

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

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
	:	
v.	:	
	:	
JULIAN SAMUELS	:	No. 03-503

MEMORANDUM AND ORDER

Schiller, J.

January 29, 2004

Defendant Julian Samuels is charged with: (1) possession with intent to distribute more than five grams of cocaine base (“crack”) in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(b); (2) possession with intent to distribute more than five grams of cocaine base (“crack”) within 1,000 feet of a school in violation of 21 U.S.C. § 860(a); (3) possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1); and (4) possession of a firearm 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 firearm and bag of alleged narcotics obtained by the Government in this case. For the reasons set forth below, the motion to suppress is denied.

I. BACKGROUND

Defendant contends that physical evidence seized from him on July 7, 2002 should be suppressed as he was illegally stopped and frisked without reasonable suspicion by Philadelphia police officers who had received an anonymous tip regarding a person with a gun. On December 18, 2003, the Court held a suppression hearing. Philadelphia Police Officers Charles Buck, Jermane Bennett and Dominic Cole were called by the Government to recount their version of the events of July 7, 2002. Ernest Moss, a bystander to the events in question, was called by Defendant. The

Government's version of the events differed dramatically from that presented by Defendant. After reviewing the supplemental briefs submitted and based on the testimony and evidence presented at the suppression hearing, I make the following findings of fact.

II. FINDINGS OF FACT

At 7:58 p.m. on July 7, 2002, Philadelphia Police Officers Charles Buck and his partner, Rashad Guess, received a radio report of a man with a gun at Arch and Edgewood Streets. (Dec. 18, 2003 Tr. at 4, 66, 78.) The radio report, based on an anonymous 911 call, described the man as heavy-set, "stocky" black male, wearing a blue baseball hat, blue jeans and a two-toned tan shirt. (*Id.* at 4.) Additional officers, including Jermane Bennett and his partner, Dominic Cole, also heard the radio call and proceeded to the area.

All of the officers involved in the events in question were assigned to the Nineteenth District, which includes the corner of Arch and Edgewood Streets, an area that they all described as a high crime area with "a lot of violent crimes," (*Id.* at 3, 77), "shootings," (*Id.* at 64, 77-8) and "a lot of drug dealing." (*Id.* at 65.) Additionally, Officer Bennett recounted that a week or two before the events in question, he had responded to a radio call a half-block down from Arch and Edgewood, which involved a fatal gun incident. (*Id.* at 65-66, 71-72.) Similarly, Officer Buck explained that within weeks before Defendant's arrest at Arch and Edgewood, he responded to a gun report a few blocks away from that corner. (*Id.* at 61-62.)

A few minutes after receiving the radio description, Officers Buck and Guess were the first officers to arrive at the corner of Arch and Edgewood. (*Id.* at 4, 22.) Officer Buck observed Defendant, a heavy-set black male wearing a blue hat, light blue jeans shorts and a two-toned tan

shirt. (*Id.* at 5, 24.) Defendant was located on the “lower” steps of the first house on the corner (*Id.* at 5, 7, 23) with his back towards Officers Buck and Guess. During this time period, Officers Bennett and Cole arrived on the scene. Officer Cole also reported that when he first saw Defendant, his back was facing Officers Buck and Guess. (*Id.* at 79-80.)

Recognizing that Defendant matched the description in the radio report, Officer Guess asked to speak to him. Defendant ignored him and “remained facing away from [the officers] with his back toward [them].” (*Id.* at 6- 8, 23- 4.) Then, Officer Buck called out to Defendant, but Defendant “failed to acknowledge again.” (*Id.* at 8-9, 24, 32.) Officer Buck testified that after pausing on the steps, Defendant “then proceeded up the steps . . . towards the porch.” (*Id.* at 9.) His back was still to the officers, who again tried to speak to him. (*Id.*)

Officer Buck testified that throughout this sequence of events, Defendant appeared nervous (*Id.* at 9, 11, 38, 51, 58); he “appeared to be looking around, again, facing away from [the officers,] looking over at the other side of the porch, looking over the door area,” (*Id.* at 10) and moved only his head and the upper part of his body. (*Id.* at 10, 38-39.) Defendant’s conduct at this point led Officer Buck to believe that there was something in Defendant’s waist that he did not want the officers to see (*Id.* at 11) which, in conjunction with the fact that Defendant matched the radio description, raised his suspicion. (*Id.* at 61.)

Next, while Defendant was on the porch and Officer Buck was only some “five to seven feet” away at the middle of the steps, Officer Buck testified that Defendant “turned” and Officer Buck saw Defendant’s waist for the first time. (*Id.* at 10-11.) Officer Buck “noticed a bulge around his waist area,” under Defendant’s untucked shirt. (*Id.* at 10, 48-49.) Although not certain the bulge was a gun, Officer Buck testified that “based on the circumstances leading up to that, Defendant

refused to speak to us, he appeared nervous. The job itself was a person with a gun matching his description and that led me to believe that there was something in his waist that he didn't want us to see." (*Id.* at 11.) Office Buck testified further that the bulge that he observed was located at Defendant's waist to the right of center, and that this location "would be the common place where you would find guns." (*Id.* at 11-12.) Upon seeing the bulge at Defendant's waist, Officers Buck and Guess "drew [their] weapons and asked the Defendant to put his hands on the wall." (*Id.* at 13, 60.) As Officer Buck explained, "if there was a gun we didn't want him to reach for anything and thought our safety at that time was possibly in jeopardy." (*Id.* at 13.) Similarly, Officer Cole testified that the only time Officers Buck and Guess drew their guns was when he heard one of the officers say, "he has a gun." (*Id.* at 80, 85.)

In response to the officers' orders, Defendant initially continued his evasive pattern. Officer Buck testified that Defendant "didn't comply, he continued to kind of look around. He had his hands pretty much down by his waist area." (*Id.* at 13.) Although his right hand at one point had been on the wall, Defendant dropped it to his waist. (*Id.*) Officer Buck was concerned about the location of Defendant's right hand because it was located near where he had seen the bulge at Defendant's waist. (*Id.*) Officers Buck, Bennett and Cole all concurred that despite ordering Defendant to raise his hands, Defendant did not comply, rather his hands were "going up and down," "dropping to the sides," and grabbing something at his waist. (*Id.* at 15, 67, 68, 69, 82.) Although Officer Cole was positioned on the side of the house by the corner to ensure that Defendant did not jump over the railing, he stated that he could see the top portion of Defendant's body from that angle, which appeared to be "pacing" and "shifting" on the porch instead of complying with the officers' orders to put his hands up. (*Id.* at 82, 88-89.) In response to Defendant's failure to comply with the

officers' orders, Officers Buck and Guess approached him to grab his hands. (*Id.* at 14-15, 40, 46.) While the other officers briefly restrained Defendant's hands, Officer Bennett lifted Defendant's shirt, reached for the area where he had seen Defendant putting his hands, and removed a gun from his waistband. (*Id.* at 14, 69.) Thereafter, Defendant was taken into custody, patted down and searched. The officers recovered a brown bag in his left pocket that contained alleged crack cocaine as well as cash. (*Id.* at 16, 45.)

To refute the testimony given by the officers, Defendant called Mr. Ernest Moss who was visiting a friend at the house on the corner of Arch and Edgewood on the date in question. (*Id.* at 96-7.) Mr. Moss stated that five minutes after Defendant arrived, Officers Guess and Buck arrived and "jumped [out of their car] with their guns out." (*Id.* 97-8.) Mr. Moss stated that he immediately put his hands in the air but, because the officers were not focused on him, he then drifted to the side of the house. (*Id.* at 99.) Mr. Moss stated that he believed one of the officers was going to start shooting. (*Id.*) Mr. Moss admitted on cross-examination that despite his fear, he remained standing at the foot of the steps near the officers. (*Id.* at 100, 103.) Mr. Moss testified that at this time, his female friend started screaming and Defendant raised his hands. Mr. Moss recounted that the officers said, "Freeze, don't move," to which Defendant responded "I didn't do anything," and thereafter, the officers grabbed, handcuffed, and searched Defendant. (*Id.* at 101.) Mr. Moss stated that he only remembered the officers recovering money and keys from Defendant. (*Id.* at 101, 106.) On cross-examination, the Government elicited that Mr. Moss has been convicted of assault, carrying a firearm, and a narcotics offense. (*Id.* at 107-08.)

Faced with this contradictory testimony, the Court must determine "the credibility of the witnesses and the weight to be given the evidence, together with the inferences, deductions and

conclusions to be drawn from the evidence.” *United States v. Scarfo*, 180 F. Supp. 2d 572, 577 (D.N.J. 2001) (citations omitted); *see also Government of the Virgin Islands v. Gereau*, 502 F.2d 914, 921 (3d Cir. 1974). Defendant argues that common sense would support Mr. Moss’s version of the facts, namely that police officers would naturally arrive with guns drawn at a scene reported to have a person with a gun. There was nothing in the testimony of the three officers, however, that would lead me to believe that they did not follow the mandates of the Constitution.

Mr. Moss’s testimony was contradicted in all respects by the consistent testimony of the officers. Officer Buck repeatedly testified that he did not draw his gun until after he saw a bulge at Defendant’s waist. (*Id.* at 13, 40-41.) Similarly, Officer Cole stated that when he first saw the scene from the car, Defendant had his back to the officers and the officers did not have their guns drawn. (*Id.* at 78-80.) As both Officers Buck and Cole explained, it was not until Defendant turned that the officers drew their guns. (*Id.* at 13, 40-41, 80.) It was at that point that Officer Buck said he saw the bulge and Officer Cole said he heard someone yell that Defendant had a gun. (*Id.* at 10, 80.)

Although Defendant tried to suggest at the hearing that the officers ordered Defendant to put his hands on the wall before they saw the bulge (*Id.* at 34, 54), Officer Buck stated consistently and repeatedly during his testimony that he first saw the bulge and then ordered Defendant to raise his hands. (*Id.* at 10-13, 34, 37, 54, 58-60.) In attempting to impeach Officer Buck with his preliminary hearing testimony, defense counsel read his statement: “Again [Defendant] appeared nervous and we asked him to put his hands on the wall *as* we noticed a bulge around his waist under his shirt.” (*Id.* at 53 (emphasis added).) While this testimony ambiguously recounts the sequence of the events, it is not inconsistent with his testimony at the suppression hearing. (*Id.* at 59.) Similarly, notes written by Officer Buck on the date in question also comport with the sequence of events as he

recounted for the Court. (Def. Ex. 3; Def. Ex. 2; Tr. at 59-60.) Moreover, relying on the assumption that the police would, as a general practice, arrive at the scene with guns drawn would be as inappropriate as measuring reasonable suspicion by what the officers recovered after the fact. Accordingly, looking at all of evidence presented as a whole, I credit the credible and consistent testimony given by Officers Buck, Bennett and Cole.

III. CONCLUSION OF LAW

Defendant challenges the admissibility of the evidence recovered as an illegal *Terry* stop without reasonable, articulable suspicion of criminal activity, “which as a result, escalated into a full blown arrest that lacked probable cause and exceeded the officers’ authority when they perform[ed] an immediate search of Defendant without first attempting to confirm their suspicions of the presence of a weapon with a *Terry* frisk.” (Def.’s Supp. Br. at 2.) “Once a defendant has challenged the admissibility of such evidence, the government must bear the burden of proving the existence of reasonable suspicion.” *United States v. Coward*, 296 F.3d 176, 180 (3d Cir. 2002) (citing *Florida v. Royer*, 460 U.S. 491, 500 (1983)); see also *United States v. Johnson*, 63 F.3d 242, 245 (3d Cir. 1995) (“Once the defendant has established a basis for his motion . . . the burden shifts to the government to show that the search or seizure was reasonable.”).

Under *Terry v. Ohio* 392 U.S. 1 (1968), and its progeny, “an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot.” *United States v. Valentine*, 232 F.3d 350, 353 (3d Cir. 2000) (citing *Illinois v. Wardlow*, 528 U.S. 119 (2000)). “Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with

information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.” *Alabama v. White*, 496 U.S. 325, 330 (1990). Thus, the question at issue is whether Officers Buck, Bennett, and Cole had the “minimal level of objective justification” necessary for a *Terry* stop. *Valentino*, 232 F.3d at 353 (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)). In evaluating reasonable suspicion, the Court “must consider ‘the totality of the circumstances--the whole picture.’” *Id.*

At the threshold of this determination is the fact that the description given to the officers was based on an anonymous tip. In *Florida v. J.L.*, 529 U.S. 266 (2000), the Supreme Court held that an anonymous tip regarding a person carrying a gun is not alone sufficient to justify a police officer’s *Terry* frisk. 529 U.S. at 273. In the present case, however, the anonymous tip and its reliability are not the sole considerations in evaluating reasonable suspicion; the content of the tip must also be taken into account, as well as other surrounding circumstances, such as Defendant’s conduct in conjunction with Officer Buck’s observation of the bulge. *See Valentino*, 232 F.3d at 355. Similarly, despite Defendant’s suggestion, “reasonable suspicion does not require that the suspect’s acts must always be themselves criminal,” as the standard requires a court to take into consideration the totality of the circumstances, including “acts capable of innocent explanation.” *Id.* at 356 (quoting *Wardlow*, 528 U.S. at 125).

When examining the testimony of the officers, it appears that their suspicion was based on the following factors: (1) an anonymous tip describing in detail a person with a gun at a particular location; (2) the said location was known to the officer to be a high crime area; (3) upon arriving at the described location, Officer Buck observed Defendant, who matched the radio report; (4) after

attempting to question Defendant, Defendant did not answer and kept his back toward the officers; (5) Defendant appeared nervous and was looking around and walking away from the officers; and (6) once Defendant turned around, Officer Buck noticed “a bulge” that he thought, under the aforementioned circumstances, was a gun.

Defendant argues that even assuming the Government’s versions of the facts, the initial encounter with Defendant violates *Terry* as the officers effectively seized Defendant by blocking his egress at the bottom of the steps. This argument, however, is inconsistent with the weight of the pertinent caselaw. The Supreme Court has held that “mere police questioning does not constitute a seizure.” *Florida v. Bostick*, 501 U.S. 429, 434 (1991). Moreover, the Court stated that “law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen.” *Id.* The location of the encounter is not the only factor in determining whether there was a seizure; “a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ requests or otherwise terminate the encounter.” *Id.*; *see also United States v. Kim*, 27 F.3d 947, 951 (3d Cir. 1994). Accordingly, the “narrowness and confinement” of a particular location has never been found to be inherently coercive. *See Kim*, 27 F.3d at 951; *Bostick*, 501 U.S. 439-40.

Similarly, even if the officers’ conduct could have been deemed a show of authority, if the suspect does not submit, there is no seizure. *Valentine*, 232 F.3d at 358 (*citing United States v. Hodari D.*, 499 U.S. 621, 626 (1991)). Defendant was not answering the officers’ question, but was walking away from them onto the porch of the house. Furthermore, once the officers noted

Defendant's nervous behavior, perceived that he was attempting to conceal the front of his body, and then noticed a bulge, they then told Defendant to put his hands on the wall. This order, however, was also not initially complied with; Defendant was making hand movements toward his waist, shifting around, and appeared nervous. As such, Defendant did not comply and thus, was not seized. In fact, his non-compliance and furtive hand movements permissibly contributed to the officers' reasonable suspicion. *Id.* (discussing that suspects refusal to comply with officer's order to stop and furtive hand movements can help provide officers with reasonable suspicion) (*citing Watkins v. City of Southfield*, 221 F.3d 883 (6th Cir. 2000); *United States v. Moorefield*, 111 F.3d 10, 14 (3d Cir. 1997)).

While each of the individual factors supporting the officers' suspicion standing alone may not be sufficient to meet the reasonable suspicion standard, *id.* at 356 (noting that presence in high crime area is not by itself sufficient to warrant *Terry* stop but is among relevant contextual considerations in *Terry* analysis); *see also Wardlow*, 528 U.S. at 124 (holding "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion") (citations omitted); *see also United States v. Cortez*, 449 U.S. 411, 418 (1981) (stating that headlong flight is not necessarily act of evasion but courts must adhere to "commonsense judgments and inferences about human behavior" when determining reasonable suspicion); *see also Florida*, 501 U.S. at 437 (1991) (holding that "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure" (*quoting INS v. Delgado*, 466 U.S. 210, 216-17 (1984))), when considered in conjunction in the present case, adequately satisfy the Government's burden of establishing reasonable suspicion.

Finally, Defendant contends that even if there were reasonable suspicion to conduct a *Terry*

stop, the officers elevated the search to a full blown arrest by grabbing the gun at the Defendant's waist. This argument is also without merit. Officer Buck testified that because Defendant was making furtive gestures, he was concerned that their "safety at the time was possibly in jeopardy." (Tr. at 13.) Officer Cole stated that he confined his intrusion to the area which Defendant had been gesturing towards, where he believed the gun to be. This limited intrusion comports with *Terry* as it was confined to what was minimally necessary to determine whether Defendant was armed and to disarm him once the weapon was discovered. *Terry*, 392 U.S. at 26, 30; *see also United States v. Edwards*, 53 F.3d 616, 619 (3d Cir. 1995) ("[W]hen police officers make an investigative stop, they may take such steps as are 'reasonably necessary to protect their personal safety and to maintain the status quo.'" (quoting *United States v. Hensley*, 469 U.S. 221, 235 (1985))). Once the gun was recovered, the officers placed Defendant into custody and searched his person, recovering the narcotics, which is permissible under the search incident to arrest exception. *Chimel v. California*, 395 U.S. 752, 762-3 (1969) (establishing search incident to arrest exception); *United States v. Myers*, 308 F.3d 251, 266 (3d Cir. 2002) (discussing *Chimel* and search incident to arrest exception). Therefore, because I conclude that the evidence was seized in a constitutionally permissible manner, I deny Defendant's motion to suppress. An appropriate Order follows.

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ORDER

AND NOW, this 29th day of **January, 2004**, upon consideration of Defendant's Motion to Suppress, the Government's Response thereto, all supplemental briefs submitted, and following oral argument thereon, and for the foregoing reasons, it is hereby **ORDERED** that:

1. Defendant's Motion to Suppress (Document No. 12) is **DENIED**.
2. A jury trial is scheduled to commence on **February 26, 2004** at **9:30 a.m.** in a courtroom to be determined.

BY THE COURT:

Berle M. Schiller, J.