

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

UNITED STATES OF AMERICA

v.

SHAWN GILBERT,

Defendant.

CIVIL ACTION
NO. 18-00095

PAPPERT, J.

February 19, 2019

MEMORANDUM

Shawn Gilbert is charged with possession with intent to distribute controlled substances, possession of a firearm in furtherance of a drug trafficking crime and possession of a firearm by a convicted felon. Drugs, a handgun and other items were seized from Gilbert during a search incident to his arrest on a street corner in Philadelphia. Gilbert moves to suppress the evidence on the grounds that the police lacked probable cause to arrest him without a warrant.

The officer who witnessed Gilbert's conduct while conducting surveillance and the officer who then arrested Gilbert both testified at the hearing on Gilbert's Motion. (ECF No. 28.) They were both extremely credible and not even a thorough and vigorous cross-examination by defense counsel revealed any inconsistencies or raised any reasonable questions about their recitation of the events in question. For these and the reasons that follow, the Court denies the Motion.

I

On September 1, 2017, Philadelphia Police Officer Stephanie Achuff¹ and her partner set up surveillance on the 100 block of W. Champlost Avenue after receiving a complaint of drug activity in that area. (Hr’g Tr. 10:5–22.) The officers parked an unmarked police van near 198 W. Champlost, in front of a corner market, on the south side of the street facing east. (*Id.* at 11:24, 12:2, 12:7–20, 39:10–15.) Achuff sat in the back of the van; her partner remained in the front seat. (*Id.* at 14:5, 14:14.) Philadelphia Police Officer Rueben Henry² and his partner were parked in a marked police car nearby, at the intersection of W. Champlost and Front Street, on backup duty.³ (*Id.* at 17:9–17, 87:21–24, 94:1.)

Surveillance of W. Champlost Avenue began at approximately 8:10 p.m.; Achuff used her cell phone to check the time. (*Id.* at 26:13–14, 26:16–19.) Achuff saw Gilbert sitting on the front steps of a rowhouse at 188 W. Champlost, five houses east of the corner market and the surveillance van. (*Id.* at 13:7–8, 14:24–15:2, 15:23–25, 21:1–4, 26:13–14.) Although it was dark, a street lamp in front of 188 W. Champlost illuminated the street and the steps on which Gilbert sat. (*Id.* at 13:11–19.) Traffic

¹ Officer Achuff has been a Philadelphia Police Officer for ten years. (Hr’g Tr. 7:16–20.) She joined the Department’s Narcotics Enforcement Team in January of 2016. (*Id.* at 8:16.) Between January of 2016 and Gilbert’s arrest, she was involved in approximately 300 narcotics surveillances and approximately 200 narcotics arrests. (*Id.* at 9:18–24.)

² Officer Henry has been a Philadelphia Police Officer for more than twelve years. (Hr’g Tr. 86:10.)

³ Achuff and Henry testified that they communicated that evening using the “35th District Tactical Band.” (Hr’g Tr. 20:2, 20:21–23, 88:4–11.) The tactical band permits groups of officers to communicate without broadcasting district-wide. (*Id.* at 20:2–9, 88:10–11.) Any officer can “tune in” to the tactical band by adjusting to the correct frequency. (*Id.* at 99:19–22.) Tactical band communications are not recorded. (*Id.* at 20:12–13.)

signals and light from the corner market also allowed Officer Achuff to see Gilbert.⁴ (*Id.* at 13:10–19.) Two or more other men stood near the curb of the sidewalk in front of the steps. (*Id.* at 14:24–15:1, 15:21–22, 47:4–5.) Achuff, using binoculars, observed a plastic bag in Gilbert’s hand, but could not identify the items in the bag. (*Id.* at 16:4–6, 16:8–14.) She saw him twist the bag and place it in the pocket of his pants. (*Id.* at 16:6–7.)

At approximately 8:15 p.m., a black male approached Gilbert. (*Id.* at 16:23–24, 21:5–8.) After engaging in a brief conversation with Gilbert, the man handed Gilbert money. (*Id.* at 16:24–17:1.) Gilbert stood up and handed the man several small unidentifiable items. (*Id.* at 17:1–3.) The man walked away, westbound, with the items. (*Id.* at 17:3–4.) Achuff reported her observations to the backup officers, asking them to find the man and stop him to identify the items he purchased. (*Id.* at 17:4–6, 17:23–25, 44:21–45:1.) Officer Henry and his partner began surveilling the area from their car. (*Id.* at 87:14–15; 89:15–19.)

At approximately 8:17 p.m., Achuff watched Gilbert sit down on the steps, lean forward, pick up a black handgun from the step below, lean backward and place the gun in his waistband. (*Id.* at 18:16–18, 21:9–13, 52:11–12.) Achuff immediately relayed this to the backup officers, instructing them to “disregard th[e] buyer” and

⁴ Gilbert argues that an evergreen tree on the lawn of the rowhouse next to the corner market may have obstructed Achuff’s view of the steps of 188 W. Champlost. The Court finds credible Achuff’s testimony that her view was not obstructed by the tree, *see* (Hr’g Tr. 13:20–23, 77:1–8). This testimony is consistent with photographs of the 100 block of W. Champlost which show that the evergreen was more parallel to the surveillance van than positioned between the van and 188 W. Champlost. *See* (Def.’s Exs. 1, 4).

Gilbert also argues that shrubs to the east of the steps of 188 W. Champlost may have obstructed Achuff’s view. At oral argument, defense counsel conceded, and photographs confirm, that the shrubs were not positioned between the surveillance van and 188 W. Champlost and could not have obstructed Achuff’s view. *See* (Hr’g Tr. 106:13–14; Def.’s Exs. 1, 2, 4).

instead “come in and stop [Gilbert] now.” (*Id.* at 19:8–11, 53:5–6.) Officer Henry and his partner returned to their post at the intersection of W. Champlost and Front Street to communicate with other officers in the district for backup. (*Id.* at 90:3–5, 97:20–24, 98:17–18.) Once they had backup in place, Achuff gave them a description of Gilbert and they drove westbound toward him. (*Id.* at 90:6–16, 98:18–20.)

At approximately 8:18 p.m., Achuff saw a second black male approach Gilbert. (*Id.* at 21:21–22.) After a brief conversation with Gilbert, the man handed Gilbert money. (*Id.* at 21:22–23, 21:25–22:1.) Gilbert shook several small unidentifiable items from an amber-colored pill bottle and gave them to the man. (*Id.* at 22:23–23:2.) The man then remained in front of 188 W. Champlost with the other men on the curb. (*Id.* at 70:2–5.) Achuff reported this to the backup officers but reiterated that she “wanted to focus on Mr. Gilbert and have him stopped.” (*Id.* at 22:19–23, 66:6–9.)

Gilbert walked westbound toward the corner market where the surveillance van was parked and began talking to another man in front of the market. (*Id.* at 23:2–4, 90:14–25.) The backup officers, who were just then driving westbound down W. Champlost, parked when they saw Gilbert. (*Id.* at 90:25–91:1.) Officer Henry got out of his patrol car and approached Gilbert from behind. (*Id.* at 23:25, 91:1–2.) Henry drew his gun, announced that he was a police officer and told Gilbert to put his hands above his head. (*Id.* at 91:1–4.) Gilbert complied. (*Id.* at 91:5–6.) Henry removed a handgun from Gilbert’s waistband and took an amber pill bottle from Gilbert’s hand. (*Id.* at 91:12–13, 92:4–6.) He placed Gilbert in handcuffs, then searched Gilbert’s pockets. (*Id.* at 92:6–11.) He found several multicolored Ziploc bags and a knotted plastic bag, all containing what he believed to be marijuana, and \$175. (*Id.* at 92:8–16.)

Achuff watched Henry arrest Gilbert from the rear passenger window of the surveillance van. (*Id.* at 23:18–25:9.) At 8:36 p.m., she or another officer on her team called the arrest in to dispatch to obtain an “arrest number” to use in her report of the arrest.⁵ (*Id.* at 36:6–37:8, 61:3–4, 79:7–9.) When Achuff returned to headquarters, she completed Form 75-48, an incident report, in which she stated the start and end time of the incident—8:10–8:20 p.m.—and the nature of the incident—VUFA (violation of Uniform Firearms Act) and narcotics violations. (Def.’s Ex. 3; Hr’g Tr. 35:18–19, 38:1–3.) A more detailed police arrest (“PARS”) report containing a factual summary of the surveillance and arrest was prepared sometime later. (Gov.’s Ex. 1; Hr’g Tr. 38:4–6.)

On March 13, 2018, a federal grand jury returned a three-count Indictment charging Gilbert with possession with intent to distribute controlled substances in violation of 21 U.S.C. § 841(a)(1), (b)(1)(D) and (b)(2), possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1) and possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1) and § 924(e). (ECF No. 1.) The Court held an evidentiary hearing and oral argument on Gilbert’s Motion to Suppress on February 13, 2019. (ECF No. 28.)

II

The Fourth Amendment to the United States Constitution prohibits “unreasonable searches and seizures.” U.S. Const. amend. IV. Ordinarily, a seizure is reasonable under the Fourth Amendment only if it is effectuated with a warrant based upon probable cause. *United States v. Johnson*, 592 F.3d 442, 447 (3d Cir. 2010). “Law enforcement authorities do not need a warrant to arrest an individual in a public

⁵ The time of the officer’s call to dispatch is documented in a Computer-Assisted Dispatch (“CAD”) report. *See* (Def.’s Ex. 5); *see also* (Hr’g Tr. 54:12–17, 55:15–17, 56:13–20).

place,” however, “as long as they have probable cause to believe that person has committed a felony.” *United States v. Burton*, 288 F.3d 91, 98 (3d Cir. 2002) (quoting *United States v. McGlory*, 968 F.2d 309, 342 (3d Cir. 1992)).

Probable cause is a “fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.” *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)). To determine whether an officer had probable cause, the Court considers whether the “facts and circumstances within [the arresting officers’] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that [defendant] had committed or was committing an offense.” *Id.* (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)); *see also id.* (“We have previously found probable cause even in the absence of the actual observance of criminal conduct when a prudent observant would reasonably infer that a defendant acted illegally.”).

In making a probable cause determination, the Court views facts “from the standpoint of an objectively reasonable police officer” and measures the “collective knowledge of the investigating officers.” *Ornelas v. United States*, 517 U.S. 690, 696 (1996); *United States v. Belle*, 593 F.2d 487, 497 n.15 (3d Cir. 1979). In other words, “the arresting officer need not possess an encyclopedic knowledge of the facts supporting probable cause, but can instead rely on an instruction to arrest delivered by other officers possessing probable cause.” *Burton*, 288 F.3d at 99.

Evidence obtained as the result of an unreasonable search or seizure must be suppressed as the “fruit of the poisonous tree.” *See United States v. Johnson*, 592 F.3d 442, 447 (3d Cir. 2010) (quoting *United States v. Brown*, 448 F.3d 239, 244 (3d Cir.

2006)); *see also Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963). As a general rule, the burden of proof is on the party moving to suppress evidence. *United States v. Johnson*, 63 F.3d 242, 245 (3d Cir. 1995) (citing *United States v. Acosta*, 965 F.2d 1248, 1256 n.9 (3d Cir. 1992)). Once the moving party establishes a basis for suppression—“*i.e.*, the search or seizure was conducted without a warrant”—the burden shifts to the government to show that the search or seizure was reasonable. *Id.* (citing *United States v. McKneely*, 6 F.3d 1447, 1453 (10th Cir. 1993)).

III

The evidence shows that Officers Achuff and Henry had probable cause to believe Gilbert committed a felony at the time of his arrest. Achuff concluded, based on her observations and experience in narcotics surveillance, that she saw Gilbert armed with a handgun on W. Champlost Avenue. She communicated her observations to Henry and told Henry to execute the arrest. Henry arrested Gilbert in reliance on Achuff’s instructions. *See* (Hr’g Tr. 92:17–21).

Achuff testified that, using binoculars, she saw Gilbert engage in what appeared to be two drug sales on the front steps of 188 W. Champlost. *See (id. at 18:10, 22:13)*. Between the sales, she saw him pick up a handgun and put it in his waistband. Although Gilbert challenges Achuff’s ability to see him clearly from the surveillance van, photographs of W. Champlost support Achuff’s testimony that she had a clear view of Gilbert and that a streetlight illuminated the area where he was sitting. *See (id. at 13:9–23; Def.’s Exs. 1, 2, 4)*. Achuff’s testimony as to what she observed also aligns with Officer Henry’s account of the events leading to the arrest, including the timing and content of Achuff’s communications with him over the tactical band.

Gilbert asks the Court to discredit both officers and find that Achuff did not see Gilbert pick up a gun. He points to Achuff's testimony that her narcotics surveillance ended when she saw the gun, *see* (Hr'g Tr. 44:9–10), which he contends is inconsistent with the fact that she reported a second suspected drug transaction over the tactical band a few minutes later. *See* (*id.* at 66:10–13, 105:23–106:1, 111:12–19). He also challenges the fact that Form 75-48 does not state that Achuff saw a gun at 8:17 p.m., (*id.* at 37:14–15, 106:2–3), and that the CAD report does not mention a gun, (*id.* at 59:3–5). Finally, he questions Henry's return to his post at Front Street before arresting Gilbert and the approximately sixteen-minute delay between the arrest and the officers' call in to dispatch to report it. *See* (*id.* at 108:5–10, 110:2–3).

None of these alleged “inconsistencies” casts doubt on the officers' credibility. Achuff testified that she reported the second drug sale to Henry in order to keep him informed, but she specifically instructed him not to pursue the buyer. *See* (*id.* at 22:19–23). This comports with her testimony that Gilbert, once armed, was her and Henry's primary focus. (*Id.* at 19:12–14.) With respect to Form 75-48, Achuff's failure to mention the time she saw the gun is inconsequential; the form only required Achuff to state the start and end time of her surveillance. *See* (Def.'s Ex. 3; Hr'g Tr. 37:16–18, 73:18–25). Moreover, the report specifically classifies the incident as a violation of the Uniform Firearms Act. (Def.'s Ex. 3.) With respect to the CAD, Gilbert is correct that the report does not mention a gun, but Achuff testified that she did not compose the report. *See* (Hr'g Tr. 59:25–60:2 (“I just ‘drop’ arrest numbers, I can't control how it comes up.”), 81:1–7). The report is relevant only to the extent that it shows an officer called in to dispatch at 8:36 p.m. to obtain Gilbert's arrest number. (Def.'s Ex. 5.)

Finally, neither Henry's return to Front Street before arresting Gilbert nor the officers' delay in calling in to dispatch impugns the officers' credibility. Henry testified, credibly, that he returned to the Front Street intersection to communicate with other officers to secure additional backup before executing the arrest. *See* (Hr'g Tr. 90:3–5, 97:20–24, 98:17–18.) And the fact that the officers waited roughly sixteen minutes to call the arrest in to dispatch is unremarkable, particularly given Achuff's testimony that the timing of their communication to dispatch often varies. (Hr'g Tr. 58:23–59:2, 83:21–25.)

An appropriate Order follows.

BY THE COURT:

/s/ Gerald J. Pappert
GERALD J. PAPPERT, J.

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ORDER

AND NOW, this 19th day of February, 2019, upon consideration of Defendant's Motion to Suppress (ECF No. 15) and the Government's Response in Opposition (ECF No. 26), and following an evidentiary hearing and oral argument (ECF No. 28), it is hereby **ORDERED** that the Motion is **DENIED**.

BY THE COURT:

/s/ Gerald J. Pappert
GERALD J. PAPPERT, J.