

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

UNITED STATES OF AMERICA

v.

SHIHEEM AMOS

CRIMINAL ACTION
NO. 18-00571

PAPPERT, J.

April 30, 2019

MEMORANDUM

Shiheem Amos has been charged with possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). He moves to suppress evidence of the firearm, which was seized after it fell from the pocket of his hooded sweatshirt during a *Terry* stop. The Court held an evidentiary hearing and oral argument on April 24, 2019 and denies the Motion for the reasons set forth below.

I

Philadelphia Police Officer Hugo Lemos testified at the hearing, explaining that he has been with the Philadelphia Police Department for nine years and has patrolled the 12th district in Southwest Philadelphia, which he describes as a high-crime area, for the last eight years. (Hr’g Tr. 7:7–9, 8:8–10, Apr. 24, 2019.) Officer Lemos, whom the Court found credible, stated that on September 26, 2018, he and his partner Nicholas Mastroianni were working a 12:00 a.m. to 8:00 a.m. patrol shift. (*Id.* at 7:3–5, 7:23–8:2.) At around 1:00 or 2:00 a.m., the officers responded to a radio call about a person screaming in the 6500 block of Dicks Avenue. (*Id.* at 9:3–5, 13:14–17.) The radio report pertained to a male allegedly assaulting a female, but did not provide any further description of the purported male assailant. (*Id.* at 9:8–18.) Officer Lemos and

his partner arrived at 65th and Dicks in their marked patrol wagon within two minutes of receiving the call. (*Id.* at 12:25–13:2; Hr’g Ex. G-2.) Not seeing anyone at the corner, the police drove down 65th street across Dicks Avenue and came to an alley running between 64th and 65th Streets. (Hr’g Tr. 16:5–11, 17:20–18:3; Hr’g Ex. G-3, G-4.) Officer Lemos saw a man in the alley walking away from 65th street. (Hr’g Tr. 19:5–17; Hr’g Ex. G-4.) Officer Lemos testified that the man was stomping his feet and throwing his arms around. (Hr’g Tr. 19:17–18.)

At that point, wanting “to speak to the individual and gather some information[,] [s]ee what had occurred in that area, if he was either involved or not,” Lemos drove the wagon around to the other end of the alley, activating his lights only for a moment to drive down a one-way street parallel to the alley. (*Id.* at 20:7–9, 21:11–22:5; Hr’g Ex. G-1.) He turned the lights off before parking his patrol wagon “pretty much . . . in the midway of the entrance of the alleyway.” (Hr’g Tr. at 22:10–12.) Officer Lemos saw the same individual, later identified as Amos, walking toward him approaching 64th street. (*Id.* at 24:10–14.)

Officer Lemos got out of the police wagon, approached Amos, and asked him to stop and put his hands up. (*Id.* at 22:13–14, 24:19–22, 36:18–37:2.)¹ The officer testified that he did so “based on the nature of the assignment, the fact that the call was for a male assaulting a woman, fact that it’s a high-crime area, and officer safety.” (*Id.* at 24:23–25:2.) After “kind of” putting his hands up (roughly halfway), Amos

¹ Officer Lemos testified that he was in the police vehicle when he spoke with Amos. (Hr’g Tr. 22:24.) On cross examination, Lemos acknowledged that at Amos’s preliminary hearing he testified that he got out of the wagon before approaching Amos. *See (id.* at 37:12–14; Hr’g Ex. D-1.) Officer Lemos then stated that his earlier testimony, that he first exited the car, was probably accurate. (*Id.* at 36:18–37:14.) Any discrepancy in where Lemos was when he first addressed Amos did not impact the Court’s assessment of Lemos’s credibility or alter the Court’s legal analysis.

turned and fled, running diagonally on 64th street. (*Id.* at 22:14–19, 23:15–18, 25:10, 25:14–18; Hr’g Ex. G-6.) Officer Mastroianni ran after Amos and caught up to him “pretty quick”. (Hr’g Tr. 26:11.) While helping Officer Mastroianni, Lemos saw a black-and-silver handgun fall out of the pocket of Amos’s hooded sweatshirt and onto the ground. (*Id.* at 28:17–20.) Lemos handcuffed Amos before securing the firearm and then put Amos in the back of the patrol wagon. (*Id.* at 28:21–24, 29:6–8.) Lemos then asked Amos if he had a valid license to carry the firearm. When Amos said he did not, he was placed under arrest. (*Id.* at 29:12–14.)

II

The Fourth Amendment to the United States Constitution prohibits “unreasonable searches and seizures,” including unreasonable investigatory stops of persons or vehicles. *See* U.S. Const. amend. IV; *United States v. Cortez*, 449 U.S. 411, 417 (1981). “Generally, for a seizure to be reasonable under the Fourth Amendment, it must be effectuated with a warrant based on probable cause.” *United States v. Robertson*, 305 F.3d 164, 167 (3d Cir. 2002) (citation omitted). However, under the exception to the warrant requirement established in *Terry v. Ohio*, 392 U.S. 1 (1968), brief investigatory stops are permissible if supported by “reasonable suspicion to believe that criminal activity ‘may be afoot.’” *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)). “Any evidence obtained pursuant to an investigatory stop (also known as a ‘*Terry* stop’ or a ‘stop and frisk’) that does not meet this exception must be suppressed as ‘fruit of the poisonous tree.’” *United States v. Brown*, 448 F.3d 239, 244 (3d Cir. 2006) (citations omitted).

Amos seeks to suppress evidence of the gun, arguing that the officers lacked reasonable suspicion to stop him. “As a general rule, the burden of proof is on the defendant who seeks to suppress evidence. However, once the defendant has established a basis for his motion, *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.” *United States v. Johnson*, 63 F.3d 242, 245 (3d Cir. 1995) (citations omitted). The applicable burden is proof by a preponderance of the evidence. *United States v. Matlock*, 415 U.S. 164, 178 n.14 (1974).

A

The initial step in the suppression analysis is to determine whether a seizure has taken place and, if so, when it occurred. *United States v. Torres*, 534 F.3d 207, 210 (3d Cir. 2008). The moment Amos was seized is the moment “the Fourth Amendment becomes relevant.” *Terry*, 392 U.S. at 16. A seizure occurs for Fourth Amendment purposes when there is a submission to a show of authority or an application of force to restrain an individual’s movement. *See United States v. Valentine*, 232 F.3d 350, 358 (3d Cir. 2000). In determining whether there has been a show of authority, courts must examine all of the surrounding circumstances to determine whether a reasonable person would have felt free to decline the interaction with law enforcement. *See Brendlin v. California*, 551 U.S. 249, 255 (2007). Factors tending to indicate a show of authority include “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 that compliance with the officer’s request might be compelled.” *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); *see also United*

States v. De Castro, 905 F.3d 676, 679–80 (3d Cir. 2018) (comparing *United States v. Brown*, 765 F.3d 278, 289 (3d Cir. 2014) (holding that “[t]here was nothing about the detectives’ brief initial approach that constituted a Fourth Amendment seizure” when the detectives “did not activate their lights or sirens, brandish their weapons, block [the defendant’s] path, physically touch [the defendant], or make any threats or intimidating movements”), with *Brown*, 448 F.3d at 245 (holding that an individual was “seized” when he turned and placed his hands on the police vehicle after the officer told him “that a robbery victim was being brought over to identify [him and another individual] as possible suspects and, if they were not identified, they would be free to go—necessarily implying that they were not free to leave”)).

Amos argues that a seizure occurred when Officer Lemos asked him to stop and raise his hands. Officer Lemos credibly testified, however, that he did not communicate to Amos—either through words or actions—that he was not free to leave. Based on the totality of the circumstances and out of concern for his safety and that of his partner, he told Amos to stop and put his hands in the air. Neither he nor Officer Mastroianni activated the police wagon’s lights or sirens, brandished their weapons, blocked Amos’s path, came into contact with Amos, or made any threats or intimidating movements. *See Brown*, 765 F.3d at 289. In short, there was no show of authority as defined under applicable precedent.

Even if there had been, Amos did not submit to the officers—he fled before his hands were even all the way up. “[F]ailure to submit has been found where a suspect takes action that clearly indicates that he ‘does not yield’ to the officers’ show of authority.” *United States v. Lowe*, 791 F.3d 424, 433 (3d Cir. 2015) (citing *California v.*

Hodari D., 499 U.S. 621, 626 (1991). “[M]omentary compliance [is] not enough” for a submission. See *United States v. Palmer*, No. CR 16-282, 2017 WL 1303477, at *3 (E.D. Pa. Apr. 7, 2017) (citing *United States v. Smith*, 575 F.3d 308 (3d Cir. 2009)). “Action—not passivity—has been the touchstone of [the Third Circuit’s] analysis. The most obvious example [of failure to submit] is when a suspect runs from the police.” *Id.* (citing *Illinois v. Wardlow*, 528 U.S. 119, 121 (2000); *Hodari D.*, 499 U.S. at 626; *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596–97 (1989)).

B

While asking Amos to stop and put his hands up did not constitute a seizure, there is no question that Officer Mastroianni seized Amos when he caught him and prevented him from getting away. The Court thus must determine whether the officers had a reasonable, articulable suspicion that criminal activity was afoot to permit such an apprehension. *Terry*, 392 U.S. at 30.

Reasonable suspicion requires more than an “inchoate and unparticularized suspicion or ‘hunch’”—“the police officer must be able to point to specific and articulable facts which, taken together with rational inference from those facts, reasonably warrant that intrusion.” *Id.* at 27. Reasonable suspicion is a “less demanding standard than probable cause,” *United States v. Delfin-Colina*, 464 F.3d 392, 396 (3d Cir. 2006) (quoting *Wardlow*, 528 U.S. at 123), requiring “only a ‘minimal level of objective justification,’” *Delfin-Colina*, 464 F.3d at 396 (quoting *Sokolow*, 490 U.S. at 7).

Courts must consider “the totality of the circumstances—the whole picture” when assessing whether investigatory stops are reasonable. *Cortez*, 449 U.S. at 417. Factors officers may consider pertinent include:

(1) the reputation of the area in which the stop occurred for criminal activity; (2) the time of day or night; (3) the geographical and temporal proximity of the stop to the alleged crime; (4) [Amos's] behavior when the officers came into [his] purview, including his flight; (5) the number of persons in the area; (6) the officers' judgments and inferences, which may be based on their own common sense or may draw upon their training, experience, and expertise; (7) and, in cases such as this where officers' investigation is based on a police dispatch, the reliability of information provided to officers that served as the impetus for the stop.

See United States v. Starkey, No. CRIM.A. 13-654-1, 2014 WL 5810659, at *4 (E.D. Pa. Nov. 4, 2014) (citing *Wardlow*, 528 U.S. at 124; *Torres*, 534 F.3d at 210; *United States v. Brown*, 159 F.3d 147, 149 (3d Cir. 1998); *United States v. Goodrich*, 450 F.3d 552, 561 (3d Cir. 2006); *United States v. Bonner*, 363 F.3d 213, 217 (3d Cir. 2004); *Robertson*, 305 F.3d at 167).

The evidence when considered in its totality shows that the officers had reasonable suspicion to stop Amos. They received a police radio dispatch at 2:00 a.m. about a person screaming at the 6500 block of Dicks Avenue and a male allegedly assaulting a female. Officer Lemos, who has patrolled this section of the city for over eight years, explained that it is known for a high level of criminal activity, including domestic disturbances, aggravated assaults, robberies and shootings. (Hr'g Tr. 7:19–21.) When he and his partner arrived at the scene less than two minutes after the radio call, they saw only one person: Amos walking down an alley between 65th and 64th streets, while stomping his feet and flailing his arms. When asked to put his hands up, Amos ran. These factors, coupled with the officers' common sense, training and experience, support a finding that the officers had reasonable suspicion to conduct an investigatory stop.

III

Amos also argues that even if there was reasonable suspicion to stop him, the detention was unlawful because it was an arrest or custodial detention requiring probable cause. (Hr'g Tr. 54:11–4.) However, under the Fourth Amendment, a police officer who lacks probable cause but whose “observations lead him reasonably to suspect” that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to “investigate the circumstances that provoke suspicion.” *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975).

Police officers are allowed to use a reasonable amount of force when they detain an individual to conduct an investigatory stop. *Graham v. Connor*, 490 U.S. 386, 396 (1989). In determining whether use of force violates the Fourth Amendment, “reasonableness . . . must be judged from the perspective of a reasonable officer on the scene.” *United States v. Laville*, 480 F.3d 187, 194 (3d Cir. 2007) (quoting *Graham*, 490 U.S. at 396). Moreover, “[u]se of physical force after less aggressive means were unsuccessful [does] not elevate the stop into an arrest.” *United States v. Fields*, 449 Fed. Appx. 146, 148 (3d Cir. 2011) (citing *Graham*, 490 U.S. at 396). The stop and inquiry must be “reasonably related in scope to the justification for their initiation.” *Terry*, 392 U.S. at 29. “Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer’s suspicions.” *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984).

Here, the initial stop was based upon reasonable suspicion from the totality of the circumstances, including the fact that Amos tried to run away rather than talk to

the officers. That suspicion justified the officers' detention of Amos with a reasonable amount of force in order to verify or dispel their suspicion. As Officer Lemos was placing handcuffs on Amos, he saw a gun fall out of Amos's hooded sweatshirt. (Hr'g Tr. at 28:17–24.) The officers then placed Amos in the back of their patrol wagon and questioned Amos about whether he had a license to carry the firearm, to which he responded that he did not. (*Id.* at 29:6–14.) At that point in time, the officers had probable cause to believe that Amos committed a crime and were entitled to arrest him.

An appropriate order follows.

BY THE COURT:

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

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ORDER

AND NOW, this 30th day of April, 2019, upon consideration of Defendant Shiheem Amos's Motion to Suppress Evidence, (ECF No. 19), the Government's response in opposition, (ECF No. 20), and the evidence presented at the hearing, it is hereby **ORDERED** that Amos's motion is **DENIED**.

BY THE COURT:

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