

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

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| UNITED STATES OF AMERICA | : | CRIMINAL ACTION |
| | : | |
| vs. | : | NO. 04-473 |
| | : | |
| HAEN AYALA | : | |

ORDER AND MEMORANDUM

ORDER

AND NOW, this 10th day of December, 2004, in consideration of the Defendant's Motion to Suppress Physical Evidence (Document No. 13, filed Nov. 10, 2004), and the Government's Response to Defendant's Motion to Suppress Physical Evidence (Document No. 14, filed Nov. 24, 2004), and following a hearing in open court on November 30, 2004 and December 6, 2004, with defendant and all counsel present, for the reasons stated on the record at the hearing and in the attached Memorandum, **IT IS ORDERED** that Defendant's Motion to Suppress Physical Evidence is **DENIED**.

MEMORANDUM

I. BACKGROUND

Defendant, Haen Ayala, is charged in an Indictment with one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The Indictment arises out of defendant's encounter with Philadelphia police officers on June 14, 2004, who found a loaded and concealed firearm in his possession. Defendant filed a Motion to Suppress Physical

Evidence on November 10, 2004. In the Motion, defendant argues that the officers lacked the reasonable suspicion necessary to engage in the investigatory stop and protective frisk which led to discovery of the firearm.

The Court held a suppression hearing on November 30 and December 6, 2004.

At the close of the hearing, the Court issued a ruling from the bench denying defendant's Motion to Suppress Physical Evidence. The Court's formal ruling memorialized in this Memorandum and Order is essentially identical to its oral ruling issued at the close of the suppression hearing. To the extent the two rulings differ, this Memorandum and Order, based upon close review of the record and additional research, supercedes the Court's bench ruling.

II. FACTS

At the suppression hearing, the parties presented both testimony from the arresting officers and documentary evidence of the following facts:

On June 14, 2004, at approximately 4:30 p.m., Officers Harron and Hooven of the Philadelphia Police Department were on duty in a marked police car at the corner of Rorer and Westmoreland Streets as part an initiative—"Project Safe Streets"—to increase police presence in high-crime areas which police officials deemed to include that intersection. While the officers were stopped at that intersection, an unknown Hispanic male ("complainant"), driving a grey van, pulled alongside the police car. The complainant was visibly upset and excitedly told the officers that another Hispanic male wearing an orange shirt and black or grey jeans¹ had just attempted to shoot him at the corner of Ontario and C Streets, roughly three blocks from the

¹ There is some inconsistency as to the color of pants described by complainant. Officer Harron recalled the complainant said grey jeans. Officer Hooven recalled the complainant saying the jeans were black.

officers' location. The officers stated they did not have any reason to believe the complainant's tip was false.

The officers then drove to the corner of Ontario and D Streets,² from which they observed a group of people near the intersection of Ontario and C Streets. The officers testified that one of these individuals, who turned out to be Ayala, matched the complainant's description—he was wearing an orange shirt.³ When the officers drove their car to the corner of Ontario and C Streets, Ayala remained as the other persons began walking away. When the officers approached Ayala, they believed he was armed and asked him to place his hands in the air. Officer Harron then patted him down for weapons and recovered from his left front jean pocket a .25-caliber Tanfoglio handgun, black with a wooden handle, serial number MI76635. The handgun contained one live round in the chamber and three live rounds in the magazine. The officers then placed Ayala under arrest. During the arrest, the complainant left the scene before officers could identify him. The officers testified that before the arrest they were more concerned with immediately locating the assailant, and mitigating the danger he posed, than in identifying the complainant.

² Officer Harron testified that they followed the complainant's van to the corner of Ontario and D Streets. However, he not did include this fact in his arrest report. Additionally, Officer Hooven did not recall following the complainant's van.

³ Additionally, Officer Harron testified that the complainant pointed to the group and said something indicating that his alleged assailant was among them. However, he did not include this detail in post-arrest reports, and Officer Hooven did not recall it.

III. DISCUSSION

The issue before the Court is whether the police officers were entitled to engage in a stop and limited protective search of the defendant based upon a reasonable suspicion that he was engaged in criminal activity and armed and dangerous.

The Supreme Court has ruled that, “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.” Illinois v. Wardlow, 528 U.S. 119, 123 (2000). In Terry v. Ohio, 392 U.S. 1, 30 (1968), the Court held:

[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

In order to determine whether an officer has reasonable suspicion for a Terry stop and frisk, a court must look to the “totality of the circumstances.” U.S. v. Valentine, 232 F.3d 350, 353 (3d Cir. 2000)(quoting U.S. v. Sokolow, 490 U.S. 1, 8 (1989)).

The Court agrees with the government that the Third Circuit’s ruling in U.S. v. Valentine is controlling. 232 F.3d 350. In Valentine, officers patrolling a high-crime neighborhood at 1 a.m. were approached by an unidentified informant who told them he had just seen a man with a gun and provided a physical description of the man and one of his companions. Id. at 352. The police observed a group of men standing 50 to 100 feet away from them matching the descriptions the informant provided. Id. at 353. The officers approached the group, which began walking away, and ordered a man alongside the defendant to stop, prompting the

defendant to run in an attempt to get by one of the officers. Id. While restraining the defendant, the officers heard his handgun hit the ground and discovered the weapon. Id. The informant was never identified. Id. at 354.

The Court of Appeals held that the officers had reasonable suspicion to conduct a Terry stop and frisk⁴ on the basis of the face-to-face tip and the other surrounding circumstances. Id. at 358. In so ruling, the court distinguished the case from Florida v. J.L., 529 U.S. 266 (2000), upon which Ayala relies. Valentine, 232 F.3d at 353-54. In J.L., the Supreme Court held that an anonymous telephone tip reporting a young black male in a plaid shirt standing beside a particular bus stop carrying a gun was not sufficiently reliable to create a reasonable suspicion for a stop and frisk. 529 U.S. at 273-74. The Valentine court distinguished J.L. on a number of bases which it said made the tip in Valentine more reliable: (1) The informant reported events which occurred moments earlier; (2) the informant communicated his tip face-to-face; and (3) the informant was in close proximity to the defendant. 232 F.3d at 354. The court also refused to consider the fact that the officers failed to identify the informant to be dispositive. Id. (“[H]ad they stalled for more lengthy questioning of the informant, the armed suspect could have escaped detention.”).

The Valentine court also cited several additional surrounding circumstances as contributing to a reasonable suspicion. In so doing, it distinguished U.S. v. Ubiles, 224 F.3d 213 (3d Cir. 2000), upon which Ayala also relies. In Ubiles, the Third Circuit held that officers

⁴ The Valentine court, although largely focusing its analysis on Terry stops, suggested that its holding could be generalized to permit frisks as well. See 232 F.3d at 357 (noting that it would not make sense to prohibit officers from frisking defendant under the circumstances). Subsequently at least one court in the Third Circuit has interpreted Valentine to announce a standard for both stops and frisks. See, e.g., U.S. v. Johnson, 95 Fed. Appx. 448, 451-52 & n.1 (3d Cir. 2004).

overseeing a daytime festival where attendees were legally permitted to carry firearms did not have reasonable suspicion to stop and frisk a defendant based upon a face-to-face tip from an informant who pointed out a man he saw carrying a gun. 224 F.3d at 218. The Valentine court held that a number of additional circumstances present in that case created the reasonable suspicion lacking in Ubiles, including the fact that the officers were patrolling a high-crime area at 1 a.m., the fact that the defendant was likely engaged in criminal acts, and the fact that the defendant walked away when officers approached him. Valentine, 232 F.3d at 356-57. See also Wardlow, 528 U.S. at 124 (defendant’s location in high-crime area is “relevant contextual consideration[]”).

The facts presented in this case more closely resemble Valentine than Ubiles or J.L.:

- (1) Officers Harren and Hooven were stationed in a high-crime area at the time the complainant approached them;
- (2) the complainant provided a face-to-face tip, roughly three blocks from the place where the incident occurred;
- (3) the complainant reported his observations moments after the alleged incident;
- (4) the complainant clearly stated that the defendant was armed and dangerous; he said the defendant was trying to shoot him; and
- (5) the complainant provided a physical description of Ayala, including the fact he was wearing an orange shirt. The officers, upon arriving at the scene, identified defendant as the alleged assailant on the basis of this description.

These circumstances, considered together, provided Officers Hooven and Harren with an objectively reasonable suspicion that criminal activity was afoot and that the defendant was

armed and dangerous. The fact that the officers never identified the complainant in no way undermines that conclusion. See Valentine, 232 F.3d at 355.

Moreover, the Court does not regard as dispositive the fact that Officers Hooven and Harren were patrolling a high-crime area at 4:30 p.m. as opposed to late at night, as in Valentine. 232 F.3d at 356. The key issue is whether the officers reasonably suspected that the defendant was engaged in criminal activity, and armed and potentially dangerous. Assuming, *arguendo*, that the daylight reduced the officers' bases for reasonable suspicion, the complainant's tip that defendant was trying to shoot him provides an added basis for the officers' suspicion of criminal activity.

Ayala argues that the officers' testimony with respect to the complainant's description and the events immediately preceding the arrest were inconsistent. In making this argument, he points to the conflicting descriptions of the color of the alleged assailant's pants, and the differing testimony on whether the officers followed the complainant's van to the intersection of Ontario and D Streets and what happened once they arrived there. He also argues that some of the facts about which the officers testified between the time of their first encounter with the complainant and the arrest were not included in the various police reports of the incident. The Court finds all such inconsistencies to be minor in nature—they did not implicate any material facts.

Finally, to whatever extent defendant independently challenges the frisk that followed the stop, the Court concludes that by the time the officers stopped Ayala they had "reason to believe that [they were] dealing with an armed and dangerous individual," sufficient to conduct a protective search. Terry, 392 U.S. at 27. Nothing in the officers' initial interaction with Ayala served to dispel this reasonable belief. Id. at 30.

IV. CONCLUSION

For the reasons above, the Court denies defendant's Motion to Suppress Physical Evidence.

BY THE COURT:

JAN E. DUBOIS, J.