

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL ACTION
 : NO. 06-CR-272-1
 :
 SHAWN DAVIS :

SURRICK, J.

SEPTEMBER 18, 2007

MEMORANDUM & ORDER

Presently before the Court is Defendant Shawn Davis's Motion To Suppress Evidence (Doc. No. 39). The Suppression Hearing was held August 10, 2007 and August 16, 2007.¹ For the following reasons, Defendant's Motion will be denied.

I. BACKGROUND

On March 28, 2006, Detective Chris Marano, a Philadelphia police officer assigned to the Major Crimes Division and detailed to the Bureau of the Alcohol, Tobacco and Firearms ("ATF"), and ATF Special Agent Jenna Motzenbecker² went to interview Jermaine Canty, a suspected straw purchaser of guns.³ (Hr'g Tr. 8/10/07 at 4-7, 51.) Canty had called into the Southwest Detective Division to report that he had three guns stolen from him. (*Id.* at 7.) Canty

¹ Defendant's Aunt, Linda Davis, was subpoenaed to appear at the suppression hearing on August 10, 2007, but was unavailable. (Hr'g Tr. 8/10/07 at 84.) The hearing was continued to August 16, 2007, so that Ms. Davis could testify. (*Id.*)

² Agent Motzenbecker's maiden name is Polack. (Hr'g Tr. 8/10/07 at 8.) She is referred to as Agent Polack during the suppression hearing. (*Id.*)

³ A straw purchaser is an individual who has no criminal record and who purchases a gun for someone with a criminal record. (Hr'g Tr. 8/10/07 at 8.) The straw purchase of guns is a violation of 18 U.S.C. § 924(a)(1)(A).

had purchased the guns only one week before. (*Id.* at 7-8.) Detective Marano and Agent Motzenbecker went to Canty's last known address, 5952 Osage Avenue, because when Canty reported the stolen guns, he refused to come to the Southwest Detectives Division to be interviewed. (*Id.* at 7-9) The Osage Avenue address is located in a high crime area of the city. (*Id.* at 7.) It is standard police procedure to interview any individual who reports a theft of firearms. (*Id.*) Agent Motzenbecker contacted Canty by telephone and arranged to interview him at his residence at 12:30 p.m. on March 28, 2007. (*Id.* at 53.) Detective Marano and Agent Motzenbecker had a Philadelphia Police Department arrest photograph of Canty. (***Id.* at 8; Gov't Ex. 1.**) They traveled to Osage Avenue in an unmarked police vehicle. (Hr'g Tr. 8/10/07 at 9.) When they arrived they stopped the car approximately five houses away from 5952 Osage Avenue and observed Defendant, Shawn Davis, in front of the house with an older male fixing a bicycle. (*Id.*) Defendant was wearing a heavy winter three-quarter length coat with fur around the hood. (*Id.*) The coat was inappropriate for the 58° to 60° weather. (*Id.* at 9-11, 58; Gov't Ex. 4). It appeared that there was a heavy object in the right side pocket of the coat and Defendant was apparently holding the heavy object close to his body. (*Id.* at 14.) Detective Marano and Agent Motzenbecker sat in the car observing the Defendant trying to decide whether he was Canty. (*Id.* at 11.) They thought that he was Canty because he resembled the photograph that they had of Canty. (*Id.* at 31.) The agents watched Defendant for approximately five to ten minutes. (*Id.* at 30.) Defendant appeared to be nervous and was continually looking in the direction of their car. (*Id.* at 11.) Based upon their experience, the way Defendant was acting, and the way Defendant was holding the coat, the agents thought that the heavy object might be a gun. (*Id.* at 14, 56.) The agents then observed Defendant walk from 59th Street going west

towards 60th Street. (*Id.* at 12.) Prior to turning the corner, Defendant turned and looked directly at the agents' unmarked vehicle and continued walking on 60th Street going south toward Addison Avenue. (*Id.* at 13.) The agents realized that they could only ascertain whether Defendant was in fact Cauty by approaching him and asking him directly. (*Id.* at 13-14.) They lost sight of Defendant for approximately twenty seconds after he made a left on 60th Street. (*Id.* at 32.) The agents then proceeded in the car to the corner of 60th Street and Osage Avenue. (*Id.* at 15.) Detective Marano told Agent Motzenbecker to stay with the car and if Defendant ran, to get into the driver's seat and follow him. (*Id.* at 15.) Detective Marano then exited the vehicle and followed Defendant on 60th Street as he was walking toward Addison Avenue. (*Id.*) When Marano exited the vehicle, he hollered, "Police, Jermaine." (*Id.*) Defendant replied, "Jermaine's around the corner." (*Id.*) Defendant then grabbed the right side of his coat, and took off running. (*Id.* at 15, 57.) Marano ran after Defendant while Agent Motzenbecker drove the car and attempted to cut Defendant off. (*Id.* at 15-16.) Defendant continued running to Addison Street then turned east onto 59th Street and made his way around the corner, returning to Osage Avenue. (*Id.* at 16.) As he ran around the block, Defendant's right hand firmly clutched the heavy object in the right pocket of his jacket while he swung his left arm as he ran. (*Id.*) Agent Motzenbecker caught up with Defendant on Osage Avenue and told Defendant, "stop running, we're the police, stop running." (*Id.* at 57.) Defendant responded by saying, "I'm not Jermaine." (*Id.* at 58.) Agent Motzenbecker said, "That's okay. Just stop running. We're the police." (*Id.*) Defendant was approximately 20-25 feet from 5952 Osage Avenue when he threw his jacket to the ground and continued running to the residence. (*Id.*) Agent Motzenbecker brought the car to a stop, exited the vehicle, and attempted to apprehend Defendant. (*Id.*) She was struggling with

Defendant on the steps of 5952 Osage Avenue when Detective Marano came to her assistance. (*Id.*) Upon arriving at 5952 Osage Avenue, Detective Marano successfully handcuffed Defendant. (*Id.*) Agent Motzenbecker then went back up the street to retrieve the jacket. (*Id.*) After retrieving the jacket from the street, Agent Motzenbecker brought the jacket back to her vehicle. (*Id.* at 42.) In the right side jacket pocket she discovered a fully-loaded Glock 40 caliber handgun and a razor blade. (*Id.* at 17, 58.) Detective Marano called for a wagon to transport Defendant to the police station. (*Id.* at 44.) Detective Marano then advised Defendant of his *Miranda* rights. (*Id.*) Defendant responded that he understood each of his *Miranda* rights. (*Id.*)⁴ As he was being placed in the wagon, Defendant was searched and the police recovered a bundle of 32 packets of crack cocaine weighing approximately three grams. (*Id.* at 46.) When the Defendant arrived at police headquarters, he was interviewed by Detective Marano and Agent

⁴ Detective Marano testified as follows regarding the *Miranda* warning:

Q: Did you question Mr. Davis after you had arrested and searched him?

A: It's my policy, since becoming detective, to Mirandize everyone that I put cuffs on as soon as I put cuffs on them and that's what I did.

Q: And by Mirandize, what do you mean?

A: I read him his constitutional rights.

Q: And what rights did you tell him that he had?

A: You – I told him he was under arrest for violation of the Uniform Firearms Act and narcotics. He had a right to remain silent. Anything he said could be used against him in court. He had a right to an attorney. He had a right to have an attorney present with him while we ask him questions. If he could not afford to hire one, one would be appointed for him. He could terminate his contact with us any time he wished, and asked him if he understood those rights. He said he did.

(*Id.* at 18-19.)

Motzenbecker. Defendant admitted to Detective Marano that he had purchased the Glock recovered from his jacket from a person named “Khalif.” (*Id.* at 19.) Pennsylvania State Police records indicate that the gun was purchased by Khalif Bolden in July 2005. The testimony of Detective Marano and Agent Motzenbecker was consistent and credible.

Defendant testified at the hearing. He claimed that Detective Marano had a lengthy conversation with him prior to the chase. (*Id.* at 91-92.) He testified that Marano said, “Jermaine” and he responded that “I’m not Jermaine. I’m sorry, sir, I’m Shawn Davis.” (*Id.*) The Defendant testified that Marano said, “Jermaine, come on Jermaine, you’re pulling my tail.” (*Id.* at 92.) Defendant testified that he repeatedly identified himself to Detective Marano as he approached Marano with his hands up, and that Marano told him, “Jermaine, get in the car.” (*Id.* at 93.) That demand, the Defendant explained, is what prompted him to run from the agents. (*Id.* at 93.) Defendant also claimed that he was running out of fear and that one of the agents was threatening to shoot him. (*Id.* at 94.) He claims that he managed to elude the agents and ran back to his house Aunt’s house at 5952 Osage Avenue, so that she could identify him and assure the officers that he was not Jermaine Canty. (*Id.*) We reject Defendant’s version of the events, and find his testimony was less than credible.

Defendant argues that the jacket and its contents, the loaded Glock 40 caliber gun and the razor blade, along with the packets of crack should be suppressed because they were seized in violation of his Fourth Amendment rights. (Doc. No. 39.) Defendant contends that the agents did not have reasonable suspicion to conduct a brief investigatory stop, and that the agents unlawfully seized him when they subjected him to a show of authority. Defendant contends that the agents had no legal justification to stop him and that all of the physical evidence seized as a

result of the illegal stop should be suppressed. (Doc. No. 39.) The Government argues that the agents had sufficient reason to stop Defendant and to frisk him. (Doc. No. 44.) The Government further contends that Defendant did not submit to any show of police authority. Instead Defendant fled and abandoned the jacket and all of its contents before any seizure took place. Since the defendant did not submit to police authority and abandoned the jacket when he threw it to the ground prior to being apprehended, the officers did not violate his Fourth Amendment rights when they searched the jacket and seized the contents. (*Id.*) Moreover, the search of Defendant's person was incident to a lawful arrest. Finally, the Government contends that any statements made by Defendant while in custody and after he had been given his *Miranda* warnings were not made in violation of Defendant's constitutional rights.

II. DISCUSSION

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court discussed the legitimate interest of the government in effective crime prevention and detection. The court recognized that in pursuing that interest “a police officer may in appropriate circumstances and in an appropriate manner approach a person for purpose of investigating criminal behavior even though there is no probable cause to make an arrest.” *Id.* at 22. The court ultimately concluded that a police officer can make an investigatory stop of an individual and conduct a frisk for weapons in order to ensure the officer's safety. *Id.* at 23–24. The frisk is considered a permissible invasion where the officer can “point to specific articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Id.* at 21. “The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in

danger.” *Id.* at 27.

In this case, it cannot be reasonably argued that the agents lacked sufficient suspicion to make an investigatory stop of Defendant. The neighborhood in which they encountered Defendant is a high-crime area where drug-trafficking and gun-violence is rampant. The agents were seeking to talk to Jermaine Canty, a suspected straw purchaser of guns. Defendant and Canty are cousins and Defendant resembled a photograph that the agents had of Canty. Defendant was acting suspiciously. He was wearing a heavy winter coat when the weather was mild. His jacket hung on his body in a way that suggested he had something unusually heavy in his right pocket. He continually paced and looked furtively toward the agents’s unmarked car, and walked away from the area while turning and looking at the agents suggesting that he was attempting to evade the agents. Based upon their experience and training, the agents suspected that Defendant had a gun in his jacket pocket. Given the totality of the circumstances we conclude that the agents were perfectly justified in approaching Defendant for investigative purposes not only to determine whether he was Canty, the suspected straw purchaser, but also to determine whether he was carrying a gun in his jacket pocket.

Before the agents were able to stop Defendant, he took off running. Defendant did not submit to any show of authority. There can be no Fourth Amendment violation unless a seizure occurs. *United States v. Valentine*, 232 F.3d 350, 358 (3d Cir. 2000). “Attempted seizures of a person are beyond the scope of the Fourth Amendment.” *City of Sacramento v. Lewis* 523 U.S. 833, 845 n.7 (1998). Detective Marano and Agent Motzenbecker gave chase and ultimately caught up with Defendant as he was attempting to enter 5952 Osage Avenue. However, during the chase and before the agents physically stopped Defendant he abandoned his jacket. In

California v. Hodari D., 499 U.S. 621 (1991), the Supreme Court decided a case remarkably similar to this case. In *Hodari D.*, the officers observed a group of youths who panicked and took flight when they saw officers approaching. *Id.* at 622-23. The officers gave chase. *Id.* at 623. As one of the officers was chasing Hodari, he threw away what appeared to be a small rock. *Id.* Ultimately, the officer tackled Hodari and handcuffed him. *Id.* The officer then went back to where Hodari had thrown the rock and retrieved it. *Id.* The rock was crack cocaine. *Id.* The Supreme Court concluded that the abandoned cocaine was not the fruit of a seizure because the defendant was not seized until he was tackled. *Id.* at 629. The *Hodari* Court discussed the meaning of the word “seizure” stating:

The word ‘seizure’ readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. (“She seized the purse-snatcher, but he broke out of her grasp.”) It does not remotely apply, however, to the prospect of a policeman yelling “Stop, in the name of the law!” at a fleeing form that continues to flee. That is no seizure.

In sum, assuming that [the officer’s] pursuit in the present case constituted a “show of authority” enjoining Hodari to halt, since Hodari did not comply with that injunction he was not seized until he was tackled.

Id. at 626, 629. Since Hodari had thrown away the crack before he was seized, the Court concluded that he abandoned the physical evidence and could not seek Fourth Amendment protection. *Id.* at 629.

Here, there is no evidence that there was a display of authority to which the Defendant submitted, nor is there any suggestion that the Defendant was physically restrained prior to his shedding of the coat. Detective Marano and Agent Motzenbecker were both consistent throughout their testimony. Both testified that the Defendant never stopped or engaged in any

meaningful exchange with the agents prior to fleeing. Detective Marano simply identified himself and Defendant began to run. No demands were made on Defendant until Agent Motzenbecker told him to “stop running, we’re the police,” as she was following him in the car. Clearly, there was no seizure here until after Defendant had abandoned his coat. That coat and its contents are not the fruits of an unlawful seizure. Accordingly, Defendant’s Motion To Suppress the coat and its contents must be denied.

After Defendant abandoned his coat, the pursuit continued. Ultimately, Agent Motzenbecker caught up to Defendant and with the help of Detective Marano, Defendant was arrested and taken into custody. We are satisfied that the arrest of Defendant was based upon probable cause.

Probable cause to arrest exists where the facts and circumstances within the knowledge of the arresting officers are sufficient to warrant a reason to believe that an offense has been or is being committed by the person being arrested. *Dunaway v. New York*, 442 U.S. 200, 208 n.9 (1979). The conduct of Defendant which the agents observed, Defendant’s flight when the agents approached, and the fact that the agents thought that they were pursuing a straw purchaser of guns, lead the agents to reasonably believe that Defendant was engaged in criminal activity. *See Cruz v. United States* 910 F.2d 1072, 1077 (3d Cir. 1990). That belief was, of course, confirmed when the agents retrieved Defendant’s jacket and found the Glock semi-automatic pistol. The search of Defendant’s person by the agents incident to the lawful arrest was perfectly proper. *See New York v. Belton*, 453 U.S. 454, 457 (1981).

Finally, after Defendant’s arrest Detective Marano advised Defendant of his *Miranda* rights. Defendant responded that he understood his rights. Defendant was taken to police

headquarters. Defendant was then interviewed by Detective Marano and Agent Motzenbecker. During the interview Defendant told Detective Marano and Agent Motzenbecker where he had gotten the gun, but he refused to sign a statement. The interview was terminated. The statements made by Defendant during the interview were not made in violation of Defendant's Fifth Amendment rights.

When dealing with a delay between *Miranda* warnings and custodial statements the court must ask two questions: (1) whether Defendant understood his rights when the *Miranda* warnings were given, and (2) whether anything occurred during the delay that would lessen the effectiveness of the *Miranda* waiver. *See United States v. Pruden*, 398 F.3d 241, 246–247 (2005). In this case it is clear that Detective Marano properly advised Defendant of his *Miranda* rights and Defendant stated that he understood those rights. *See Cruz*, 910 F.2d at 1080. It is also clear that nothing occurred during the trip to the police station, after being advised of his rights, or during Detective Marano's interview of Defendant at the police station to lessen the effectiveness of the *Miranda* waiver.

For the above reasons, Defendant's motion to suppress will be denied.

An appropriate Order follows.

