent to distribute crack cocaine base in violation of 21 U.S.C. § 841(a)(1), carrying a firearm in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c), and possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e).

II.

In his motion to suppress Bouie first contends that Officer Callahan lacked reasonable suspicion to stop his vehicle. Second, he argues that even if the initial traffic stop was lawful, Officer Callahan did not have reasonable suspicion to pat him down and thus the crack cocaine, gun, and money were fruits of an illegal search.

The Fourth Amendment protects the "right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV.⁴ Once the defendant has challenged the legality of a search and seizure, the burden is on the government to prove that they were constitutional. United States v. Johnson, 63 F.3d 242, 245 (3d Cir. 1995). Evidence arising out of an unlawful search will be suppressed. Wong Sun v. United States, 371 U.S. 471, 484-85 (1963).

4. The Fourth Amendment, of course, has been incorporated into the Due Process Clause of the Fourteenth Amendment and is applicable to state and local police conduct. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

The stop of a car and detention of its occupants constitutes a seizure within the meaning of the Fourth Amendment. Whren v. United States, 517 U.S. 806, 809-10 (1996); Johnson, 63 F.3d at 245. Accordingly, such a stop is "subject to the constitutional imperative that it not be 'unreasonable' under the circumstances." Whren, 517 U.S. at 810. In determining whether a traffic stop is reasonable a court must make two inquiries, first "whether the officer's action was justified at its inception," and second, "whether it was reasonably related in scope to the circumstances which justified the interference in the first place." Terry v. Ohio, 392 U.S. 1, 19-20 (1968). In other words, both the traffic stop itself and the scope and duration of the subsequent detention must be reasonable.

The first inquiry is not difficult in this case. It is well settled that "a traffic stop is lawful under the Fourth Amendment where a police officer observes a violation of the state traffic regulations." United States v. Moorefield, 111 F.3d 10, 12 (3d Cir. 1997). Here Officer Callahan observed Bouie run a stop sign. This testimony was unchallenged by defendant, and we find it credible. Running a stop sign is a traffic violation under Pennsylvania law. 75 Pa. Cons. Stat. Ann. § 3323(b). Thus, the initial stop of Bouie's car was lawful under the Fourth Amendment.

The real issue is whether the subsequent pat down of Bouie was legally justified. It is always permissible for a police officer conducting a lawful traffic stop to require the

driver and any passengers to exit the car during the stop. Maryland v. Wilson, 519 U.S. 408 (1997); Pennsylvania v. Mimms, 434 U.S. 106 (1977). However, a subsequent frisk or pat down search of one of the vehicle's occupants is not permissible unless a police officer has reasonable suspicion "that he is dealing with an armed and dangerous individual." Terry, 392 U.S. at 27. The test for reasonable suspicion is an objective one: whether under the totality of the circumstances "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Terry, 392 U.S. at 27; see United States v. Cortez, 449 U.S. 411, 417 (1981). Such a belief must be supported by "specific and articulable facts." Terry, 392 U.S. at 21. An "inchoate and unparticularized suspicion or 'hunch'" is not enough. Terry, 392 U.S. at 27.

"The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search." Florida v. J.L., 529 U.S. 266, 271 (2000). Prior to the pat down, Officer Callahan was aware, from the police dispatcher, of the anonymous phone call about a shooting incident at 13th and Allegheny. While "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," it may provide reasonable suspicion for a Terry stop and frisk if the tip is suitably corroborated and demonstrates a "sufficient indicia of reliability." Alabama v. White, 496 U.S. 325, 329, 327 (1990). In analyzing an anonymous tip, a court must consider

both the "quantity and quality" of the information given. Id. at 330. There is no exact threshold of content or reliability required, but "if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable." Id.

The Supreme Court's decision in Florida v. J.L. is instructive. There Miami-Dade police officers received an anonymous call informing them that a young black male in a plaid shirt standing at a particular bus stop was carrying a gun. Responding to this uncorroborated, anonymous tip, the police stopped and frisked J.L. at that particular location and seized a gun from one of his pockets. J.L. was arrested for carrying a concealed weapon without a license. The Supreme Court affirmed the suppression of the gun as the fruit of an illegal search. The Court reiterated "the requirement that an anonymous tip bear standard indicia of reliability in order to justify" a Terry stop and frisk. J.L., 529 U.S. at 274. After examining the tip before it, the Court concluded that it lacked even a "moderate indicia of reliability." Id. at 271. The Court pointed out that the informant provided no predictive information and the officers therefore had no way of testing the informants knowledge and credibility. Of course, it was irrelevant that the allegation about the gun turned out to be true. Reasonable suspicion "must be measured by what the officers knew before they conducted their search." Id. The Court was also unpersuaded by the argument

that the tip was reliable enough to justify the stop because the description was of a particular person at a particular location, the police promptly verified these pertinent details, and there were no factors to cast doubt on the tip. The Court explained that reasonable suspicion "requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." Id. at 272.

The tip in this case suffers from the same deficiencies as the one in J.L. It was over the phone, evidenced no predictive behavior, and was completely uncorroborated by any personal observations by law enforcement. Since the tip resulted from an anonymous phone call, the officers had no opportunity to assess the informant's credibility and demeanor, there was no way to hold her accountable for a false complaint, and there was no way to know if she had first hand knowledge of what she was reporting. See United States v. Valentine, 232 F.3d 350, 354 (2000). Moreover, not only was the tip uncorroborated, the police officers on the scene within minutes after it was received declared it "unfounded," that is unsupported by any visible evidence. Officer Callahan had received word the tip was unfounded before he stopped Bouie.

The content of the tip was also deficient in detail. It simply described a heavysset black male and a tall, thin black male in a blue car and a gray car with tinted windows. Clearly there are numerous individuals and automobiles that fit these very general descriptions, in North Philadelphia and elsewhere.

In addition, Bouie's car was closer to green than blue and contained two people.⁵ The tip referred to a blue car and a gray car with tinted windows, with one individual in each car. In sum, the tip was unreliable not only in its "assertion of illegality," but also in "its tendency to identify a determinate person." J.L., 529 U.S. at 272. As such, the reliability and content of the tip before us is even more lacking than the one before the Supreme Court in J.L.

Since the anonymous call was insufficient to establish a reasonable suspicion that Bouie was armed and dangerous, we turn to the surrounding circumstances to determine whether they make up for what the call lacked in reliability and content. We are cognizant of the Supreme Court's recent admonition in United States v. Arvizu, 122 S. Ct. 744 (2002), not to parse too finely the factors upon which reasonable suspicion may depend. Rather, we must examine the "totality of the circumstances -- the whole picture." Cortez, 449 U.S. at 417.

The government points out that the stop of Bouie occurred at night in a high crime area and that his car was heading away from the location of a recent reported shooting. While the stop was at night, it was only 9:51 p.m., a time when there would still be much legitimate activity on city streets.

5. We note that in the photograph admitted into evidence during the hearing Bouie's car looks predominantly green. Also, on the traffic citation issued to Bouie the word green appears on the line available to record the vehicle color with the word "bluish" written in smaller letters on top of it, suggesting that it was added as an afterthought after "green" was inserted.

See Arvizu, 122 S. Ct. at 752. Unlike many of the cases, the stop was not after midnight or in the wee hours of the morning. Cf. Adams v. Williams, 407 U.S. 143, 147-48 (1972); Valentine, 232 F.3d at 356. It is also well settled that the presence of an individual in a high crime area is not enough, by itself, to establish reasonable suspicion that the individual is committing a crime or is armed and dangerous. See Illinois v. Wardlow, 528 U.S. 119, 124 (2000); Brown v. Texas, 443 U.S. 47, 52 (1979). Nonetheless, we recognize that a high incidence of crime in an area can be a "relevant contextual consideration[]" in a Terry analysis because "officers are not required to ignore the relevant characteristics of a location." Wardlow, 528 U.S. at 124.

Looking at the "relevant characteristics of [the] location," we must remember that Bouie was driving toward and was stopped in front of his residence, a fact of which Officer Callahan was aware after checking Bouie's registration and before the pat down. The reliance on the direction in which Bouie's car was moving can be given little weight because such reliance casts too wide a net in a large city like Philadelphia. The requisite probative value is lacking. A quick glance at the map discloses that cars can move from 13th and Allegheny in all directions by numerous routes. The court will take judicial notice that on any weeknight at 9:51 p.m. there are at least hundreds of cars and undoubtedly scores of blue cars within a six block radius of 13th

and Allegheny which could be described as heading away from that intersection.

A police officer must be able to point to facts that are particular or specific to the individual in order to justify an intrusion such as a pat down. Terry, 392 U.S. at 21; Cortez, 449 U.S. at 418. Factors such as the recent report of a shooting, a crime-ridden neighborhood, and the hour are not particular to any individual. United States v. Woodrum, 202 F.3d 1, 7 (1st Cir. 2000). "While such factors may put officers on their guard, they cannot alone justify a stop. Were the law otherwise, any person who happened to wander into a high-crime area, late at night, in the immediate aftermath of a serious crime, could be detained." Id. at 7 (internal citation omitted).

Finally, in support of its position that the search was lawful, the government urges us to consider the fact that Bouie became nervous and agitated. The government relies on our Court of Appeals' decisions in Moorefield and Valentine. In Moorefield police officers stopped the car in which the defendant was a passenger after witnessing it commit a traffic violation. The officers instructed the occupants to remain in the vehicle and to show their hands at all times or put them up in the air. Despite this command, Moorefield made several furtive hand and body movements, including leaning back and shoving something towards his waist, and then attempting to push his upper-body out of the window. Because of these movements, the officers believed Moorefield may have been trying to conceal a weapon or narcotics,

and they ordered him out of the car for a pat down. During the pat down a pistol was discovered in the waistband of Moorefield's shorts. Moorefield subsequently moved to suppress the gun.

Moorefield, 111 F.3d at 11-12. The court held that the officers had a reasonable suspicion for the pat down. Specifically, it found that "Moorefield's furtive hand movements and refusal to obey the officers' orders constituted suspicious behavior" that justified the frisk. Id. at 14.

A similar result was reached in Valentine. In that case, police officers approached Valentine after receiving a tip that he had a gun. As soon as he saw the officers, Valentine began walking away. When the officers told Valentine to stop, he responded by saying "Who me?" and charged toward one of the officers, trying to push aside his outstretched arms. The Court of Appeals held that what the defendant "did after he failed to comply with the police officers' orders can be considered in evaluating reasonable suspicion," because he "did not submit in any realistic sense to the officers' show of authority."

Valentine, 232 F.3d at 359.

The instant action is quite different from both Moorefield and Valentine. There is nothing to suggest that Bouie made any abrupt movements or engaged in suspicious, furtive behavior that would have justifiably prompted Officer Callahan or the other officers to fear for their safety. See J.L., 529 U.S. at 268. On the contrary, Bouie acted like a "perfect gentleman" and submitted to Officer Callahan's authority at all times: he

pulled over immediately, produced a valid driver's license, car registration, and proof of insurance, kept his hands on the steering wheel, and got out of the car for a pat down when requested. In addition and most significantly for our analysis, Bouie did not become nervous and agitated until after he began to submit to the pat down. Under the circumstances, his nervousness and agitation may not be considered to support the legality of the search because "the reasonableness of official suspicion must be measured by what the officers knew before they conducted their search." J.L., 529 U.S. at 271.

In summary, Officer Callahan had only the following salient information when he commenced his pat down of Bouie: (1) a highly unreliable, uncorroborated, indeed unfounded, very general anonymous tip regarding an alleged shooting at 13th and Allegheny, six blocks away from the car stop; (2) the fact that Bouie's car, like at least hundreds of cars within a six block radius of 13th and Allegheny, was heading in a direction away from that location; (3) the fact that Bouie was stopped in a high crime neighborhood but at a not unreasonable hour of 9:51 p.m. and in front of his residence; and (4) the fact that Bouie at all times acted politely, had a valid driver's license, automobile registration, and proof of insurance, and complied without exception to all police commands. Reviewing the "whole picture," we hold that the government has not met its burden of proving that a reasonable police officer would have had a reasonable suspicion that Bouie was armed and dangerous prior to the pat

down. The circumstances here can give rise to nothing more than an unparticularized hunch. See Terry, 392 U.S. at 27.

Accordingly, the search of Jerome Bouie violated the Fourth Amendment to the Constitution of the United States, and the drugs, gun, and money recovered as a result of it must be suppressed as the fruit of an unlawful search. See Wong Sun, 371 U.S. at 484-85.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION
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JEROME BOUIE : NO. 01-507

ORDER

AND NOW, this day of March, 2002, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that motion of defendant Jerome Bouie to suppress physical evidence and statements is GRANTED. All evidence obtained from the search of defendant's person and vehicle on April 10, 2001 is SUPPRESSED.

BY THE COURT:

J.