

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

UNITED STATES OF AMERICA : CRIMINAL ACTION
 :
 v. :
 :
 RAYMOND TALLEY : NO. 16-316

MEMORANDUM

Bartle, J.

December 7, 2016

Defendant Raymond Talley is charged with possession of a firearm by a convicted felon under 18 U.S.C. §§ 922(g)(1) and 924(e). He now moves to suppress evidence of the firearm on the ground that it was seized in violation of his rights under the Fourth Amendment to the United States Constitution and to suppress his post-arrest statements because they were obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), and are the fruit of the poisonous tree under the exclusionary rule in Murray v. United States, 487 U.S. 533 (1988), and Wong Sun v. United States, 371 U.S. 471 (1963).

I.

The court makes the following findings after an evidentiary hearing.

On the evening of May 16, 2016, Philadelphia Police Officers Kyle Morris and Christopher Hyk were working in plainclothes in an unmarked police vehicle in the 25th Philadelphia Police District. They were parked near the intersection of 8th Street and Allegheny Avenue, specifically on

the south side of Allegheny Avenue facing east toward the intersection with 8th Street. Officer Morris was seated in the front passenger seat and Officer Hyk in the driver's seat.

At approximately 8 p.m., the officers observed a silver Chevrolet Impala park on the west side of 8th Street facing north, just below the intersection of 8th and Allegheny. The officers each identified Talley as the driver of the Impala. Officer Morris observed the Impala and Talley through the unmarked police vehicle's front passenger side window, which was tinted. Officer Hyk observed the Impala and Talley through the unmarked police vehicle's untinted windshield. Talley was approximately twenty to twenty-five feet away from the officers' point of observation. Officer Morris stated that there was still daylight but it was nearing dusk and that there were no streetlights aiding his observation.

After Talley parked the Impala, he exited the vehicle and walked to the front of the hood while facing the officers and holding a black knit cap. Talley put the cap under his right arm and, with his back to the officers, he opened the hood. Officer Morris testified that he observed one and a half inches of the silver and black butt of a firearm protruding from the cap while it was under Talley's right arm. Talley then placed the cap with its contents under the hood and closed it.

Officer Morris testified that he had never before seen anyone store a firearm in the engine compartment of a vehicle.

Officer Hyk, who was also sitting in the unmarked police vehicle, did not see the firearm and simply identified the item under Talley's arm as a black cloth. However, at some point Officer Morris told Officer Hyk that he saw a gun. The exact point when Officer Morris communicated this to Officer Hyk is unclear.

According to Officer Morris, he used his personal cell phone rather than the police radio to call Officer Jared Krzywycki, a uniformed officer in a marked patrol vehicle whom Officer Morris knew was working in the area. Officer Morris testified that he informed Officer Krzywycki that he saw a man put a gun under the hood of his silver Impala. Officer Krzywycki then passed the information to the driver of the marked patrol vehicle, Officer Keith White. According to Officer Morris, he called Officer Krzywycki using his cell phone rather than alerting police dispatch because calling police dispatch would cause the activation of lights and sirens from many police officers rushing to the scene and would encourage Talley to flee, putting the officers in danger. Officer Morris stated that Officers Krzywycki and White would be able "to do a routine car stop."

While Officer Morris was relaying information to Officer Krzywycki, Talley retrieved shoes and clothing from the trunk of the Impala and put them in the front passenger seat. Talley then began to drive away. After a short distance while Talley was stopped at the red light on Glenwood Avenue, Officer White activated the marked patrol vehicle's police lights and pulled Talley over. He then approached Talley's vehicle. By this time, it was a few minutes after 8 p.m.

Officers Morris and Hyk, who followed Talley's vehicle from a distance and never lost sight of it, observed Officers Krzywycki and White pull over Talley's vehicle. Officers Morris and Hyk then parked their unmarked vehicle behind the marked patrol vehicle of Officers Krzywycki and White.

Officer White approached Talley and asked Talley to produce his license and registration. After asking Talley to exit his vehicle, Officer White informed him that for safety purposes, the officers would conduct an investigation and would handcuff him. Officer White testified that Talley, who was acting nervous and shaking, stated, "I can't deal with this right now." At this point, Talley was placed in the back of the marked patrol vehicle in handcuffs.

After Talley had exited the vehicle, Officer Morris opened the hood of Talley's vehicle by pulling the latch located inside of the passenger compartment near the driver's seat. He

then recovered the black knit cap and firearm from the rear of the engine compartment on the driver's side. Officer Morris approached Talley, who was seated in the back seat of the marked patrol vehicle, and told Talley that he had seen him put the firearm in the engine compartment of the Impala. In response Talley said, "Oh fuck. I'm going away for a long time."

Officer Krzywycki testified that after pulling Talley over he alerted police radio dispatch of the events. The timing of Officer Krzywycki's call to police radio dispatch is unclear. In the police dispatch recording, Officer Krzywycki noted to the dispatcher that a "car stop" took place.

Canisha Bailey of the Philadelphia Police Department's Radio Audio Reproduction Unit testified at the hearing as to the computer generated dispatch report which tracks the record of radio dispatch calls. According to Bailey, an internal computer system generates a technical priority code for each call into the police dispatcher. The computer system automatically generates this priority number for the type of call based on the description of the events given by the police officer to the dispatcher. Bailey identified that the urgent priority "level 1" is assigned to a call for a "person with a weapon." The events surrounding Talley's stop, however, were assigned in the dispatch report as "investigate person," a priority "level 2."

A climatological report from the National Climatic Data Center for the month of May 2016 contradicted Officer Morris' testimony. It revealed that on May 6, 2016, the date of the incident, sunset in Philadelphia took place at 7 p.m., one hour before the events in question. We find this report to be credible.

The police witnesses were clear that Talley at no time had violated any traffic laws.

II.

Talley argues that the seizure of the firearm without a search warrant violated the Fourth Amendment. It provides:

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend IV. The government first maintains that a search warrant was not necessary because of the automobile exception outlined in Maryland v. Dyson. 527 U.S. 465 (1999). Although the Fourth Amendment generally requires the police to obtain a warrant before conducting a search, the United States Supreme Court has recognized an exception to this requirement for vehicle searches. The Court has held that "where there was

probable cause to search a vehicle 'a search is not
unreasonable

if based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained.'"

See Dyson, 527 U.S. at 467 (quoting United States v. Ross, 456 U.S. 798, 809 (1982)). Exigency is not necessary. See id.

We must therefore decide whether the police officers had probable cause to open the hood of Talley's vehicle and seize the firearm. "The probable cause inquiry is 'commonsense,' 'practical,' and 'nontechnical;' it is based on the totality of the circumstances and is judged by the standard of 'reasonable and prudent men.'" United States v. Donahue, 764 F.3d 293, 301 (3d Cir. 2014) (quoting Illinois v. Gates, 462 U.S. 213, 230-31 (1983)). "We evaluate 'the events which occurred leading up to the . . . search, and then . . . [decide] whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to . . . probable cause.'" See id. (quoting Ornelas v. United States, 517 U.S. 690, 696 (1996)). There is probable cause if "there is a fair probability that contraband or evidence of a crime will be found in a particular place." See Gates, 462 U.S. at 238. "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." Ross, 456 U.S. at 825.

We find that Officer Morris did not see the butt of the firearm protruding from the black knit cap when Talley exited the Impala at 8th Street and Allegheny Avenue and placed the cap with its contents under the hood of the vehicle. We make this finding for several reasons. First, contrary to what Officer Morris said on the witness stand, it was not still light nearing dusk at 8 p.m. on the evening of May 6, 2016 when he allegedly observed the firearm. The climatological report from the National Climatic Data Center stated that sunset had occurred a full hour earlier at 7 p.m. Moreover, he testified that he was not aided by street lights. It is highly improbable that he saw one and a half inches of a black and silver butt of a gun in the dark from twenty to twenty-five feet away through a tinted window of a police vehicle, particularly when he had never seen a suspect hide a gun in this way. In addition, the cap was large enough to easily encompass the entire firearm. It was unlikely that part of the firearm was visible.

Further, Officer Morris did not call the police radio dispatch to report a person with a gun. Instead he used his personal cell phone to alert the uniform officers in the area. According to Officer Morris, he did so because he did not want many officers with lights and sirens to arrive in the area for fear of Talley fleeing or causing danger to the officers. We find this explanation implausible. We cannot believe that an

officer would not use the police radio if he had actually observed a person with a firearm. Finally, when police radio was used, the incident was described in the record of the police dispatch as "investigate person" and not the higher priority "person with a weapon." This record is telling.

While Officer Morris may have had a hunch or inchoate suspicion that Talley had a firearm, he did not in fact see a firearm at 8th Street and Allegheny Avenue. Thus, neither Officer Morris nor the other police officers had probable cause to open the hood of Talley's vehicle to search for and seize the firearm from the engine compartment. The government's reliance on the automobile exception under Maryland v. Dyson to excuse the need for a warrant fails. See 527 U.S. at 467.

III.

The government has a fallback position. If the automobile exception is not applicable, the government argues that the police made a valid "Terry stop" and consequently the seizure of the firearm did not violate the Fourth Amendment.

Under Terry v. Ohio, 392 U.S. 1 (1968), a police officer is permitted to "stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity

'may be afoot,' even if the officer lacks probable cause."

United

States v. Sokolow, 490 U.S. 1, 7 (1989) (citing Terry, 392 U.S.

at 30). A police officer may conduct a Terry search of a vehicle pursuant to a valid Terry stop. See Michigan v. Long, 463 U.S. 1032, 1049 (1983).

The Supreme Court determined that in making the stop the officer must be able to articulate something more than "inchoate and unparticularized suspicion or hunch," which requires "some minimal level of objective justification" for the stop. See Sokolow, 490 U.S. at 7 (citing Terry, 392 U.S. at 27 and INS v. Delgado, 466 U.S. 210, 217 (1984)).

The standard for reasonable suspicion as required for a valid Terry stop is less demanding than the standard for probable cause, which is found if "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Gates, 462 U.S.

at 238. Instead, when assessing the validity of a Terry stop, courts should consider the totality of the circumstances. Sokolow, 490 U.S. at 8 (citing United States v. Cortez, 449 U.S. 411, 417 (1981)).

The Court has acknowledged that there are circumstances in which lawful conduct may give rise to reasonable suspicion. Reid v. Georgia, 448 U.S. 438, 441 (1980). Individual acts on their own may not give rise to reasonable suspicion, but considering the totality of the

circumstances multiple acts viewed together may amount to reasonable suspicion. See Sokolow, 490 U.S. at 9 (citing

Florida v. Royer, 460 U.S. 491, 502 (1983)); see also Terry, 392 U.S. at 22. The knowledge of the officer to whom reasonable suspicion exists is imputed to officers in the field. See United States v. Whitfield, 634 F.3d 741, 745 (3d Cir. 2010).

An investigatory stop pursuant to Terry supported by reasonable suspicion is valid under the Fourth Amendment so long as it is not "excessively intrusive in its scope or manner of execution." United States v. Johnson, 592 F.3d 442, 451 (3d Cir. 2010) (citing United States v. Rickus, 737 F.2d 360, 366 (3d Cir. 1984)). The manner in which the stop was conducted must be "reasonably related in scope to the circumstances which justified the interference in the first place." Terry, 392 U.S. at 19-20. Under the exclusionary rule, evidence obtained outside the parameters of a Terry stop must be suppressed as fruit of the poisonous tree. Wong, 371 U.S. at 485-86; Murray, 487 U.S. 536-37.

The scope of a Terry stop is limited to "those areas in which a weapon may be placed or hidden . . . if the police officer possesses a reasonable belief based on 'specific and articulable facts . . . [that] reasonably warrant' the officers in believing that the suspect is dangerous and the suspect may gain immediate control of the weapons." Long, 463 U.S. at 1049

(citing Terry, 392 U.S. at 21). The scope of a Terry stop
relies on the presumption that 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;

Long, 463 U.S. at 1050.

The seizure of Talley's firearm cannot be sustained on the basis of a Terry stop. Based on our observation of the witness at the hearing and the testimony presented, Officer Morris at most had a hunch or inchoate suspicion that Talley had placed a firearm under the hood of his vehicle. As previously noted, he did not see the firearm and had never seen a suspect hide a firearm in the manner that occurred here.

The circumstances involved in this case do not rise to the level of reasonable suspicion. See Sokolow, 490 U.S. at 7.

Even if Officer Morris had a reasonable suspicion that Talley had secured the firearm in the engine compartment, a valid Terry stop, in our view, would not allow the police to search under the hood of the vehicle without a warrant. When Talley was removed from the Impala, he was immediately handcuffed and placed in the marked patrol vehicle. As the Supreme Court explained in Long, a search pursuant to a Terry stop is limited to those areas in which the officer holds a reasonable belief based on specific and articulable facts that

the suspect is dangerous and that the suspect may gain
immediate control of a weapon. 463 U.S. at 1049.

There is nothing here to support a finding
that the police officers had a reasonable

fear for their safety or the safety of others so as to permit Officer Morris to open the hood and search the engine compartment without a warrant. See Terry, 392 U.S. at 30. There is simply no basis for a reasonable belief that Talley could have gained immediate control of the firearm under the circumstances presented here. In sum, the government's Terry stop argument lacks merit.

IV.

Talley also argues that the statements he made are inadmissible because they were taken in violation of his rights under Miranda v. Arizona. 384 U.S. at 478-79. The government

counters that the police officers were not required to give Talley his Miranda warnings because he was not under arrest.

The Fifth Amendment to the United States Constitution provides in relevant part, "No person . . . shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend V. The Supreme Court held in Miranda that "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and subjected to questioning, the privilege against self-incrimination is jeopardized" and "[p]rocedural safeguards must be employed to protect the privilege." 384 U.S. at 478-79.

The Court outlined the specific warnings that a suspect must be given prior to custodial interrogations by law enforcement in

order to protect the suspect's Fifth Amendment privilege against self-incrimination.¹ Id. at 479. "[U]nwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under Miranda."

Oregon v. Elstad, 470 U.S. 298, 307 (1985).

The requirement of Miranda warnings is triggered upon custodial interrogation of a suspect by law enforcement. See Illinois v. Perkins, 496 U.S. 292, 297 (1990). A custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444.

In determining whether a suspect is in custody, the Supreme Court has described a two-part inquiry. See Thompson v. Keohane, 516 U.S. 99 (1995). "[F]irst, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt that he or she was not at liberty to terminate the interrogation and leave." Id. at 112. "[T]he court must [then] apply an

1. The specific warnings which police must administer to a suspect are: the suspect "has the right to remain silent, that anything he says can be used against him in court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior

to any questioning if he so desires." See Dickerson v. United States, 530 U.S. 428, 435 (2000) (quoting Miranda, 384 U.S. at 479).

objective test to resolve 'the ultimate inquiry': '[was] there a 'formal arrest or restraint of freedom of movement' of the degree associated with a formal arrest.'" Id. (citing California v. Beheler, 429 U.S. 1121, 1125 (1983) and quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977)).

In addition to the requirement of custody, a suspect must also undergo interrogation, as in "express questioning or its functional equivalent," in order to enjoy the procedural safeguards of Miranda. See Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980). Under Miranda, "the term 'interrogation' . . . refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Innis, at 301.

As a preliminary matter we find that Talley's first statement, "I can't deal with this right now," was not inculpatory and need not detain us further.

While Talley was handcuffed in the back of the patrol vehicle, Officer Morris walked up to his vehicle and told him that he had seen him put the firearm in the engine compartment of his vehicle. Talley immediately responded with his second statement: "Oh fuck. I'm going away for a long time." Talley

was in the custody of law enforcement in the back of a police vehicle at the time and certainly was not free to leave.

In addition, Officer Morris' words to Talley were the functional equivalent of express questioning. Any police officer should have known that under the circumstances it was "reasonably likely to elicit an incriminating response from the suspect." Id.

The failure of the police to administer the Miranda warnings to Talley before he responded compels us to suppress his statement, "Oh fuck. I'm going away for a long time."

In addition, Talley's statements were obtained pursuant to an unlawful search and seizure in violation of the Fourth Amendment. The statements must be suppressed as fruit of the poisonous tree. See eg, Wong Sun, 371 U.S. at 485-86.

