

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

UNITED STATES	:	
	:	
	:	
v.	:	CRIMINAL NO. 11-111
	:	
SHAWN LOWE	:	

DECISION
FINDINGS OF FACT AND CONCLUSIONS OF LAW

JOYNER, J.

JANUARY 8, 2014

Pursuant to the Order of the United States Court of Appeals for the Third Circuit, United States of America v. Shawn Lowe, -- Fed. Appx. --, 2013 WL 1876999 (3d Cir. May 7, 2013), and upon consideration of Defendant's Motion to Suppress Physical Evidence and Statement and Memorandum (Doc. No. 19), Supplement in Support Thereof, (Doc. No. 25) and the United States' Response In Opposition Thereto (Doc. No. 27), as well as Defendant's Post-Hearing Memorandum (Doc. No. 58) and Proposed Findings of Fact and Conclusions of Law (Doc. No. 59) and the United States' Supplemental Memorandum (Doc. No. 60) and Proposed Findings of Fact and Conclusions of Law (Doc. No. 61), as well as Defendant's Reply (Doc. No. 62), the Court enters these findings of fact and conclusions of law:

Findings of Fact

1. On September 19, 2010, at approximately 4:00 am, Philadelphia Police Officers Ryan McGinnis and Francesco Campbell received a radio call reporting "flash information of a black male wearing a gray hoodie with a gun in his waistband talking to a female that was at . . . 914 North Markoe Street outside." (Tr. 6). The tip was anonymous.
2. The 900 block of North Markoe Street is a violent, high crime area known for drug crimes. Officer Campbell had made numerous narcotics and gun arrests in the vicinity of that block. (Tr. 4).
3. Approximately an hour and a half earlier, Officers Campbell and McGinnis had received a call regarding an alleged gun shot at the 900 block of 49th Street, which is "around the corner" from 914 North Markoe Street. (Tr. 8). No one had been apprehended for that shooting. (Tr. 39, 40).
4. When the officers received the call, they were in a marked police car at 36th and Market Streets. (Tr. 7). Officer McGinnis activated the car's emergency lights and sirens; when the officers were about a block and a half away from 914 North Markoe Street, Officer McGinnis turned off the lights and sirens. (Tr. 7). It took the officers approximately two minutes to arrive at 914 North Markoe. (Tr. 7).
5. North Markoe Street is a one-way street with traffic running northbound. (Tr. 23). House number 914 is on the left hand side

of the block. (Tr. 23). Because of construction being done on the house just northward of 914 North Markoe, there was a fence on the sidewalk preventing access to the North of house 914. (Tr. 23, 27, 112, 113).

6. Officers Campbell and McGinnis stopped their patrol car approximately 50 or 60 feet south of 914 North Markoe St. (Tr. 8, 41). Two additional police cars, including one driven by Officer Pezzeca, pulled in behind them within seconds of their arrival. (Tr. 18, 24).

7. The officers saw Shawn Lowe, wearing a gray hoodie, in front of 914 North Markoe Street. (Tr. 8, 40, 41). Mr. Lowe was speaking with a woman, later identified as Tamika Witherspoon. (Tr. 8, 109). Tamika Witherspoon later testified that 914 North Markoe Street was her home address. (Tr. 108).

8. Officers Campbell and McGinnis did not see a gun or any indication of a gun, nor did they see or hear any arguing when they first pulled up to the residence. (Tr. 20, 49, 50).

9. The four officers from the three police cars exited the vehicle and began to approach Mr. Lowe. (Tr. 21, 22).

10. The four witnesses provided varying versions of what ensued. Officer McGinnis testified that he approached Mr. Lowe by walking North on North Markoe Street, with Mr. Lowe sitting fifty to sixty feet ahead and to the left. (Tr. 41, 42). As he approached, Officer McGinnis asked Mr. Lowe to remove his hands from his

pockets. (Tr. 43, 51). Mr. Lowe did not do so; instead, he "froze" and looked both ways over his shoulders. (Tr. 43, 52). Officer McGinnis proceeded to give Mr. Lowe "numerous verbal commands to take his hands out of his pockets" with which Mr. Lowe did not initially comply. (Tr. 43). Because Mr. Lowe kept his hands in his pockets, Officer McGinnis drew his gun. (Tr. 50).

11. Only after five to ten commands were given did Mr. Lowe take his hands out of his pockets and slowly move towards the wall. (Tr. 43, 57). The officers pushed him towards the wall, and Mr. Lowe reached for his waistband. (Tr. 44). Officer McGinnis then observed a gun in Mr. Lowe's waistband, which Officer Campbell removed after a brief struggle. (Tr. 44).

12. Officer McGinnis also testified that he and the other Officers were aware that a police officer had been injured earlier in 2010 by an individual who shot his gun through his pocket. (Tr. 43). The Court credits Officer McGinnis's logical explanation of the motivation for his alarm at Mr. Lowe's refusal, even after multiple commands, to display his hands to the officers.

13. Officer Pezzeca testified that he arrived on the scene after Officers Campbell and McGinnis were already about six to eight feet away from Mr. Lowe. (Tr. 71). As Officer Pezzeca approached, Mr. Lowe and Ms. Witherspoon were standing in front of him to the

left. (Tr. 70). Mr. Lowe was backing away from the officers, and they were moving toward him. (Tr. 71). Officer Pezzeca heard Officers Campbell and McGinnis tell Mr. Lowe "several" times to show them his hands. (Tr. 71, 72). Mr. Lowe kept his hands "in his pockets or underneath his hoodie or in his pockets in the front of him." (Tr. 72). The Court credits Officer Pezzeca's testimony, which corroborates Officer McGinnis's explanation of what transpired.

14. The officers grabbed Mr. Lowe to place him against the wall, and Officer Pezzeca helped them turn Mr. Lowe so that he was facing the wall. (Tr. 72, 73). Officer Pezzeca testified that Mr. Lowe only placed his hands on the wall when he was forced to do so by the officers; he never did so voluntarily. (Tr. 73).

15. Officer Campbell testified that Mr. Lowe was standing in front of 914 North Markoe when the officers arrived. (Tr. 8). Like Officer Pezzeca, Officer Campbell also testified that Mr. Lowe backed away from the officers as they approached. (Tr. 9). Officer Campbell believes he ordered Mr. Lowe "to stop, put your hands on the wall. Put your hands up." (Tr. 20).

16. In contrast to the other officers, when asked if Mr. Lowe and Ms. Witherspoon did in fact put their hands up, Officer Campbell testified, "I know he did. I wasn't really trained on her too much." (Tr. 20). Officer Campbell testified that after Mr. Lowe put his hands on the wall, but before the officers had a

chance to engage him, Mr. Lowe removed his hands from the wall and moved them to his waistband. (Tr. 9). After a few-minute struggle with Mr. Lowe, Officer Campbell observed and recovered a gun from Mr. Lowe's waistband. (Tr. 10). Upon consideration of the entirety of the testimony, the Court affords more weight to the congruent testimony of Officers McGinnis and Pezzeca, whose accounts provide a consistent story, and slightly less weight to Officer Campbell's recollection regarding Mr. Lowe's compliance with the order to raise his hands.

17. The final witness was Tamika Witherspoon. Ms. Witherspoon testified that she had invited her good friend, Shawn Lowe, to her house around 3:45 am the morning of September 19, 2010. (Tr. 108, 109). She and Mr. Lowe stood in front of her house, talking. (Tr. 109, 110). Mr. Lowe pulled the gun he was carrying out of his waistband or hoodie pocket and showed it to Ms. Witherspoon. (Tr. 109). After ten or fifteen minutes, the police arrived. (Tr. 110). During the encounter, Ms. Witherspoon stood next to Mr. Lowe, and she focused her attention on the police officers. (Tr. 120). The officers ordered Ms. Witherspoon and Mr. Lowe to put their hands up, and they both complied. (Tr. 110). Upon observation of Ms. Witherspoon's demeanor and testimony, the Court finds her testimony to be less credible than that of Officers McGinnis and Pezzeca. Moreover, the Court finds that when the officers first arrived at 914 North Markoe, Ms.

Witherspoon's focus was naturally on the officers, and thus she was not in the best position to observe whether or not Mr. Lowe raised his hands.

18. Tamika Witherspoon also testified that the officers then "forced [Mr. Lowe] over to the front of [the] house, the wall of the house, and searched him." (Tr. 110). After retrieving the gun, "for some strange reason [the officers] started to abuse him." (Tr. 111). The Court finds this testimony incredible in light of the fact that the three officers testified that Mr. Lowe's moving his hands down to his waistband was the catalyst for the ensuing struggle. (Tr. 13, 45, 73-74).

19. The Court finds that, when the officers first arrived on the scene, Mr. Lowe was standing in front of 914 North Markoe. As the officers steadily moved toward Mr. Lowe, he took several steps backing away from them. He was prevented from moving back more than a few steps by the construction fence next to 914 North Markoe Street.

20. The Court also finds that Officers McGinnis and Campbell gave Mr. Lowe multiple commands to raise his hands or take his hands out of his pockets while in close proximity to Mr. Lowe. Mr. Lowe did not initially comply. While there is some discrepancy as to whether Mr. Lowe then subsequently voluntarily placed his hands against the wall before reaching to his waistband, or whether he was forced to place his hands against

the wall,¹ the Court finds that this momentary compliance does not undercut the overall pattern of resistance by Mr. Lowe to officers' commands and directions.

21. While he was facing the wall, Mr. Lowe dropped his arms and reached for his waistband. The officers saw a gun in Mr. Lowe's waistband and recovered it.

Conclusions of Law

1. If a police Officer observes unusual conduct which, in light of his experience, leads him to reasonably believe that criminal activity is afoot and that the person he has observed may be armed and dangerous, he may stop the person and conduct "a carefully limited search." Terry v. Ohio, 392 U.S. 1, 30 (1968).

2. The goal of a Terry stop and frisk, which is a seizure within the meaning of the Fourth Amendment, is to discover any weapons on the suspect's person, thereby assuring the safety of the officer and others in the vicinity. Id. at 16, 30.

3. The reasonable suspicion necessary to conduct a stop and frisk is a less demanding standard than probable cause, requires a showing considerably less than a preponderance of the evidence, and can arise from information that is less reliable than that

¹ The Court does not need to resolve the conflict as to how exactly the Officers recovered the firearm from Mr. Lowe and how he sustained his injuries, because these actions occurred after Mr. Lowe was seized.

required to show probable cause. United States v. Valentine, 232 F.3d 350, 353 (3d Cir. 2000) (internal citations omitted).

4. The assessment of whether reasonable suspicion exists must be based upon all the circumstances. U.S. v. Cortez, 449 U.S. 411, 418 (1981). A police officer may take into account the location of the suspect, the crime rate of that location, and his own "commonsense judgments and inferences about human behavior." Illinois v. Wardlow, 528 U.S. 119, 124-5 (2000). Police officers are afforded the opportunity to "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." U.S. v. Arvizu, 534 U.S. 266, 273 (2002) (internal quotations omitted).

5. Although a refusal to cooperate with police, without more, does not give officers the objective grounds needed for detention or seizure, Florida v. Royer, 460 U.S. 491, 498 (1983), actions by an individual that are indicative of criminal activity, even if they are "susceptible of an innocent explanation," may do so. Illinois v. Wardlow, 528 U.S. 119, 125 (2000); see also Terry, 392 U.S. at 22-23.

6. A person is "seized" within the meaning of the Fourth Amendment when an officer applies physical force, or makes a show of authority to which the suspect submits. California v. Hodari D., 499 U.S. 621, 626 (1991).

7. The anonymous tip received by the officers in the present case was not, by itself, sufficient to establish reasonable suspicion. See Florida v. J.L., 529 U.S. 266, 270-72 (2000).

8. The critical inquiry is whether the officers had developed reasonable suspicion - specific and articulable facts - to justify the seizure of Mr. Lowe at the point when the encounter became a Terry stop. See U.S. v. Brown, 448 F.3d 239, 245 (3d Cir. 2006) (“[w]e begin by determining when the seizure [of the defendant] occurred . . . [o]nly then can we evaluate the presence or absence of reasonable suspicion.”)

9. The encounter between the officers and Mr. Lowe did not become a Terry stop at the officers' *first* command that Lowe remove his hands from his pockets; instead, “the interaction became a stop” when the officers *repeated* their commands, “ma[king] it clear that [the suspect] was not free to ignore [the officers] and would not be left alone until he complied.” Johnson v. Campbell, 332 F.3d 199, 206 (3d. Cir. 2003) (finding that stop occurred after officer's second command to individual to roll down his car window).

10. Mr. Lowe submitted to the officers' show of authority by not fleeing from them when the commands to take his hands out of his pockets were repeated. See United States of America v. Shawn Lowe, 2013 WL 1876999 (non-precedential) (Ambro, J., concurring) (“if he halted and did not attempt to flee as a result

of either instruction, this would be enough to show he was seized at that moment."); U.S. v. Brown, 448 F.3d 239, 246 (3d Cir. 2006) (holding that clear submission occurred where defendant turned to face police car and was moving to place his hands on the vehicle); Johnson, 332 F.3d at 206 (holding that seizure occurred when individual remained in vehicle despite his refusal to comply with Officers' order that he roll down the window).

11. In sum, Mr. Lowe was seized within the meaning of the Fourth Amendment at the point when the officers repeated their commands to him, and he responded by not fleeing.

12. Mr. Lowe's refusal to remove his hands from his pockets, after the first or first few² commands to do so, occurred prior to the seizure. Thus, the initial refusal should be considered in the calculus of whether the officers had developed reasonable suspicion to seize Mr. Lowe. See, e.g., Valentine, 232 F.3d at 352 ("[the defendant's] acts after the Officers ordered him to stop should have been considered."); U.S. v. Johnson, 620 F.3d 685, 692 (6th Cir. 2010) (enumerating defendants' actions immediately prior to moment of seizure as part of totality of circumstances available to officers). While this behavior would not give rise to reasonable suspicion in itself, it is a factor

² Because both Officers Campbell and McGinnis began giving Mr. Lowe commands to take his hands out of his pockets after exiting their car, these repeated commands are not as easily delineated into "first" and "second" as those made by the one officer in Johnson v. Campbell, 332 F.3d 199 (3d Cir. 2009).

that can be considered in the totality of the circumstances. See U.S. v. Johnson, 212 F.3d 1313, 1316-17 (D.C. Cir.

2000) (suspect's "shoving down" motion and refusal to comply with officers' requests to show his hands could reasonably suggest hiding or retrieving a gun).

13. The officers thus had the following facts available to them at the moment of seizure: an anonymous tip that a male matching Mr. Lowe's description was engaged in criminal activity, the fact that 914 North Markoe Street was located in a high-crime neighborhood in which a shooting had occurred over an hour earlier, the late hour of the night, and the fact that, when Mr. Lowe was approached and asked to show his hands, he refused to remove his hands from his hoodie pockets.

14. Mr. Lowe's refusal to remove his hands from his pockets could reasonably have been considered by the officers to be indicative of criminal activity and pose a danger to their safety. Unlike the officer in Johnson v. Campbell, Officers Campbell, McGinnis, and Pezzeca were not shielded from Mr. Lowe by a car door and window. See 332 F.3d at 202-03. Nor was Mr. Lowe sitting in a van in a motel parking lot "with another man and reading a paper," see id. at 209-10, his body necessarily facing forward, away from the officer rapping at his window. Instead, Mr. Lowe was standing up, in close vicinity of the officers, in an area the officers knew to be dangerous, with both

of his hands fixed in his pockets. When considered in light of the other factors available to the officers at the time of the seizure, Mr. Lowe's action could have led a reasonable person in the officers' place to believe Mr. Lowe was armed, and to fear for his or her safety.

15. Mr. Lowe's refusal to remove his hands was also unlike the defendant's actions in U.S. vs. Johnson, 620 F.3d 685 (6th Cir. 2010). In Johnson, an individual who had his back to police officers did not stop at officers' commands for him to stop. Id. at 689. Instead, he walked at the same pace toward his car, crossed in front of the car, opened the passenger-side door, threw his bag in the car, and then stood at the passenger-side door with both hands on the car within officers' view. Id. at 689, 692. Mr. Lowe's hands, in contrast, were not within view of the officers, and Mr. Lowe was not facing away and walking away from the officers in a non-threatening manner. Mr. Lowe's action of steadfastly holding his hands in his pockets could reasonably have put officers in peril in a way that Johnson's actions could not.³

³ Notably, Judge Ralph B. Guy, Jr.'s dissent finds the fact that the defendant "bent forward and reached his hands toward his 'middle region' . . . could reasonably be viewed as an attempt to conceal a weapon or other contraband from the officers." 620 F.3d at 699 (Ralph B. Guy, J., dissenting). The majority does not include this hand-reaching action in its analysis because it occurred *after* the seizure of the defendant, not because it could not be viewed as indicative of criminal activity. See id. at 696. In the present case, in contrast, Mr. Lowe's initial refusal to take his hands out of his pockets occurred *before* the seizure.

16. The Court finds that the factors above, viewed in light of Officer Campbell and McGinnis's respective eight and a half and three and a half years of experience in the police force, led the officers to reasonably believe that Mr. Lowe's actions were consistent with someone who may be carrying a gun. The officers thus had reasonable suspicion at the point of seizure. See, e.g., *U.S. v. Connolly*, 349 Fed. Appx. 754, 757 (3d Cir. 2009) (non-precedential) ("[the defendant] immediately placed his hands in his pockets and refused both a request and a directed order to remove them. We conclude that from this sequence of events, the attendant circumstances, and their combined 30 years of experience, the police officers could reasonably suspect that [defendant] might be armed and dangerous."); *U.S. v. Nelson*, 284 F.3d 472, 483 (3d Cir. 2002) ("a high-crime area during the late night to early morning hours, and the fact that every detail provided by the informant matched the details observed by the officers, and that some of those details established a particularized suspicion, warranted the limited intervention of an investigatory stop").

17. For all of these reasons, the Motion to Suppress is denied.

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

UNITED STATES

v.

SHAWN LOWE

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CRIMINAL NO. 11-111

ORDER

AND NOW, this 8th day of January, 2014, upon consideration of Defendant's Motion to Suppress Physical Evidence and Statement and Memorandum (Doc. No. 19), Supplement in Support Thereof, (Doc. No. 25) and the United States' Response In Opposition Thereto (Doc. No. 27), as well as Defendant's Post-Hearing Memorandum (Doc. No. 58) and Proposed Findings of Fact and Conclusions of Law (Doc. No. 59) and the United States' Supplemental Memorandum (Doc. No. 60) and Proposed Findings of Fact and Conclusions of Law (Doc. No. 61), as well as Defendant's Reply (Doc. No. 62), it is hereby ORDERED that the Motion To Suppress is DENIED.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.