

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

UNITED STATES OF AMERICA : CRIMINAL ACTION  
 : NO. 00-87  
 v. :  
 :  
 DAVID CORBETT, :  
 a/k/a DAVID MCNEAL :

**ORDER**

**AND NOW**, this **29th** day of **June, 2000**, it is hereby **ORDERED** that Defendant's Motion to Suppress Physical Evidence (doc. no. 19) is **DENIED**.

It is **FURTHER ORDERED** as follows:

1. The case will be **SPECIALLY LISTED** for trial on **July 17, 2000** at **9:00 a.m.**, in courtroom 7A, United States Courthouse, 601 Market St., Philadelphia, Pennsylvania;<sup>1</sup>

2. On or before **July 7, 2000**, the Government may, by way of supplementation, and defendant may, but need not, file and serve, with one (1) copy delivered to Chambers, room 7814, the following:

- a. Motions in limine, including motions to suppress or limit evidence, if any;
- b. Proposed jury voir dire questions;
- c. Proposed jury instructions with citations of authority for each instruction (ONE (1) instruction PER PAGE). If a model jury instruction taken, for instance, from Devitt & Blackmar, Federal Jury Practice and Instructions, or Sand, Modern Federal Jury Instructions, is submitted, the parties shall state whether the proposed jury instruction is unchanged or

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<sup>1</sup> In the event the parties reach a pre-trial disposition of the case, Government counsel shall contact chambers at (215)597-4073 to arrange an early date for a plea hearing.

modified. If a party modifies a model jury instruction the modification shall be set forth in the following manner: additions shall be underlined and deletions shall be placed in brackets;

- d. Proposed verdict slip; and
- e. A trial memorandum; and

3. Responses to motions shall be filed by **July 13, 2000**. A hearing on all motions in limine, including motions to suppress and any necessary Starks or Daubert hearing, will be held on **July 17, 2000** at **9:00 a.m.** in courtroom 7A, United States Courthouse, 601 Market St., Philadelphia, Pennsylvania; and

4. In the event a party intends to call an expert witness at trial, the party shall deliver to the opposing party the curriculum vitae of the expert and the expert report at least ten (10) days before trial.

**AND IT IS SO ORDERED.**

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**EDUARDO C. ROBRENO, J.**

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M E M O R A N D U M

EDUARDO C. ROBRENO, J.

JUNE 29, 2000

I. INTRODUCTION

The defendant, David Corbett (defendant), is charged in a two count indictment with possession of a firearm and ammunition by a convicted felon in violation of 18 U.S.C. §922(g)(1). Presently before the court is defendant's motion to suppress the ammunition found on his person at the time of his arrest. The court concludes that because the arresting officers had probable cause to arrest defendant, and the search of defendant's person that uncovered the ammunition in question was incident to that arrest, defendant's motion will be denied.<sup>2</sup>

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<sup>2</sup> The court held a hearing on defendant's motion on April 24, 2000, and thereafter afforded counsel for the Government and counsel for defendant the opportunity to submit supplemental memoranda of law. Both counsel availed themselves of that opportunity, and the matter is now fully briefed and ready for disposition.

## II. FACTS

On June 10, 1999, Philadelphia Police Officers Melvin Perkins, Pablo Seda, and Derrick Williams were on bicycle patrol in southwest Philadelphia. At approximately 8:30 p.m., officer Perkins observed what he believed to be a drug transaction in progress involving an African-American female and an African-American male. After officer Perkins identified himself as a police officer to the suspects, the male suspect fled.<sup>3</sup> In the course of his flight from officer Perkins, the male suspect ran past officer Williams. Officer Williams then pursued the suspect for several blocks both on foot and on his bicycle, including a chase around a parked vehicle. Despite officer Williams' pursuit, the male suspect ultimately escaped into an alley adjacent to the parked vehicle and disappeared from the scene. After the male suspect escaped, officer Seda reported that he had recovered a firearm which was discarded by the suspect.<sup>4</sup>

Twelve (12) days later, on June 22, 1999, officers Perkins and Williams again were on patrol in southwest Philadelphia when they saw defendant through a restaurant window. The officers recognized defendant as the male suspect who fled during the June

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<sup>3</sup> The record does not explain what happened to the female suspect involved in the alleged drug transaction.

<sup>4</sup> Defendant does not dispute that the male suspect discarded a firearm while evading officers Perkins and Williams on June 10, 1999.

10, 1999 pursuit. Based upon their own eyewitness identification, the officers placed defendant under arrest for carrying a firearm without a license on June 10, 1999.

Incident to the arrest, officer Williams searched defendant's person and found six (6) live rounds of ammunition in defendant's pants pocket. See generally; Transcript of April 24, 2000 Hearing, pp. 11-19, 45-55. It is this ammunition found on defendant's person that is at issue in defendant's motion.

### III. DISCUSSION

Defendant contends that the ammunition seized from his person on June 22, 1999 must be suppressed because officers Perkins and Williams lacked probable cause to arrest him. Defendant does not quarrel with the arresting officers' description of events that occurred on June 10, 1999, rather, he argues that the arresting officers simply misidentified him as the individual whom they encountered on June 10, 1999. As support, defendant points to the discrepancies in height, weight, skin color, and facial hair between the description of the male suspect give by officer Perkins on June 10, 1999, the date of the incident, and defendant's appearance on June 22, 1999, the date of his arrest. Defendant does not contest that, if his arrest was supported by probable cause, incident to that arrest, officers Perkins and Williams had a right to search defendant's

person.<sup>5</sup>

The Government counters that officers Perkins and Williams each personally identified defendant as the suspect whom they pursued just twelve (12) days earlier, and that this identification is sufficient to support a finding of probable cause.

A. Standard for Probable Cause to Arrest

Probable cause to arrest exists where, at the time of the arrest, "the facts and circumstances within the officer's knowledge are 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.'"

United States v. Glasser, 750 F.2d 1197, 1205 (3d Cir.

1984)(quoting Beck v. Ohio, 85 S. Ct. 223, 225 (1964)). The

court must determine "whether the objective facts available to the officers at the time of arrest were sufficient to justify a reasonable belief" that the suspect was committing, or had committed, an offense. Id. at 1206 (citation omitted).

Determining whether probable cause to arrest is present should be done with a view to the "totality of the circumstances" and from a "common sense" perspective. Illinois v. Gates, 103 S. Ct. 2317, 2328-29 (1983)).<sup>6</sup>

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<sup>5</sup> See United States v. Robinson, 94 S. Ct. 467 (1973).

<sup>6</sup> Defendant does not argue that officers Perkins and Williams were without probable cause to believe a crime had been committed on June 10, 1999, rather, defendant attacks only the

B. Application of Probable Cause Standard

The court must examine the objective facts available to officers Perkins and Williams to determine whether those facts "justify a reasonable belief" that defendant was the same individual they encountered on June 10, 1999. Glasser, 750 F.2d at 1206. First, both officers had a sufficient opportunity to view the individual who evaded them on June 10, 1999. Officer Perkins testified that he had an unobstructed view of the individual from a distance of "about ten feet" for approximately thirty (30) seconds to one minute, and that he had no trouble observing the individual because of darkness. (Tr. p. 13). Officer Williams testified that he initially observed the individual "for just a second or two," but that later, while he pursued the individual around a parked car, the individual stopped, and officer Williams stood directly across from the individual with nothing obstructing his view, and that he also had no trouble observing the individual because of darkness. (Tr. pp. 59, 50-51). Second, the time elapsed between the officers' initial observation of the suspect and defendant's arrest is relatively short, only twelve (12) days. Third, the officers were certain in their identification of defendant on June 22, 1999. Both officers Williams and Perkins testified that

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arresting officers' belief that defendant was the person who committed a crime on June 10, 1999.

they had "no doubt" that defendant was the individual they pursued on June 10, 1999. (Tr. pp. 19-20, 54). For all of these reasons, the court concludes that officers Perkins and Williams had probable cause to arrest defendant on June 22, 1999.

Defendant argues that the discrepancies between the physical description of the male suspect provided by officer Perkins on June 10, 1999 and defendant's actual appearance on June 22, 1999 undermine the reliability of officer Perkins' identification on June 22, 1999, such that probable cause to arrest defendant did not exist. On June 10, 1999, officer Perkins described the suspect as a medium brown skinned African-American male, six feet, three inches tall, weighing one hundred ninety (190) pounds, with a mustache. (Tr. pp. 36-39). Defendant is in fact a light to medium brown skinned male, six feet tall, weighing one hundred ninety-five (195) pounds, and who, at the time of his arrest, had a full beard. (Tr. pp. 36-39).

In Wilson v. Russo, \_\_ F.3d \_\_, 2000 WL 641201 (3d Cir. 2000), the Third Circuit recognized that while a positive identification by a victim witness would usually be sufficient to establish probable cause, if a subsequent identification of the perpetrator is inherently incompatible with the initial identification, such discrepancies could undermine a finding of probable cause. Wilson, 2000 WL 641201, \*8. In Wilson, which is a case brought under 42 U.S.C. §1983, a robbery victim described

the perpetrator as 'very tall,' "between 6'2" and 6'4", between 190 and 200 pounds." Id. at \*2. The victim later identified the perpetrator from a photo array as a man who was between five feet, ten and five feet, eleven inches tall and weighed approximately one hundred sixty (160) pounds. Id. at \*2-3. Despite these discrepancies, the court found probable cause to arrest, stating:

[The victim] had considerable opportunity to view the robber at the scene of the crime, and she exhibited a level of certainty [at the photo array identification]. . . . Granted, [the victim's] testimony should be viewed with some skepticism because her identification . . . was inherently incompatible with her description of the robber . . . . However, this indication of unreliability does not, from the vantage point of the arresting officer, fatally undermine the forceful positive identification.

Id. at \*8-9.

Applying Wilson to this case,<sup>7</sup> given that officer Perkins had an adequate opportunity to observe the suspect on June 10, 1999, at the scene of the crime, the high degree of certainty in officer Perkins' identification of defendant on June 22, 1999, the short period of time between the initial identification and the arrest, the discrepancies between the two identifications,

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<sup>7</sup> Admittedly, Wilson involved a description and identification by a victim of a crime, and officers Perkins and Williams can not technically be called victims of any crime that occurred on June 10, 1999. However, like a victim of a crime, the officers were in close physical proximity to the suspect and likewise had a sufficient opportunity to observe him. Thus, the court finds the difference between Wilson and the instant case of no moment.

made twelve (12) days apart, in height (6'3" v. 6'0"), weight (195 lbs. v. 190 lbs.), skin color (black male, medium brown skinned v. black male, light to medium brown skinned), and facial hair (mustache v. beard) are not so great as to undermine officer Perkins' reasonable belief that the person he saw on June 22, 1999 through the restaurant window, and who turned out to be defendant, was the same person who possessed the gun on June 10, 1999.<sup>8</sup>

#### IV. CONCLUSION

The court concludes that officers Perkins and Williams had sufficient opportunity to view the suspect they encountered on June 10, 1999 to later positively identify that person on June 22, 1999. Moreover, the officers' identification is not affected by any substantial evidence tending to show that their

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<sup>8</sup> Even if officer Perkins' description were sufficient to completely undermine his identification, it appears that officer Williams would have had independent probable cause to arrest defendant since he provided no description of the suspect. However, because the court concludes that officer Perkins' description does not render his identification a nullity, as defendant suggests, it is unnecessary to address this issue.

This result is consistent with the Supreme Court's instruction in Gates that a determination of whether probable cause to arrest is present should be performed in the context of the "totality of the circumstances" and from a "common sense" perspective. Gates, 103 S. Ct. at 2328-29. The court finds it entirely sensible for an individual to positively identify another person whom he has seen on a prior occasion without first providing a perfect physical description of that person.

identification was unreliable. Thus, probable cause to arrest defendant was present at the time of his arrest.

An appropriate order follows.