

"lower end" of the 39th District ever since the shooting of a young child at 23rd and Cambria Streets in January or February 2004. (Id. at 10-11.) As the officers were driving by Taney and Cambria Streets, they observed Defendant sitting in a lawn chair on the corner. (Id. at 8, 12.) Because Officer Harris did not recognize Defendant from the neighborhood and thought it was "unusual" for someone to be sitting in a lawn chair on a street corner, he decided to pull over and speak with Defendant. (Id. at 12, 24.)

Upon pulling over in front of Defendant, the officers, both of whom were in uniform, exited their marked police vehicle and approached Defendant, who was still seated in the lawn chair. (Id. at 12, 14, 25, 37-38.) The officers asked Defendant where he lived. (Id. at 13.) Defendant advised them that he lived in the corner house, which was approximately ten to twenty feet away from where he was sitting. (Id. at 12-13.) Defendant also gave the officers his name and date of birth upon request. (Id. at 28.) When the officers asked Defendant for identification, he stood up and reached into the side pockets of his baggy jeans, but was unable to produce identification. (Id. at 14-15.) Defendant advised the officers that his identification was in the corner house. (Id.) Defendant continued to reach "in and out" of his pockets, despite being ordered two or three times by Officer Harris to stop. (Id. at 15-16, 47.) Defendant also began to open and close his fists, which Officer Harris found to be threatening.

(Id. at 16-17, 47.) At that time, Officer Heim went to the corner house and knocked on the door, which was answered by a woman. (Id. 14-15.) Officer Heim asked the woman if she knew Defendant. (Id. at 15.) The woman advised Officer Heim that she knew Defendant from the neighborhood, but that he did not live in the corner house. (Id. at 15.)

Officer Heim returned to the street corner, where Defendant and Officer Harris were still located. (Id. at 31.) The officers then placed Defendant against their police vehicle and Officer Harris began to frisk Defendant's outer clothing. (Id. at 36.) Officer Harris felt a hard object as he pressed his hands on Defendant's right rear pocket. (Id. at 18-19.) Based on his extensive training and experience as a police officer, Officer Harris immediately suspected that the hard object was crack cocaine. (Id. 7, 19-20.) Officer Harris then handcuffed Defendant and seized a clear sandwich bag containing 113 packets of crack cocaine from Defendant's pocket. (Id. at 19, 41.) Officer Harris also recovered approximately \$429 from Defendant. (Id. at 20.)

On cross-examination, Officer Harris admitted that he did not suspect Defendant of any criminal activity when he initially approached him on the street corner. (Id. at 28-29.) Officer Harris also stated that Defendant was "cooperative" in answering the officers' questions. (Id. at 26.) Although Officer Harris felt threatened by Defendant's opening and closing of his fists,

Officer Harris conceded that Defendant never raised his clenched fists towards the officers or made any move in their direction. (Id. at 35.) Officer Harris also stated that he never saw "anything" in Defendant's hands. (Id.) Officer Harris further testified that he directed Defendant to "stay still" as Officer Heim proceeded towards the corner house, (id. at 29), and admitted that he did not accompany Officer Heim to the corner house because he "wanted [Defendant] to stay exactly where he was." (Id. at 33.) Officer Harris also conceded that he still had "no indication . . . that [Defendant] had been involved in any illegal activity . . . when Officer Heim [came] back down" from the corner house. (Id. at 32.)

II. LEGAL STANDARD

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Courts may exclude evidence obtained during the course of an unreasonable search or seizure from being admitted at trial. Wong Sun v. United States, 371 U.S. 471, 484-85 (1963). Ordinarily, it is the defendant's burden to demonstrate that the search was unreasonable. United States v. Acosta, 965 F.2d 1248, 1256 n.9 (3d Cir. 1992). When the police conducted the search or seizure without a warrant, however, "the burden shifts to the government to show that the search or seizure was reasonable." United States v.

Johnson, 63 F.3d 242, 245 (3d Cir. 1995). The Government bears the burden of demonstrating the reasonableness of a search or seizure by a preponderance of the evidence. United States v. Spencer, Crim. A. No. 02-788, 2003 WL 1594737, at *4 (E.D. Pa. Mar. 26, 2003).

III. DISCUSSION

In Terry v. Ohio, 392 U.S. 1 (1968), the United States Supreme Court held that "an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." Illinois v. Wardlow, 528 U.S. 119, 123 (2000) (citing Terry, 392 U.S. at 30); see also United States v. Brown, 159 F.3d 147, 149 (3d Cir. 1998) ("An officer cannot conduct a Terry stop simply because criminal activity is afoot, . . . [i]nstead the officer must have a particularized and objective basis for believing that *the particular person* is suspected of criminal activity.") (emphasis added). The officer may also conduct a protective frisk of the suspect's outer clothing when he "observes unusual conduct which leads him to reasonably conclude in light of his experience that criminal activity may be afoot *and* that the persons with whom he is dealing may be armed and presently dangerous." Terry, 392 U.S. at 30 (emphasis added). In determining whether an officer had reasonable suspicion to both stop and frisk an individual, "due weight must be given . . . not

to his inchoate and unparticularized suspicion, or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." Id. at 27. "While 'reasonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for the stop." Wardlow, 528 U.S. at 123. In evaluating the justification for a Terry stop and frisk, a court examines "the totality of the circumstances." United States v. Valentine, 232 F.3d 350, 353 (3d Cir. 2000).

Defendant argues that the officers' initial stop was not justified by a reasonable suspicion that he was involved in criminal activity. In evaluating whether an officer had reasonable suspicion to stop a suspect, courts must first ascertain the point at which the "seizure" occurred. See Johnson v. Campbell, 332 F.3d 199, 206 (3d Cir. 2003) (noting that court must determine whether facts known to officer "as of th[e] moment" that the stop occurred support reasonable suspicion). "[N]ot all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of [1] physical force or [2] show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Terry, 392 U.S. at 19 n.16. "[A]n initially consensual encounter between a police officer and a citizen can be transformed into a seizure or

detention within the meaning of the Fourth Amendment, 'if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" INS v. Delgado, 466 U.S. 210, 215 (1984) (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.)); see also Florida v. Bostick, 501 U.S. 429, 436-37 (1991) (noting that critical inquiry is "whether, taking into account all of the circumstances surrounding the encounter, the police would have communicated to a reasonable person that he was not at liberty to ignore police presence and go about his business") (internal quotation omitted). "Interrogation relating to one's identity or a request for identification by police does not, by itself, constitute a Fourth Amendment seizure." Id. at 216. "Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, [and] ask for identification . . . provided they do not induce cooperation by coercive means." United States v. Drayton, 536 U.S. 194, 201 (2002). "[E]xamples of circumstances that might indicate a seizure, even where the person did not attempt to leave,' includ[e] 'the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating the compliance with the officer's request might be compelled.'" Kaupp v. Texas, 538 U.S. 626, 629 (2003) (quoting Mendenhall, 446 U.S. at 554 (opinion

of Stewart, J.)).

The Court finds that a Terry stop occurred when Officer Harris ordered Defendant to "stay still" and stood by him while Officer Heim went to the door of the corner house. See Kaupp, 538 U.S. at 629. Indeed, Officer Harris admitted that he did not accompany Officer Heim to the corner house because he "wanted [Defendant] to stay exactly where he was." (08/18/05 N.T. at 33.); see Michigan v. Chesternut, 486 U.S. 567, 576 n.7 (1988) ("[T]he subjective intent of the officer[] is relevant to an assessment of the Fourth Amendment implications of police conduct . . . [where] . . . that intent has been conveyed to the person confronted."). As of that moment, the following information was available to Officer Harris: (1) Defendant had been sitting in a lawn chair on a street corner in a high-crime area during broad daylight; (2) Defendant purportedly lived in the house on the street corner; (3) Defendant could not produce identification upon request, but cooperatively answered questions; (4) Defendant repeatedly opened and closed his fists; and (5) Defendant failed to comply with orders to stop reaching into his pants' pockets. Drawing on his vast experience and training as a police officer, Officer Harris testified that these circumstances - even coupled with his subsequent discovery that Defendant had lied about living in the corner house - provided "no indication that [Defendant] had been involved in any illegal activity." (08/18/05 N.T. at 32.) Although "[t]he fact that the

officer does not have the state of mind which is hypothecated by . . . the legal justification for the officer's action" is not fatal under the Fourth Amendment's objective standard of reasonableness, United States v. Williams, 413 F.3d 347, 353 n.6 (3d Cir. 2005) (citation omitted), the Government has not even attempted to justify Officer Harris's actions in this case on grounds that he had a reasonable suspicion that criminal activity was afoot.² Rather, the Government maintains that Officer Harris ultimately had no choice but to frisk Defendant out of concern for his own safety.

To justify a protective search under Terry, however, "the officer must first have constitutional grounds to insist on the encounter, to make a forcible stop." Terry, 392 U.S. at 32 (Harlan, J., concurring). Thus, "the right to frisk . . . depends upon the reasonableness of a *forcible stop to investigate a suspected crime*." Id. at 33 (Harlan, J., concurring) (emphasis added); see also Adams v. Williams, 407 U.S. 143, 146 (1972) ("So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose."); United States v. Burton, 228 F.3d 524, 528 (4th Cir. 2000) ("But before [the officer] was entitled to allay his safety

² Government counsel acknowledged at the hearing that "[t]here wasn't necessarily anything to indicate to Officer Harris, and he certainly testified this way, that, you know, Mr. Alston would necessarily have drugs in his pocket or anything like that." (08/18/05 N.T. at 64.)

concerns [stemming from the defendant's refusal to remove his hand from his coat pocket] . . . he had to be presented with objective facts that would justify an investigative Terry stop - a reasonable suspicion that a crime had been committed or that criminal activity was taking place."); United States v. Gray, 213 F.3d 998, 1000 (8th Cir. 2000) ("The requirement that a protective frisk be based upon reasonable suspicion that criminal activity is afoot explains why this type of search is normally preceded by an investigatory stop based upon an officer's suspicion of criminal activity."); United States v. Dudley, 854 F. Supp. 570, 580 (S.D. Ind. 1994) ("[I]f the stop itself is unlawful, [Supreme Court precedent does not] authorize the police to search the suspects . . . for weapons, even if the officers reasonably fear for their safety.") (citations omitted); Gomez v. United States, 597 A.2d 884, 891 (D.C. 1991) ("[T]he seizure could not be justified on the notion that it would be dangerous to chat with [the defendant] and his companions without restricting their liberty. No matter how appealing the cart may be, the horse must precede it."); 4 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, §§ 9.5(b), 9.6(a) (4th ed. 2004).³ Under the circumstances of this case, the

³ Where an officer encounters a potentially dangerous individual but lacks the reasonable suspicion necessary to make a Terry stop, he may protect himself by not engaging in the confrontation. See Terry, 392 U.S. at 32 (Harlan, J., concurring) ("Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such person for his own protection, he must first

Government cannot meet its burden of proving that any of the challenged seizures were reasonable under the Fourth Amendment without first demonstrating that the officers had a reasonable suspicion that Defendant was involved in criminal activity at the time they detained him for investigation.

The Court's independent analysis of the facts and circumstances known to Officer Harris at the time of the stop confirms that a reasonable officer would not have suspected legal wrongdoing by Defendant. The officers were not investigating any particular crime when they approached Defendant, who was sitting alone, on the street corner. Although sitting in a lawn chair on a street corner is perhaps less common than sitting on the front porch or steps of a house, it is "not so improbable as to suggest it was a pretext for criminal activity," Gray, 213 F.3d at 1001, especially considering the time of day and season, as well as Defendant's then-uncontradicted statement that he lived in the adjacent house. Defendant did not attempt to hide anything or flee the scene upon the officers' arrival, but instead remained in or around the lawn chair and willingly answered the questions they asked him. Given that Defendant was not driving a vehicle at the time of the stop, his inability to produce identification is unremarkable. See Gomez v. Turner, 672 F.2d 134, 144 n.18 (D.C.

have a right not to avoid him but to be in his presence.").

Cir. 1982) (noting that "pedestrians, unlike drivers, are not required to carry a driver's license or any other formal identification papers with them on their walks"). There is no indication that Defendant made any furtive movements with his hands while they were in his pockets so as to suggest he was concealing drugs or illegal weapons, and Officer Harris did not observe any contraband in Defendant's possession while his hands were exposed. Even when the Court considers the high-crime location of the stop, together with all of the surrounding circumstances, the Court cannot conclude that the officers possessed the quantum of suspicion required by Terry to justify their invasion of Defendant's privacy in this case. As the officers lacked reasonable suspicion to stop Defendant, the crack cocaine and cash recovered during the subsequent frisk must be suppressed. See Wong Sun, 371 U.S. at 484-85.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion to Suppress Physical Evidence is granted. The Government may not admit the crack cocaine and cash seized from Defendant into evidence at the trial in this matter.

An appropriate Order follows.

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

UNITED STATES OF AMERICA

v.

RONALD ALSTON

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CRIMINAL NO. 05-CR-268

O R D E R

AND NOW, this 22nd day of August, 2005, upon consideration of Defendant's Motion to Suppress Physical Evidence (Doc. No. 22), the Government's Response thereto, and the hearing held on August 18, 2005, **IT IS HEREBY ORDERED** that said Motion is **GRANTED**. **IT IS FURTHERED ORDERED** that the crack cocaine and cash seized from Defendant is hereby **SUPPRESSED**, and such evidence is inadmissible in the Government's case in chief at trial.

BY THE COURT:

s/ John R. Padova
John R. Padova, J.