Blue to Gold
LAW ENFORCEMENT TRAINING

CASE LAW

Three Golden Rules

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104 S.Ct. 2091
Supreme Court of the United States

Edward G. WELSH, Petitioner

v.

WISCONSIN.

No. 82-5466.
|
Argued Oct. 5, 1983.
|
Decided May 15, 1984.

Synopsis

The Circuit Court, Dane County, Mark A. Frankel, J., revoked defendant's motor vehicle operator's license for 60 days for unreasonable refusal to submit to a breathalyzer test, and he appealed. The Court of Appeals, 102 Wis.2d 727, 308 N.W.2d 772, reversed, and the State sought review. The Wisconsin Supreme Court, Callow, J., 108 Wis.2d 319, 321 N.W.2d 245, reversed, and certiorari was granted. The Supreme Court, Justice Brennan, held that warrantless, nighttime entry into home to arrest individual for driving while under the influence of an intoxicant was prohibited by the Fourth Amendment.

Vacated and remanded.

Justice Blackmun, filed a concurring opinion; Chief Justice Burger filed a separate statement.

Justice White filed a dissenting opinion in which Justice Rehnquist joined.

Syllabus[a1]

On the night of April 24, 1978, a witness observed a car that was being driven erratically and that eventually swerved off the road, coming to a stop in a field without causing damage to any person or property. Ignoring the witness' suggestion that he wait for assistance in removing his car, the driver walked away from the scene. The police arrived a few minutes later and were told by the witness that the driver was either very inebriated or very sick. After checking the car's registration, the police, without obtaining a warrant, proceeded to the petitioner's nearby home, arriving at about 9 p.m. They gained entry when petitioner's stepdaughter answered the door, and found petitioner lying naked in bed. Petitioner was then arrested for driving a motor vehicle while under the influence of an intoxicant in violation of a Wisconsin statute which provided that a first offense was a noncriminal violation subject to a civil forfeiture proceeding for a maximum fine of $200. Petitioner was taken to the police station, where he refused to submit to a breath-analysis test. Pursuant to Wisconsin statutes, which subjected an arrestee who refused to take the test to the risk of a 60–day revocation of driving privileges, petitioner requested a court hearing to determine whether his refusal was reasonable. Under Wisconsin law, a refusal to take a breath test was reasonable if the underlying arrest was not lawful. The trial court, ultimately concluding that petitioner's arrest was lawful and that his refusal to take the breath test was therefore ****2093** unreasonable, issued an order suspending petitioner's license. The Wisconsin Court of Appeals vacated the order, concluding that the warrantless arrest of petitioner in his home violated the Fourth Amendment because the State, although demonstrating probable cause to arrest, had not established the existence of exigent circumstances. The Wisconsin Supreme Court reversed.

Held: The warrantless, nighttime entry of petitioner's home to arrest him for a civil, nonjailable traffic offense, was prohibited by the special protection afforded the individual in his home by the Fourth Amendment. Pp. 2097–2100.

(a) Before government agents may invade the sanctity of the home, the government must demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. An important factor to be considered when determining ***741** whether any exigency exists is the gravity of the underlying offense for which the arrest is being made. Moreover, although no exigency is created simply because there is probable cause to believe that a serious crime has been committed, application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense has been committed. Pp. 2097–2100.

(b) Petitioner's warrantless arrest in the privacy of his own bedroom for a non-criminal traffic offense cannot be justified on the basis of the "hot pursuit" doctrine, because there was no immediate or continuous pursuit of the petitioner from the scene of a crime, or on the basis of a threat to public safety, because petitioner had already arrived home and had abandoned his car at the scene of the accident. Nor can the arrest be justified as necessary to preserve evidence of petitioner's blood-alcohol level. Even assuming that the underlying facts would support a finding of this exigent circumstance, given the fact that the State had chosen to classify the first offense for driving while intoxicated as a noncriminal, civil forfeiture offense for which no imprisonment was possible, a warrantless home arrest cannot be upheld simply because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant. Pp. 2099–2100.

State v. Welsh, 108 Wis.2d 319, 321 N.W.2d 245, vacated and remanded.

Attorneys and Law Firms

Gordon Brewster Baldwin argued the cause for petitioner. With him on the briefs was *Archie E. Simonson.*

Stephen W. Kleinmaier, Assistant Attorney General of Wisconsin, argued the cause for respondent. With him on the brief was *Bronson C. La Follette,* Attorney General.*

* *Charles F. Kahn, Jr.,* filed a brief for the Wisconsin Civil Liberties Union Foundation as *amicus curiae* urging reversal.

Opinion

Justice BRENNAN delivered the opinion of the Court.

Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), held that, absent probable cause and exigent circumstances, warrantless arrests in the home are prohibited by the Fourth Amendment. ***742** But the Court in that case explicitly refused "to consider the sort of emergency or dangerous situation, described in our cases as 'exigent circumstances,' that would justify a warrantless entry into a home for the purpose of either arrest or search." Id., at 583, 100 S.Ct. at 1378. Certiorari was granted in this case to decide at least one aspect of the unresolved question: whether, and if so under what circumstances, the Fourth Amendment prohibits the police from making a warrantless night entry of a person's home in order to arrest him for a nonjailable traffic offense.

I

A

Shortly before 9 o'clock on the rainy night of April 24, 1978, a lone witness, Randy Jablonic, observed a car being driven erratically. After changing speeds and veering from side to side, the car eventually swerved off the road and came to a stop in an open field. No damage to any person or property occurred. Concerned about the driver and fearing that the car would get ****2094** back on the highway, Jablonic drove his truck up behind the car so as to block it from returning to the road. Another passerby also stopped at the scene, and Jablonic asked her to call the police. Before the police arrived, however, the driver of the

car emerged from his vehicle, approached Jablonic's truck, and asked Jablonic for a ride home. Jablonic instead suggested that they wait for assistance in removing or repairing the car. Ignoring Jablonic's suggestion, the driver walked away from the scene.

A few minutes later, the police arrived and questioned Jablonic. He told one officer what he had seen, specifically noting that the driver was either very inebriated or very sick. The officer checked the motor vehicle registration of the abandoned car and learned that it was registered to the petitioner, Edward G. Welsh. In addition, the officer noted that the petitioner's residence was a short distance from the scene, and therefore easily within walking distance.

***743** Without securing any type of warrant, the police proceeded to the petitioner's home, arriving about 9 p.m. When the petitioner's stepdaughter answered the door, the police gained entry into the house.[1] Proceeding upstairs to the petitioner's bedroom, they found him lying naked in bed. At this point, the petitioner was placed under arrest for driving or operating a motor vehicle while under the influence of an intoxicant, in violation of Wis.Stat. § 346.63(1) (1977).[2] The petitioner was taken to the police station, where he refused to submit to a breath-analysis test.

B

As a result of these events, the petitioner was subjected to two separate but related proceedings: one concerning his refusal to submit to a breath test and the other involving the alleged code violation for driving while intoxicated. Under the Wisconsin Vehicle Code in effect in April 1978, one arrested for driving while intoxicated under § 346.63(1) could be requested by a law enforcement officer to provide breath, blood, or urine samples for the purpose of determining the presence or quantity of alcohol. Wis.Stat. § 343.305(1) (1975). If such a request was made, the arrestee was required ***744** to submit to the appropriate testing or risk a revocation of operating privileges. Cf. South Dakota v. Neville, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983) (admission into evidence of a defendant's refusal to submit to a blood-alcohol test does not offend constitutional right against self-incrimination). The arrestee could challenge the officer's request, however, by refusing to undergo testing and then asking for a hearing to determine whether the refusal was justified. If, after the hearing, it was determined that the refusal was not justified, the arrestee's operating privileges would be revoked for 60 days.[3]

****2095** The statute also set forth specific criteria to be applied by a court when determining whether an arrestee's refusal to take a breath test was justified. Included among these criteria was a requirement that, before revoking the arrestee's operating privileges, the court determine that "the refusal ... to submit to a test was unreasonable." § 343.305(2)(b)(5) (1975). It is not disputed by the parties that an arrestee's refusal to take a breath test would be reasonable, and therefore operating privileges could not be revoked, if the underlying arrest was not lawful. Indeed, state law has consistently provided that a valid arrest is a necessary prerequisite to the imposition of a breath test. See Scales v. State, 64 Wis.2d 485, 494, 219 N.W.2d 286, 292 (1974).[4] Although the statute ***745** in effect in April 1978 referred to reasonableness, the current version of § 343.305 explicitly recognizes that one of the issues that an arrestee may raise at a refusal hearing is "whether [he] was lawfully placed under arrest for violation of s.346.63(1)." §§ 343.305(3)(b)(5)(a), (8)(b) (1981–1982). See also 67 Op.Wis.Atty.Gen. No. 93–78 (1978) ("statutory ***746** scheme ... contemplates that a lawful arrest be made prior to a request for submission to a test").[5]

Separate statutory provisions control the penalty that might be imposed for the substantive offense of driving while intoxicated. At the time in question, the Vehicle Code provided that a first offense for driving while intoxicated was a noncriminal violation subject to a civil forfeiture proceeding for a maximum fine of $200; a second or subsequent offense in the previous five years was a potential misdemeanor that could be punished by imprisonment for up to one year and a maximum fine of $500. Wis.Stat. § 346.65(2) (1975). Since that time, the State has made only minor amendments to these penalty provisions. Indeed, the statute continues to categorize ****2096** a first offense as a civil violation that allows for only a monetary forfeiture of no more than $300. § 346.65(2)(a) (Supp.1983–1984). See State v. Albright, 98 Wis.2d 663, 672–673, 298 N.W.2d 196, 202 (App.1980).

C

As noted, in this case the petitioner refused to submit to a breath test; he subsequently filed a timely request for a refusal hearing. Before that hearing was held, however, the State filed a criminal complaint against the petitioner for driving while intoxicated.[6] The petitioner responded by ***747** filing a motion to dismiss the complaint, relying on his contention that the underlying arrest was invalid. After receiving evidence at a hearing on this motion in July 1980, the trial court concluded that the criminal complaint would not be dismissed because the existence of both probable cause and exigent circumstances justified the warrantless arrest. The decision at the refusal hearing, which was not held until September 1980, was therefore preordained. In fact, the primary issue at the refusal hearing—whether the petitioner acted reasonably in refusing to submit to a breath test because he was unlawfully placed under arrest, see supra, at 2094–2096—had already been determined two months earlier by the same trial court.

As expected, after the refusal hearing, the trial court concluded that the arrest of the petitioner was lawful and that the petitioner's refusal to take the breath test was therefore unreasonable.[7] Accordingly, the court issued an order suspending the petitioner's operating license for 60 days. On appeal, the suspension order was vacated by the Wisconsin Court of Appeals. See State v. Welsh, 102 Wis.2d 727, 308 N.W.2d 772 (1981). Contrary to the trial court, the appellate court concluded that the warrantless arrest of the petitioner in his home violated the Fourth Amendment because the State, although demonstrating probable cause to arrest, had not established the existence of exigent circumstances. The petitioner's refusal to submit to a breath test was therefore reasonable.[8] The Supreme Court of Wisconsin in turn reversed the Court of Appeals, relying on the existence of ***748** three factors that it believed constituted exigent circumstances: the need for "hot pursuit" of a suspect, the need to prevent physical harm to the offender and the public, and the need to prevent destruction of evidence. See 108 Wis.2d 319, 336–338, 321 N.W.2d 245, 254–255 (1982). Because of the important Fourth Amendment implications of the decision below, we granted certiorari. 459 U.S. 1200, 103 S.Ct. 1182, 75 L.Ed.2d 430 (1983).[9]

****2097** II

It is axiomatic that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." United States v. United States District Court, 407 U.S. 297, 313, 92 S.Ct. 2125, 2134, 32 L.Ed.2d 752 (1972). And a principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest. See Johnson v. United States, 333 U.S. 10, 13–14, 68 S.Ct. 367, 368–369, 92 L.Ed. 436 (1948).[10] It is not surprising, therefore, ***749** that the Court has recognized, as "a 'basic principle of Fourth Amendment law[,]' that searches and seizures inside a home without a warrant are presumptively unreasonable." Payton v. New York, 445 U.S., at 586, 100 S.Ct., at 1380. See Coolidge v. New Hampshire, 403 U.S. 443, 474–475, 91 S.Ct. 2022, 2042–2043, 29 L.Ed.2d 564 (1971) ("a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show ... the presence of 'exigent circumstances' "). See also Michigan v. Clifford, 464 U.S. 287, 296–297, 104 S.Ct. 641, 646, 78 L.Ed.2d 477 (1984) (plurality opinion); Steagald v. United States, 451 U.S. 204, 211–212, 101 S.Ct. 1642, 1647–1648, 68 L.Ed.2d 38 (1981); McDonald v. United States, 335 U.S. 451, 456, 69 S.Ct. 191, 193, 93 L.Ed. 153 (1948); Johnson v. United States, supra, 333 U.S., at 13–15, 68 S.Ct., at 368–370; Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886).

Consistently with these long-recognized principles, the Court decided in Payton v. New York, supra, that warrantless felony arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances. Id., 445 U.S., at 583–590, 100 S.Ct., at 1378–1382. At the same time, the Court declined to consider the scope of any exception for exigent circumstances that might justify warrantless home arrests, id., at 583, 100 S.Ct., at 1378, thereby leaving to the lower courts the initial application of the exigent-circumstances exception.[11] Prior decisions of this Court, however, have emphasized that exceptions to the warrant requirement are "few in number and carefully delineated," United States v. United States District Court, supra, 407 U.S., at 318, 92 S.Ct., at 2137, and that the police bear a heavy burden ***750** when attempting to demonstrate an urgent need that might justify warrantless searches or arrests. Indeed, the Court has recognized only a few such emergency conditions, see, e.g., United States v. Santana, 427 U.S. 38, 42–43, 96 S.Ct. 2406, 2409–2410, 49 L.Ed.2d 300 (1976) (hot

pursuit of a fleeing felon); Warden v. Hayden, 387 U.S. 294, 298–299, 87 S.Ct. 1642, 1645–1646, 18 L.Ed.2d 782 (1967) (same); ****2098** Schmerber v. California, 384 U.S. 757, 770–771, 86 S.Ct. 1826, 1835–1836, 16 L.Ed.2d 908 (1966) (destruction of evidence); Michigan v. Tyler, 436 U.S. 499, 509, 98 S.Ct. 1942, 1949, 56 L.Ed.2d 486 (1978) (ongoing fire), and has actually applied only the "hot pursuit" doctrine to arrests in the home, see Santana, supra.

Our hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is particularly appropriate when the underlying offense for which there is probable cause to arrest is relatively minor. Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. See Payton v. New York, supra, 445 U.S., at 586, 100 S.Ct., at 1380. When the government's interest is only to arrest for a minor offense,[12] that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate.

This is not a novel idea. Writing in concurrence in McDonald v. United States, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948), Justice Jackson explained why a finding of exigent circumstances to justify a warrantless home entry should be severely restricted when only a minor offense has been committed:

***751** "Even if one were to conclude that urgent circumstances might justify a forced entry without a warrant, no such emergency was present in this case. This method of law enforcement displays a shocking lack of all sense of proportion. Whether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense thought to be in progress as well as the hazards of the method of attempting to reach it.... It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it. While I should be human enough to apply the letter of the law with some indulgence to officers acting to deal with threats or crimes of violence which endanger life or security, it is notable that few of the searches found by this Court to be unlawful dealt with that category of crime.... While the enterprise of parting fools from their money by the 'numbers' lottery is one that ought to be suppressed, I do not think its suppression is more important to society than the security of the people against unreasonable searches and seizures. When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant." Id., at 459–460, 69 S.Ct., at 195–196 (footnote omitted).

Consistently with this approach, the lower courts have looked to the nature of the underlying offense as an important factor to be considered in the exigent-circumstances calculus. In a leading federal case defining exigent circumstances, for example, the en banc United States Court of Appeals for the District of Columbia Circuit recognized that the gravity of the underlying offense was a principal factor ***752** to be weighed. ****2099** Dorman v. United States, 140 U.S.App.D.C. 313, 320, 435 F.2d 385, 392 (1970).[13] Without approving all of the factors included in the standard adopted by that court, it is sufficient to note that many other lower courts have also considered the gravity of the offense an important part of their constitutional analysis.

For example, courts have permitted warrantless home arrests for major felonies if identifiable exigencies, independent of the gravity of the offense, existed at the time of the arrest. Compare United States v. Campbell, 581 F.2d 22 (CA2 1978) (allowing warrantless home arrest for armed robbery when exigent circumstances existed), with Commonwealth v. Williams, 483 Pa. 293, 396 A.2d 1177 (1978) (disallowing warrantless home arrest for murder due to absence of exigent circumstances). But of those courts addressing the issue, most have refused to permit warrantless home arrests for nonfelonious crimes. See, e.g., State v. Guertin, 190 Conn. 440, 453, 461 A.2d 963, 970 (1983) ("The [[[exigent-circumstances] exception is narrowly drawn to cover cases of real and not contrived emergencies. The exception is limited to the investigation of serious crimes; misdemeanors are excluded"); People v. Strelow, 96 Mich.App. 182, 190–193, 292 N.W.2d 517, 521–522 (1980). See also People v. Sanders, 59 Ill.App.3d 6, 16 Ill.Dec. 437, 374 N.E.2d 1315 (1978) (burglary without weapons not grave offense of violence for this purpose); State v. Bennett, 295 N.W.2d 5 (S.D.1980) (distribution of controlled substances not a grave offense for these purposes). But cf. State v. Penas, 200 Neb. 387, 263 N.W.2d 835 (1978) (allowing warrantless home arrest upon hot pursuit from commission of misdemeanor in the officer's presence; decided before Payton); ***753** State v. Niedermeyer, 48 Ore.App. 665, 617 P.2d 911 (1980) (allowing warrantless home arrest upon hot pursuit from commission of misdemeanor in the officer's presence). The

approach taken in these cases should not be surprising. Indeed, without necessarily approving any of these particular holdings or considering every possible factual situation, we note that it is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor.

We therefore conclude that the common-sense approach utilized by most lower courts is required by the Fourth Amendment prohibition on "unreasonable searches and seizures," and hold that an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made. Moreover, although no exigency is created simply because there is probable cause to believe that a serious crime has been committed, see Payton, application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case, has been committed.

Application of this principle to the facts of the present case is relatively straightforward. The petitioner was arrested in the privacy of his own bedroom for a noncriminal, traffic offense. The State attempts to justify the arrest by relying on the hot-pursuit doctrine, on the threat to public safety, and on the need to preserve evidence of the petitioner's blood-alcohol level. On the facts of this case, however, the claim of hot pursuit is unconvincing because there was no immediate or continuous pursuit of the petitioner from the scene of a crime. Moreover, because the petitioner had already arrived home, and had abandoned his car at the scene of the accident, there was little remaining threat to the public safety. Hence, the only potential emergency claimed by the State was the need to ascertain the petitioner's blood-alcohol level.

**2100 *754 Even assuming, however, that the underlying facts would support a finding of this exigent circumstance, mere similarity to other cases involving the imminent destruction of evidence is not sufficient. The State of Wisconsin has chosen to classify the first offense for driving while intoxicated as a noncriminal, civil forfeiture offense for which no imprisonment is possible. See Wis.Stat. § 346.65(2) (1975); § 346.65(2)(a) (Supp.1983–1984); supra, at 2095. This is the best indication of the State's interest in precipitating an arrest, and is one that can be easily identified both by the courts and by officers faced with a decision to arrest. See n. 6, supra. Given this expression of the State's interest, a warrantless home arrest cannot be upheld simply because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant.[14] To allow a warrantless home entry on these facts would be to approve unreasonable police behavior that the principles of the Fourth Amendment will not sanction.

III

The Supreme Court of Wisconsin let stand a warrantless, nighttime entry into the petitioner's home to arrest him for a civil traffic offense. Such an arrest, however, is clearly prohibited by the special protection afforded the individual in his home by the Fourth Amendment. The petitioner's arrest was therefore invalid, the judgment of the Supreme Court of Wisconsin is vacated, and the case is *755 remanded for further proceedings not inconsistent with this opinion.[15]

It is so ordered.

THE CHIEF JUSTICE would dismiss the writ as having been improvidently granted and defer resolution of the question presented to a more appropriate case.

Justice BLACKMUN, concurring.

I join the Court's opinion but add a personal observation.

I yield to no one in my profound personal concern about the unwillingness of our national consciousness to face up to—and to do something about—the continuing slaughter upon our Nation's highways, a good percentage of which is due to drivers who are drunk or semi-incapacitated because of alcohol or drug ingestion. I have spoken in these Reports to this point before. Perez v. Campbell, 402 U.S. 637, 657, and 672, 91 S.Ct. 1704, 1715 and 1722, 29 L.Ed.2d 233 (1971) (opinion concurring in part

and dissenting in part); Tate v. Short, 401 U.S. 395, 401, 91 S.Ct. 668, 672, 28 L.Ed.2d 130 (1971) (concurring opinion). See also South Dakota v. Neville, 459 U.S. 553, 555–559, 103 S.Ct. 916, 918–920, 74 L.Ed.2d 748 (1983).

And it is amazing to me that one of our great States—one which, by its highway signs, proclaims to be diligent and emphatic in its prosecution of the drunken driver—still classifies driving while intoxicated as a civil violation that allows only a money forfeiture of not more than $300 so long as it is a first offense. Wis.Stat. § 346.65(2)(a) (Supp.1983–1984). The State, like the indulgent parent, hesitates to discipline the spoiled child very much, even though the child is engaging in an act that is dangerous to others who are law abiding and helpless in the face of the child's act. See ****2101** ante, at 2100, n. 14 (citing other statutes). Our personal convenience still weighs heavily in the balance, and the highway deaths and ***756** injuries continue. But if Wisconsin and other States choose by legislation thus to regulate their penalty structure, there is, unfortunately, nothing in the United States Constitution that says they may not do so.

Justice WHITE, with whom Justice REHNQUIST joins, dissenting.

At common law, "a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony onot committed in his presence if there was reasonable ground for making the arrest." United States v. Watson, 423 U.S. 411, 418, 96 S.Ct. 820, 825, 46 L.Ed.2d 598 (1976). But the requirement that a misdemeanor must have occurred in the officer's presence to justify a warrantless arrest is not grounded in the Fourth Amendment, see Street v. Surdyka, 492 F.2d 368, 371–372 (CA4 1974); 2 W. LaFave, Search and Seizure § 5.1 (1978), and we have never held that a warrant is constitutionally required to arrest for nonfelony offenses occurring out of the officer's presence. Thus, "it is generally recognized today that the common law authority to arrest without a warrant in misdemeanor cases may be enlarged by statute, and this has been done in many of the states." E. Fisher, Laws of Arrest 130 (1967); see ALI, Model Code of Pre–Arraignment Procedure, Appendix X (1975); 1 C. Alexander, The Law of Arrest 445–447 (1949); Wilgus, Arrest Without a Warrant, 22 Mich.L.Rev. 541, 673, 706 (1924).

Wisconsin is one of the States that have expanded the common-law authority to arrest for nonfelony offenses. Wisconsin Stat. § 345.22 (Supp.1983–1984) provides that "[a] person may be arrested without a warrant for the violation of a traffic regulation if the traffic officer has reasonable grounds to believe that the person is violating or has violated a traffic regulation." Relying on this statutory authority, officers of the Madison Police Department arrested Edward Welsh in a bedroom in his home for violating Wis.Stat. § 346.63(1) (1977), which proscribes the operation of a motor ***757** vehicle while intoxicated. Welsh refused to submit to a breath or blood test, and his operator's license was eventually revoked for 60 days for this reason pursuant to Wis.Stat. § 343.305 (1975).

In the civil license revocation proceeding, Welsh argued that his arrest in his house without a warrant was unconstitutional under the Fourth and Fourteenth Amendments to the Federal Constitution and that his refusal to submit to the test could not be used against him. This contention was not based on the proposition that using the refusal in the revocation proceeding would contravene federal law, but rather rested on the fact that Wis.Stat. § 343.305(2)(b)(5) (1975) had been interpreted to require that an arrest be legal if a refusal to be tested is to be the basis for a license revocation.

On review of the license revocation, the Supreme Court of Wisconsin appears to have recognized that, under the Wisconsin statute, Welsh's license was wrongfully revoked if the officers who arrested him had violated the Federal Constitution. 108 Wis.2d 319, 321 N.W.2d 245 (1982). See Scales v. State, 64 Wis.2d 485, 494, 219 N.W.2d 286, 292 (1974). The court acknowledged that "the individual's right to privacy in the home is a fundamental freedom" and made clear that the State bore the burden of establishing exigent circumstances justifying a warrantless in-home arrest. 108 Wis.2d, at 327, 321 N.W.2d, at 250. But it discerned a strong state interest in combating driving under the influence of alcohol, id., at 334–335, 321 N.W.2d, at 253–254, and held that the warrantless arrest was proper because (1) the officers were in hot pursuit of a defendant seeking to avoid a chemical sobriety test; (2) Welsh posed a potential threat to public safety; and (3) "[w]ithout an immediate blood alcohol test, highly reliable and persuasive evidence facilitating the state's proof of [Welsh's] alleged violation ... would be destroyed." Id., at 338, 321 N.W.2d, at 255. For two reasons, I would ****2102** not overturn the judgment of the Supreme Court of Wisconsin.

***758** First, it is not at all clear to me that the important constitutional question decided today should be resolved in a case such as this. Although Welsh argues vigorously that the State violated his federal constitutional rights, he at no point relied on the exclusionary rule, and he does not contend that the Federal Constitution or federal law provides the remedy he seeks. As a general rule, this Court "reviews judgments, not statements in opinions." Black v. Cutter Laboratories, 351 U.S. 292, 297, 76 S.Ct. 824, 827, 100 L.Ed. 1188 (1956). Because the Court does not purport to hold that federal law requires the conclusion that Welsh's refusal to submit to a sobriety test was reasonable, it is not clear to me how the judgment of the Supreme Court of Wisconsin offends federal law.

It is true that under the Wisconsin statutory scheme, an arrestee's refusal to take a breath or blood test would be reasonable and would not justify revocation of operating privileges if the underlying arrest violated the Fourth Amendment or was otherwise unlawful. What the State has done, however, is to attach consequences to an arrest found unlawful under the Federal Constitution that we have never decided federal law itself would attach. The Court has occasionally taken jurisdiction over cases in which the States have provided remedies for violations of federally defined obligations. E.g., Moore v. Chesapeake & Ohio R. Co., 291 U.S. 205, 54 S.Ct. 402, 78 L.Ed. 755 (1934). But it has done so in contexts where state remedies are employed to further federal policies. See Greene, Hybrid State Law in the Federal Courts, 83 Harv.L.Rev. 289, 300 (1969). The Fourth Amendment of course applies to the police conduct at issue here. In providing that a driver may reasonably refuse to submit to a sobriety test if he was unlawfully arrested, Wisconsin's Legislature and courts are pursuing a course that they apparently hope will reduce police illegality and safeguard their citizens' rights. Although the State is entitled to draw this conclusion and to implement it as a matter of state law, I am very doubtful that the policies underlying the Fourth Amendment would ***759** require exclusion of the fruits of an illegal arrest in a civil proceeding to remove from the highways a person who insists on driving while under the influence of alcohol. If that is the case—if it would violate no federal policy to revoke Welsh's license even if his arrest was illegal—there is no satisfactory reason for us to review the Supreme Court of Wisconsin's judgment affirming the revocation, even if that court mistakenly applied the Fourth Amendment. For me, this is ample reason not to disturb the judgment.

In any event, I believe that the state court properly construed the Fourth Amendment. It follows from Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), that warrantless nonfelony arrests in the home are prohibited by the Fourth Amendment absent probable cause and exigent circumstances. Although I continue to believe that the Court erred in Payton in requiring exigent circumstances to justify warrantless in-home felony arrests, id., at 603, 100 S.Ct., at 1388 (WHITE, J., dissenting), I do not reject the obvious logical implication of the Court's decision. But I see little to commend an approach that looks to "the nature of the underlying offense as an important factor to be considered in the exigent-circumstances calculus." Ante, at 2098.

The gravity of the underlying offense is, I concede, a factor to be considered in determining whether the delay that attends the warrant-issuance process will endanger officers or other persons. The seriousness of the offense with which a suspect may be charged also bears on the likelihood that he will flee and escape apprehension if not arrested immediately. But if, under all the circumstances of a particular case, an officer has probable cause to believe that the delay involved in procuring an arrest warrant will gravely endanger the officer or other persons or will result in the suspect's escape, I perceive no reason to disregard ****2103** those exigencies on the ground that the offense for which the suspect is sought is a "minor" one.

***760** As a practical matter, I suspect, the Court's holding is likely to have a greater impact in cases where the officer acted without a warrant to prevent the imminent destruction or removal of evidence. If the evidence the destruction or removal of which is threatened documents only the suspect's participation in a "minor" crime, the Court apparently would preclude a finding that exigent circumstances justified the warrantless arrest. I do not understand why this should be so.

A warrantless home entry to arrest is no more intrusive when the crime is "minor" than when the suspect is sought in connection with a serious felony. The variable factor, if there is one, is the governmental interest that will be served by the warrantless entry. Wisconsin's Legislature and its Supreme Court have both concluded that warrantless in-home arrests under circumstances like those present here promote valid and substantial state interests. In determining whether the challenged governmental conduct was reasonable, we are not bound by these determinations. But nothing in our previous decisions suggests that the fact that a State has defined an offense as a misdemeanor for a variety of social, cultural, and political reasons necessarily requires the

conclusion that warrantless in-home arrests designed to prevent the imminent destruction or removal of evidence of that offense are always impermissible. If anything, the Court's prior decisions support the opposite conclusion. See Camara v. Municipal Court, 387 U.S. 523, 539–540, 87 S.Ct. 1727, 1736, 1737, 18 L.Ed.2d 930 (1967); McDonald v. United States, 335 U.S. 451, 454–455, 69 S.Ct. 191, 192–193, 93 L.Ed. 153 (1948). See also State v. Penas, 200 Neb. 387, 263 N.W.2d 835 (1978); State v. Niedermeyer, 48 Ore.App. 665, 617 P.2d 911 (1980), cert. denied, 450 U.S. 1042, 101 S.Ct. 1761, 68 L.Ed.2d 239 (1981).

A test under which the existence of exigent circumstances turns on the perceived gravity of the crime would significantly hamper law enforcement and burden courts with pointless litigation concerning the nature and gradation of various crimes. The Court relies heavily on Justice Jackson's ***761** concurring opinion in McDonald v. United States, supra, which, in minimizing the gravity of the felony at issue there, illustrates that the need for an evaluation of the seriousness of particular crimes could not be confined to offenses defined by statute as misdemeanors. To the extent that the Court implies that the seriousness of a particular felony is a factor to be considered in deciding whether the need to preserve evidence of that felony constitutes an exigent circumstance justifying a warrantless in-home arrest, I think that its approach is misguided. The decision to arrest without a warrant typically is made in the field under less-than-optimal circumstances; officers have neither the time nor the competence to determine whether a particular offense for which warrantless arrests have been authorized by statute is serious enough to justify a warrantless home entry to prevent the imminent destruction or removal of evidence.

This problem could be lessened by creating a bright-line distinction between felonies and other crimes, but the Court—wisely in my view—does not adopt such an approach. There may have been a time when the line between misdemeanors and felonies marked off those offenses involving a sufficiently serious threat to society to justify warrantless in-home arrests under exigent circumstances. But the category of misdemeanors today includes enough serious offenses to call into question the desirability of such line drawing. See ALI, Model Code of Pre–Arraignment Procedures 131–132 (Prelim. Draft No. 1, 1965) (discussing ultimately rejected provision abandoning "in-presence" requirement for misdemeanor arrests). If I am correct in asserting that a bright-line distinction between felonies and misdemeanors is untenable and that the need to prevent the ****2104** imminent destruction or removal of evidence of some nonfelony crimes can constitute an exigency justifying warrantless in-home arrests under certain circumstances, the Court's approach will necessitate a case-by-case evaluation of the seriousness of ***762** particular crimes, a difficult task for which officers and courts are poorly equipped.

Even if the Court were correct in concluding that the gravity of the offense is an important factor to consider in determining whether a warrantless in-home arrest is justified by exigent circumstances, it has erred in assessing the seriousness of the civil-forfeiture offense for which the officers thought they were arresting Welsh. As the Court observes, the statutory scheme in force at the time of Welsh's arrest provided that the first offense for driving under the influence of alcohol involved no potential incarceration. Wis.Stat. § 346.65(2) (1975). Nevertheless, this Court has long recognized the compelling state interest in highway safety, South Dakota v. Neville, 459 U.S. 553, 558–559, 103 S.Ct. 916, 919–920, 74 L.Ed.2d 748 (1983), the Supreme Court of Wisconsin identified a number of factors suggesting a substantial and growing governmental interest in apprehending and convicting intoxicated drivers and in deterring alcohol-related offenses, 108 Wis.2d, at 334–335, 321 N.W.2d, at 253–254, and recent actions of the Wisconsin Legislature evince its "belief that significant benefits, in the reduction of the costs attributable to drunk driving, may be achieved by the increased apprehension and conviction of even first time ... offenders." Note, 1983 Wis.L.Rev. 1023, 1053.

The Court ignores these factors and looks solely to the penalties imposed on first offenders in determining whether the State's interest is sufficient to justify warrantless in-home arrests under exigent circumstances. Ante, at 2099–2100. Although the seriousness of the prescribed sanctions is a valuable objective indication of the general normative judgment of the seriousness of the offense, Baldwin v. New York, 399 U.S. 66, 68, 90 S.Ct. 1886, 1887, 26 L.Ed.2d 437 (1970) (plurality opinion), other evidence is available and should not be ignored. United States v. Craner, 652 F.2d 23, 24–27 (CA9 1981); United States v. Woods, 450 F.Supp. 1335, 1340 (Md.1978); Brady v. Blair, 427 F.Supp. 5, 9 (SD Ohio 1976). Although first offenders are subjected ***763** only to civil forfeiture under the Wisconsin statute, the seriousness with which the State regards the crime for which Welsh was arrested is evinced by (1) the fact that defendants charged with driving under the influence are guaranteed the right to a jury trial, Wis.Stat. § 345.43 (1981–1982); (2) the legislative authorization of warrantless arrests for traffic offenses occurring outside the officer's presence, Wis.Stat. § 345.22 (1981–1982); and (3) the collateral consequence of mandatory license

revocation that attaches to all convictions for driving under the influence, Wis.Stat. § 343.30(1q) (1981–1982). See also District of Columbia v. Colts, 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 177 (1930); United States v. Craner, supra. It is possible, moreover, that the legislature consciously chose to limit the penalties imposed on first offenders in order to increase the ease of conviction and the overall deterrent effect of the enforcement effort. See Comment, 35 Me.L.Rev. 385, 395, n. 35, 399–400, 403 (1983).

In short, the fact that Wisconsin has chosen to punish the first offense for driving under the influence with a fine rather than a prison term does not demand the conclusion that the State's interest in punishing first offenders is insufficiently substantial to justify warrantless in-home arrests under exigent circumstances. As the Supreme Court of Wisconsin observed, "[t]his is a model case demonstrating the urgency involved in arresting the suspect in order to preserve evidence of the statutory violation." 108 Wis.2d, at 338, 321 N.W.2d, at 255. We have previously recognized that "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." **2105 Schmerber v. California, 384 U.S. 757, 770, 86 S.Ct. 1826, 1835, 16 L.Ed.2d 908 (1966). Moreover, a suspect could cast substantial doubt on the validity of a blood or breath test by consuming additional alcohol upon arriving at his home. In light of the promptness with which the officers reached Welsh's house, therefore, I would hold that the need to prevent the imminent and ongoing destruction of evidence of a serious *764 violation of Wisconsin's traffic laws provided an exigent circumstance justifying the warrantless in-home arrest. See also, e.g., People v. Ritchie, 130 Cal.App.3d 455, 181 Cal.Rptr. 773 (1982); People v. Smith, 175 Colo. 212, 486 P.2d 8 (1971); State v. Findlay, 259 Iowa 733, 145 N.W.2d 650 (1966); State v. Amaniera, 132 N.J.Super. 597, 334 A.2d 398 (1974); State v. Osburn, 13 Ore.App. 92, 508 P.2d 837 (1973).

I respectfully dissent.

All Citations

466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732

Footnotes

a1 The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed.2d (1906).

1 The state trial court never decided whether there was consent to the entry because it deemed decision of that issue unnecessary in light of its finding that exigent circumstances justified the warrantless arrest. After reversing the lower court's finding of exigent circumstances, the Wisconsin Court of Appeals remanded for full consideration of the consent issue. See State v. Welsh, 102 Wis.2d 727, 308 N.W.2d 772 (App.1981). That remand never occurred, however, because the Supreme Court of Wisconsin reversed the Court of Appeals and reinstated the trial court's judgment. See 108 Wis.2d 319, 321 N.W.2d 245 (1982). For purposes of this decision, therefore, we assume that there was no valid consent to enter the petitioner's home.

2 Since the petitioner's arrest, § 346.63 has been amended to provide that it is a code violation to drive or operate a motor vehicle while under the influence of an intoxicant or while evidencing certain blood- or breath-alcohol levels. See Wis.Stat. §§ 346.63(1)(a), (b) (1981–1982). This amendment, however, has no bearing on the issues raised by the present case.

3 Since the petitioner's arrest, this statute also has been amended, with the current version found at Wis.Stat. § 343.305 (1981–1982). Although the procedures to be followed by the law enforcement officer and the arrestee have remained essentially unchanged, §§ 343.305(3), (8), the potential length of any revocation of operating privileges has been increased, depending on the arrestee's prior driving record, §§ 343.305(9)(a), (b). An arrestee who improperly refuses to submit to a required test may also be required to comply with an assessment order and a driver safety plan, §§ 343.305(9)(c)–(e). These amendments, however, also have no direct bearing on the issues raised by the present case.

4 "The implied consent law does not limit the right to take a blood sample as an incident to a lawful arrest. It should be emphasized, however, that the arrest, and therefore probable cause for making it, must precede the taking of the blood sample. We conclude that the sample was constitutionally taken incident to the lawful arrest." 64 Wis.2d, at 494, 219 N.W.2d, at 292 (emphasis added).

Nor is there any doubt that the Supreme Court of Wisconsin applies federal constitutional standards when determining whether an arrest, even for a nonjailable traffic offense, is lawful. The court, for example, explained the basis for its holding in this case as

follows: "The trial court revoked the defendant's motor vehicle operator's license for sixty days pursuant to his unreasonable refusal to submit to a breathalyzer test, as required by [[[state statute].

"The defendant challenges the officer's warrantless arrest in his residence as violating the Fourth Amendment of the United States Constitution and Article I, section 11 of the Wisconsin Constitution. The [trial court] upheld this warrantless arrest concluding that probable cause to believe that the defendant had been operating a motor vehicle while under the influence of an intoxicant, coupled with the existence of exigent circumstances, justified the officers' entry into the defendant's residence.... [T]he court of appeals reversed the trial court, holding that, although the officers' warrantless arrest was unreasonable, thereby violating the Fourth and Fourteenth Amendments, the absence of a finding regarding the consensual entry necessitated remanding the case on that issue. We affirm the findings of the [trial court], holding that the co-existence of probable cause and exigent circumstances in this case justifies the warrantless arrest....

"To prevail in this case, the state must prove the co-existence of probable cause and exigent circumstances, justifying the officer's conduct at the defendant's residence. We hold that there was ample evidence supporting the trial court's ruling that the officer's entry was justified on the basis of both probable cause and exigent circumstances. Entry to effect a warrantless arrest in a residence is subject to the limitations imposed by both the United States and the Wisconsin Constitutions. U.S. Const. amend. IV; Wis. Const. art. I, sec. 11." 108 Wis.2d, at 320–321, 326–327, 321 N.W.2d, at 246–247, 249–250 (emphasis added) (citations and footnotes omitted).

5 Because state law provides that evidence of the petitioner's refusal to submit to a breath test is inadmissible if the underlying arrest was unlawful, this case does not implicate the exclusionary rule under the Federal Constitution.

6 The petitioner was charged with a criminal misdemeanor because this was his second such citation in the previous five years. See § 346.65(2) (1975). Although the petitioner was subject to a criminal charge, the police conducting the warrantless entry of his home did not know that the petitioner had ever been charged with, or much less convicted of, a prior violation for driving while intoxicated. It must be assumed, therefore, that at the time of the arrest the police were acting as if they were investigating and eventually arresting for a nonjailable traffic offense that constituted only a civil violation under the applicable state law. See Beck v. Ohio, 379 U.S. 89, 91, 96, 85 S.Ct. 223, 225, 228, 13 L.Ed.2d 142 (1964).

7 When ruling from the bench after the refusal hearing, the trial judge specifically indicated: "[T]he Court is bound by its earlier ruling that that was a valid arrest. And, I think [counsel for the petitioner] certainly will have the right to challenge that on appeal if he appeals this matter, as well as the previous ruling should there be a conviction on the underlying charge." App. 111. See also id., at 112–113.

8 The court remanded the case for further findings as to whether the police had entered the petitioner's home with consent. See n. 1, supra.

9 Although the state courts differed in their respective conclusions concerning exigent circumstances, they each found that the facts known to the police at the time of the warrantless home entry were sufficient to establish probable cause to arrest. The petitioner has not challenged that finding before this Court.

The parallel criminal proceedings against the petitioner, see supra, at 2096, and n. 6, resulted in a misdemeanor conviction for driving while intoxicated. During the jury trial, held in early 1982, the State introduced evidence of the petitioner's refusal to submit to a breath test. His appeal from that conviction, now before the Wisconsin Court of Appeals, has been stayed pending our decision in this case. See Brief for Petitioner 17, n. 5.

10 In Johnson, Justice Jackson eloquently explained the warrant requirement in the context of a home search:

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.... The right of officers to thrust themselves into a home is ... a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." 333 U.S., at 13–14, 68 S.Ct., at 369 (footnote omitted).

11 Our decision in Payton, allowing warrantless home arrests upon a showing of probable cause and exigent circumstances, was also expressly limited to felony arrests. See, e.g., 445 U.S., at 574, 602, 100 S.Ct., at 1374, 1388. Because we conclude that, in the

circumstances presented by this case, there were no exigent circumstances sufficient to justify a warrantless home entry, we have no occasion to consider whether the Fourth Amendment may impose an absolute ban on warrantless home arrests for certain minor offenses.

12 Even the dissenters in Payton, although believing that warrantless home arrests are not prohibited by the Fourth Amendment, recognized the importance of the felony limitation on such arrests. See id., 445 U.S., at 616–617, 100 S.Ct., at 1395–1396 (WHITE, J., joined by BURGER, C.J., and REHNQUIST, J., dissenting) ("The felony requirement guards against abusive or arbitrary enforcement and ensures that invasions of the home occur only in case of the most serious crimes").

13 See generally Donnino & Girese, Exigent Circumstances for a Warrantless Home Arrest, 45 Albany L.Rev. 90 (1980); Harbaugh & Faust, "Knock on Any Door"—Home Arrests After Payton and Steagald, 86 Dick.L.Rev. 191, 220–233 (1982); Note, Exigent Circumstances for Warrantless Home Arrests, 23 Ariz.L.Rev. 1171 (1981).

14 Nor do we mean to suggest that the prevention of drunken driving is not properly of major concern to the States. The State of Wisconsin, however, along with several other States, see, e.g., Minn.Stat. § 169.121 subd. 4 (1982); Neb.Rev.Stat. § 39–669.07(1) (Supp.1983); S.D.Codified Laws § 32–23–2 (Supp.1983), has chosen to limit severely the penalties that may be imposed after a first conviction for driving while intoxicated. Given that the classification of state crimes differs widely among the States, the penalty that may attach to any particular offense seems to provide the clearest and most consistent indication of the State's interest in arresting individuals suspected of committing that offense.

15 On remand, the state courts may consider whether the petitioner's arrest was justified because the police had validly obtained consent to enter his home. See n. 1, supra.

408 F.3d 52
United States Court of Appeals,
First Circuit.

UNITED STATES of America, Appellee,

v.

Luis B. FORNIA–CASTILLO, Defendant, Appellant.

Nos. 03–1069, 03–1070.
|
Heard Sept. 15, 2004.
|
Decided May 27, 2005.

Synopsis

Background: Defendant was convicted in the United States District Court for the District of Puerto Rico, Gene Carter, Senior District Judge, and Juan M. Pérez–Giménez, J., of conspiracy to distribute in excess of five kilograms of cocaine and possession with intent to distribute in excess of five kilograms of cocaine, and he appealed.

Holdings: The Court of Appeals, Lipez, Circuit Judge, held that:

district court committed no clear error in determining that defendant's consent to search of his car trunk was valid;

officer's valid investigatory stop of suspect did not transform into de facto arrest;

prosecution did not constructively amend indictment;

defendant's prosecution for drug possession was not barred by Double Jeopardy Clause; and

remand for resentencing was required.

Convictions affirmed; sentences vacated and remanded.

Appeal from the United States District Court for the District of Puerto Rico, Gene Carter, Senior District Judge*

Attorneys and Law Firms

***55** G. Richard Strafer, with whom Luis Fornia–Castillo, pro se ipso, was on brief, for appellant.

Edwin O. Vázquez–Berrios, Assistant United States Attorney, with whom H.S. Garcia, United States Attorney, and Sonia I. Torres–Pabón, Assistant United States Attorney, were on brief, for appellee.

Before SELYA, Circuit Judge, COFFIN, Senior Circuit Judge, and LIPEZ, Circuit Judge.

Opinion

LIPEZ, Circuit Judge.

Defendant-appellant Luis B. Fornia–Castillo was indicted, tried, and convicted on a single count of conspiracy to distribute in excess of five kilograms of cocaine in violation of 21 U.S.C. § 846. He then sought to dismiss, on double jeopardy grounds, a second indictment charging him with another count of conspiracy under 21 U.S.C. § 846 and four substantive counts of possession with intent to distribute in excess of five kilograms of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A), and aiding and abetting others in those ***56** offenses in violation of 18 U.S.C. § 2. After the government dismissed the second conspiracy count, the court denied Fornia's motion to dismiss the second indictment. Fornia then pled guilty to each of the four remaining substantive offense counts, expressly reserving his right to appeal those convictions on double jeopardy grounds. Fornia was sentenced in separate hearings to consecutive terms of 210 months' imprisonment for the conspiracy conviction and 365 months' imprisonment for the four substantive counts (to run concurrently to each other), for a total term of imprisonment of approximately 48 years. Fornia appeals his convictions and sentences.

With respect to his conspiracy conviction, Fornia argues that: (1) the trial court erroneously denied his motion to suppress evidence obtained in violation of his Fourth Amendment right to protection against unreasonable searches and seizures and his Fifth Amendment right to protection against self-incrimination; (2) his pre-trial counsel rendered constitutionally defective representation at his suppression hearing in violation of his Sixth Amendment right to effective assistance of counsel; and (3) the government violated his Fifth Amendment right to indictment by a grand jury by constructively amending the indictment after its presentment to the grand jury. With respect to his pleas to the substantive offenses, Fornia argues that the prosecution was barred by the Double Jeopardy Clause of the Fifth Amendment because the government failed to exercise due diligence either by seeking a superseding indictment to the initial conspiracy charge or by promptly joining both cases for prosecution.[1] Fornia also assigns numerous errors to his sentences, including the claim that the court imposed mandatory sentence enhancements in each case based solely on judicial fact-finding, thereby increasing the maximum sentence otherwise authorized by jury-found or admitted facts in violation of *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

After careful consideration of each of Fornia's claims, tested against the record on appeal, we affirm Fornia's convictions. Because we are not "convinced that a lower sentence would not have been imposed" under a post-*Booker,* non-mandatory Guidelines regime, *United States v. Vázquez–Rivera,* 407 F.3d 476, 490, 2005 WL 1163672 at *10, (1st Cir.2005), we vacate all of the sentences and remand both cases for resentencing.

I. BACKGROUND

We recount the facts, consistent with record support, in the light most favorable to the jury's guilty verdict on the conspiracy charge, *United States v. Gonzalez–Maldonado,* 115 F.3d 9, 12 (1st Cir.1997), and as found by the district court after a suppression hearing, *United States v. Ngai Man Lee,* 317 F.3d 26, 30 (1st Cir.2003). We reserve further details for our analysis of Fornia's individual claims.

On the afternoon of September 9, 1999, Drug Enforcement Administration ("DEA") Task Force agents conducting visual surveillance of suspected drug conspirators outside a furniture store witnessed several people entering and exiting the store with small boxes and bags that the agents had reason to believe contained ***57** illegal drugs or drug proceeds.[2] Later that day, two suspects left the store carrying a large bag, which they placed in the trunk of a car. Agents followed the two men as they drove the car from the furniture store to a bakery, where they met a third man unknown to the agents, who was later identified as Fornia. The agents observed the men transferring the contents of the car trunk to the trunk of Fornia's car, and began following Fornia as he drove away from the bakery alone.

At around 7:45 PM, agents instructed a member of the Task Force who was a local police officer in uniform to pull Fornia over under the pretense of investigating a report of a car stolen from a nearby shopping center whose description matched Fornia's car. After identifying Fornia through his driver's license and car registration, the officer obtained Fornia's consent to search the car, including a garbage bag in the trunk, which contained several smaller bags and a shoe box, all filled with large amounts of cash. Once the officer saw the cash, he handcuffed Fornia and frisked him, finding no weapon.[3] While Fornia was handcuffed, the officer signaled for assistance from two local police officers who were not part of the Task Force but who happened to be patrolling the area. Fornia remained handcuffed until another Task Force member arrived on the scene, pretending to be another police officer in charge of security at the shopping center parking lot, and ordered the handcuffs removed.

The newly arrived agent informed Fornia that the money would have to be turned over either to the tax authorities, who would take the cash, deduct a portion, and return the remainder to Fornia by check, or, in the alternative, to the DEA. Fornia stated several times that he would prefer to turn the money over to the tax authorities, observing that their procedure resembled money laundering. Instead, the officers awaited the arrival of DEA agents, all of whom were members of the Task Force investigating the suspected drug conspiracy. When the DEA agents arrived, they told Fornia that he was not under arrest for carrying a large quantity of cash. The agents questioned Fornia about his recent whereabouts and asked where he was going with the large amount of cash. Fornia did not mention that he had been at the bakery, but replied that he had bought coffee at the shopping center and that he was bringing the money to his mother-in-law's house to be stored. The agents then seized the money and asked Fornia to go to the DEA office for further questioning. Fornia agreed and drove his own car to the DEA office, where he answered additional questions. Fornia was then given a receipt for the cash and left the DEA office.

On April 26, 2000, a federal grand jury returned a sealed indictment ("I96") charging 26 named individuals, including Fornia, and unknown co-conspirators with a solitary count of conspiracy to distribute in excess of five kilograms of cocaine in violation of 21 U.S.C. § 846 during a time period beginning "not later than the summer of 1997" and continuing through the date of the indictment. The indictment assigned each named individual a number and described his or her alleged role within the conspiracy. Fornia, # 21, was included ***58** among # 16–23 as "transporters of drug[s] or money."[4] The indictment also alleged 74 overt acts, "among others," committed in furtherance of the conspiracy. Fornia's name appeared only once in the list of overt acts, in paragraph 50, which alleged that "[o]n September 9, 1999, (2) Fernando TORRES–Fernandez and (20) Osvaldo VILLEGAS–Rivera delivered to (21) Luis FORNIA–Castillo approximately Two Hundred Eighty–One Thousand and Nine Hundred Twenty–Six Dollars ($281,926.00) of drug proceeds" (emphasis omitted).

The indictment was unsealed on May 1, 2000, and Fornia was arrested on a warrant that day. He was later released on bail. On December 27, 2000, Fornia moved to suppress the evidence, including his statements, obtained as a result of the September 9, 1999 stop and search of his car and his subsequent interview at the DEA office. After an evidentiary hearing before Judge Casellas on February 5–6, 2001, the motion was denied.[5] By March 2001, each of Fornia's 25 co-defendants in I96 had pled guilty.

On August 1, 2001, a federal grand jury returned a sealed indictment ("I528") charging 15 named individuals, including Fornia and one other person who had also been indicted in I96,[6] and others unknown, with conspiracy to distribute in excess of five kilograms of cocaine in violation of 21 U.S.C. § 846 during a time period beginning "on or about the end part of 1996" and continuing through the date of the indictment. As in I96, all of the conduct alleged against Fornia in I528 took place no earlier than "the summer of 1997." I528 identified Fornia as # 1, "owner of drugs."[7] The indictment also charged Fornia with four additional counts alleging substantive offenses in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A), and aiding and abetting others in those offenses in violation of 18 U.S.C. § 2. The substantive offenses were also alleged as overt acts # 4–6 and # 10 committed in furtherance of the conspiracy charged in Count One.

Specifically, Count Two alleged that Fornia, indicted co-conspirators # 2 and # 6, and an unindicted co-conspirator possessed with intent to distribute approximately 50 kilograms of cocaine "[o]n or about the end part of 1997." Count Three alleged that Fornia, the same indicted co-conspirators, and an unindicted co-conspirator possessed with intent to distribute the same quantity

of cocaine "[o]n or about the beginning of 1998." Count Four alleged that Fornia, indicted co-conspirator # 3, and an unindicted co-conspirator possessed with intent to distribute approximately 40 kilograms of cocaine "[o]n or about August[ ] 1999," and Count Five alleged that ***59** Fornia and an unindicted co-conspirator possessed with intent to distribute approximately 30 kilograms of cocaine "[o]n or about October[ ] 1999."[8] Additional overt acts alleged in furtherance of the conspiracy included three instances of drug-related payments, including an expanded version of paragraph 50 of I96 alleging that "[o]n September 9, 1999, ... OSVALDO VILLEGAS RIVERA[ ] and an unindicted co-conspirator delivered to ... LUIS B. FORNIA–CASTILLO approximately $281,926.00 of drug proceeds, money related to over[t] acts Nos. 6 and 7 herein" (emphasis omitted). The money was also related to the facts alleged in support of the substantive offense charged in Count Three. Fornia was arrested on the second set of charges on August 30, 2001 and held without bail.

On April 15, 2002, more than eight months later and during the week when Fornia's jury trial in I96 was scheduled to begin before Judge Carter (who was sitting by designation), the government moved at a pre-trial status conference, over Fornia's objection, to consolidate I96 and I528 for trial and sentencing.[9] Judge Carter denied the motion, stating: "We are going to try this case." In a written motion filed the next day upon the court's instruction, the government explained its reasons for seeking joinder and for seeking a second indictment instead of a superseding indictment in I96:[10]

> The counts contained in both indictment[s] could have been joined in the same indictment since they are of the same or similar character pursuant to Fed. R. Crim P. 8(a). However, since [by] August 1, 2001, [the date on which the second indictment was returned,] all the codefendants with the exception of codefendant Luis B. Fornia–Castillo in [I96] had already pled guilty[,] the government elected to file a separate indictment against fourteen (14) additional codefendants in lieu of supersed[ing] the indictment in [I96].

Fornia's trial in I96 began two days later, on April 18, 2002, and continued for five days. The government's first witness was a member of the DEA Task Force who described the events depicted on a surveillance videotape, including the arrival and departure of suspected co-conspirators at the furniture store on September 9, 1999, the two co-conspirators' rendezvous with Fornia at the bakery, and the subsequent discovery of the bags of cash in Fornia's trunk by investigators during the stop and search of his car.

The government then called an indicted co-conspirator, Fernando Torres–Fernandez, who had pled guilty in I96, as a cooperating witness. Torres testified that sometime in late 1997, Fornia asked him if he had any contacts at the airport who could assist in shipping cocaine to New York. According to Torres, he and two other co-conspirators then met with Fornia to arrange a test shipment of 50 kilograms of cocaine to New York.[11] Torres testified ***60** that when the test shipment, which also involved a fifth individual who worked at the local airport, proved successful, the same group of four co-conspirators arranged a second shipment of more than 50 kilograms of cocaine to New York.[12] The second shipment, however, never arrived at its destination, according to Torres, because the airport worker had been killed and the cocaine lost. Torres testified that the four co-conspirators had gone to the airport several times to try to find the killer.

During Torres' testimony, Fornia's counsel objected several times on hearsay grounds to Torres' reports of statements made by other alleged co-conspirators. After one such objection, the court took judicial notice of the indictment in I528, which was pending before Judge Pérez–Giménez. Because the events Torres described were alleged only in I528, and the co-conspirators to whom Torres referred were indicted only in I528, the court asked the government whether it could show that the co-conspirators were also participants in the conspiracy charged in I96 for purposes of admitting their hearsay statements. The court then asked: "Why have you indicted in two separate indictments, alleging in the indictment all of these transactions in case number 528, and now you are proving those acts and transactions in a separate case, this one bearing number 96. I don't understand what you are trying to do." The government responded that "at the time [I96 and I528] were indicted, they were separate conspirac[ies]."[13] The court warned, "You can't convict the same defendant two times [for the same conspiracy]." The court then permitted the government to proceed with its direct examination of Torres, advising the government that it would not admit co-conspirator hearsay "until you tell me that you can connect those co-conspirators to this conspiracy and not just to the other [one in I528]."

Torres next testified that on September 9, 1999, he had collected money from several people in order to pay Fornia for about 40 kilograms of cocaine Torres had purchased from him at a price of $13,000 per kilogram. Torres testified that the cash seized from Fornia later that same day represented partial payment for the drugs after successful resale.[14] Torres ***61** also identified a paper bag and a shoe box that had been used to hold the cash, and identified his handwriting on the containers recording the amount of cash held in each. Torres went on to state that on September 10, 1999, Fornia had informed him that the cash had been seized by the DEA the previous day, but that Fornia planned to recover the cash through a suppression motion or by characterizing the money as proceeds from his legal motorcycle business. Torres then described new installment payment procedures Fornia devised for receiving future payments in order to avoid the possibility of any additional seizures of large amounts of cash. Finally, Torres described one additional incident that took place after September 9, 1999, in which Fornia supplied him with about 30 kilograms of cocaine.[15]

After the government rested its case, Fornia moved for an acquittal. His counsel stated that

> because this case ... involved a conspiratorial time period that would overlap with [I528], it appears that the evidence that has been brought here is partially from [I528] and ... because of that, I don't know how we can decide whether this particular conspiracy has been set forth with all of the elements.

The court asked the government how, in the event Fornia was convicted in I96, he would "prove[ ] in the other court that he has already been convicted of the same conduct that he is charged with [in I528]?" In response, the government continued to assert that the conspiracy alleged in I528 was different from the one for which Fornia was being tried in I96. Eventually, however, the government represented that it would request dismissal of the conspiracy count against Fornia in I528.

On April 24, 2002, the jury found Fornia guilty of conspiracy and found that the quantity of cocaine involved in the offense exceeded five kilograms. On April 26, 2002, Fornia moved for a new trial alleging that "the government's failure to provide required pretrial disclosure materially prejudiced [his] right to a fair trial" and that "by falsely indicting and prosecuting [Fornia] for two conspiracies when it knew there was only one, the government deprived [him] of a fair trial." On June 6, 2002, Fornia also moved in I96 to "confirm consolidation" of his cases on the ground that, *inter alia,* they involved the same alleged conspiracy. The government opposed Fornia's motion to confirm consolidation of the cases, arguing that: (1) consolidation had already been denied; (2) "no substantial public interest [would] be promoted" by consolidation "[a]t this stage of the proceedings"; and (3) Fornia was estopped from seeking consolidation or had waived the claim because he had opposed the government's earlier motion, filed on the eve of trial, to consolidate the cases. On June 25, 2002, Judge Carter denied both Fornia's motion for a new trial and his motion to confirm consolidation of the cases, noting that any double jeopardy concerns could adequately be addressed by Judge Pérez–Giménez in I528.

On July 1, 2002, Fornia filed a motion to dismiss I528 on double jeopardy grounds. As promised, the government dismissed the conspiracy count against Fornia in I528 on July 3, 2002. Fornia then moved in I528 for a change of plea.[16] At the ***62** change-of-plea hearing on July 15, 2002, Judge Pérez–Giménez denied Fornia's motion to dismiss I528. Fornia then pled guilty to the four remaining counts charging him with substantive drug offenses. Although Fornia did not enter into a plea agreement with the government, he expressly reserved the right to appeal his conviction in I528 on double jeopardy grounds, citing *Menna v. New York,* 423 U.S. 61, 62–63, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) (per curiam) (guilty plea does not automatically waive double jeopardy claim).

On October 8, 2002, Judge Carter recused himself from sentencing, and the case was reassigned to Judge Pérez–Giménez. Fornia moved in I528 to consolidate both cases for sentencing on October 25, 2002, but Judge Pérez–Giménez denied the motion. On the morning of December 5, 2002, Judge Pérez–Giménez sentenced Fornia in I96 to 210 months' imprisonment. That afternoon, in a separate sentencing hearing, the court sentenced Fornia in I528 to 365 months' imprisonment to run concurrently as to the four substantive counts, but consecutive to the sentence in I96. Fornia timely appealed his convictions and his sentences.

II. I96 CONSPIRACY CONVICTION

A. Suppression of Evidence

1. Validity of Consent to Search

We construe Fornia's Fourth Amendment claim, which he raises in a pro se brief, as a renewal of his challenge to the voluntariness of his consent to the search of the bag in his car trunk. *See United States v. Weidul,* 325 F.3d 50, 53 (1st Cir.2003) (consent to a warrantless search "must be voluntary to be valid"). Fornia alleges that his consent was invalid because it was coerced by the police officer's drawing of his gun after Fornia opened the car trunk, requiring suppression of the bags of cash contained within the larger bag in the trunk. "Typically, whether consent is voluntary turns on questions of fact, determinable from the totality of the circumstances. For that reason, a finding of voluntary consent (other than one based on an erroneous legal standard) is reviewable only for clear error, and the trial court's credibility determinations ordinarily must be respected." *United States v. Romain,* 393 F.3d 63, 69 (1st Cir.2004) (citations omitted).

During the suppression hearing, Officer Alverio, the police officer who initially stopped Fornia, testified that after Fornia consented to a search of the car and opened the trunk to reveal a large bag, he asked Fornia if he would mind opening the bag. When Fornia began to open the bag, Officer Alverio testified that he drew his gun in a "defensive position"—out of Fornia's visual range and pointing at the ground—because it was too dark for him to be able to see whether the trunk contained any weapons. The district court determined that Officer Alverio "provided credible undisputed testimony that Fornia voluntarily agreed to allow him to search the vehicle and to examine the trunk."[17] The court specifically found that the officer "kept [the gun] out of Fornia's view[ ] and at his side, and placed it back in his holster when Fornia stepped away from the trunk, all of which were confirmed by the [surveillance] ***63** video" played during the hearing. The court further found that "the video shows Fornia willingly reach[ing] in to the open trunk of the vehicle and open[ing] the bags containing the money."

Because "the evidence presented at the suppression hearing fairly supports" the district court's factual findings, *United States v. Laine,* 270 F.3d 71, 75 (1st Cir.2001), the district court committed no clear error in determining that Fornia's consent to the search of the car trunk was valid. Based on those findings, the court properly denied Fornia's motion to suppress the evidence obtained during the stop.

2. *Miranda* Claim

Fornia argues that the statements he made during his entire encounter with the Task Force agents, including those made at the DEA office, should have been suppressed because he was subjected to custodial interrogation without first being advised of his *Miranda* rights, in violation of his Fifth Amendment right to protection against self-incrimination. *See Dickerson v. United States,* 530 U.S. 428, 435, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (failure to give required *Miranda* warnings amounts to Fifth Amendment violation).[18] "*Miranda* warnings must be given before a suspect is subjected to custodial interrogation." *United States v. Ventura,* 85 F.3d 708, 710 (1st Cir.1996). By contrast, "[a]s a general rule, *Terry* stops do not implicate the requirements of *Miranda.*" *United States v. Streifel,* 781 F.2d 953, 958 (1st Cir.1986).[19] This is so "because '*Terry* stops, though inherently somewhat coercive, do not usually involve the type of police dominated or compelling atmosphere which necessitates *Miranda* warnings.' " *Id.* (quoting *United States v. Bautista,* 684 F.2d 1286, 1291 (9th Cir.1982)). A valid investigatory stop may nevertheless escalate into custody, thereby triggering the need for *Miranda* warnings, where the totality of the circumstances shows that a reasonable person would understand that he was being held to "the degree associated with a formal arrest," *Stansbury v. California,* 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994) (per curiam) (internal quotation marks omitted). Relevant factors bearing on whether an investigatory stop has evolved into a de facto arrest include "whether the suspect was questioned in familiar or at least neutral surroundings, the number of law enforcement officers present at the scene, the degree of physical restraint placed upon the suspect, and the duration and character of the interrogation." *Ventura,* 85 F.3d at 711 (internal quotation marks omitted). While we review the court's factual findings for clear error, the ultimate conclusion whether a seizure is a de facto arrest "qualifies for independent review" because it presents a "mixed question of law and fact."

United States v. Trueber, 238 F.3d 79, 91, 93 (1st Cir.2001) (quoting *Thompson v. Keohane,* 516 U.S. 99, 113, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995)).

***64** During the suppression hearing, Officer Alverio testified that once he saw the large quantity of cash contained in the bags in Fornia's car trunk, he re-holstered his weapon and handcuffed and frisked Fornia because he was the sole law enforcement officer on the scene, and, in his personal experience, people who may be traveling with large quantities of drug proceeds may also be armed or may travel with armed escorts. Officer Alverio explained that he did not remove the handcuffs even after the local police officers arrived on the scene to assist him because he did not know the officers.

Fornia argues that the totality of the circumstances establishes that the stop of his car, while initially a valid investigatory stop, escalated into a de facto arrest triggering the need for *Miranda* warnings. Fornia maintains that the combination of the officer's display of a gun, his use of handcuffs and a pat-down search, and his explanation that he was investigating a car theft would have led a reasonable person to believe he was effectively under arrest.[20] In particular, Fornia argues that he was subjected to custodial interrogation because Officer Alverio questioned him while he was handcuffed. Indeed, Officer Alverio testified during the suppression hearing that he asked Fornia where the money in his trunk had come from while Fornia was handcuffed, and that Fornia responded that the money was from his motorcycle business. While the government did not introduce this particular statement at trial, Fornia maintains that the statements he made after the handcuffs were removed in response to questioning by other Task Force agents should have been suppressed because they were derived from the same *Miranda* violation. *See United States v. Byram,* 145 F.3d 405, 409–10 (1st Cir.1998) ("where the *Miranda* violation is not merely technical, where there is a substantial nexus between the violation and the second statement, and where the second statement is not itself preceded by an adequate *Miranda* warning," suppression of subsequent voluntary statements may be warranted).

The district court concluded that Fornia was not subjected to custodial interrogation at any time during the stop and therefore that no *Miranda* violation occurred. The court recognized "two arguably coercive facts" in support of Fornia's *Miranda* violation claims: Officer Alverio's drawing of his gun and his use of handcuffs. As the court correctly noted, however, neither the use of handcuffs nor the drawing of a weapon necessarily transforms a valid *Terry* stop into a de facto arrest. *Trueber,* 238 F.3d at 94 (officer's drawing of weapon while asking suspected narcotics trafficker to step out of vehicle at night does not transform entire investigatory stop into de facto arrest); *United States v. Acosta–Colon,* 157 F.3d 9, 18 (1st Cir.1998) (the "use of handcuffs in the course of an investigatory stop does not automatically convert the encounter into a de facto arrest"). As the court had previously found, Officer Alverio briefly drew his weapon out of Fornia's view and for defensive purposes only. Similarly, based on Officer Alverio's testimony, the district court found that "reasonable safety concerns permeated the [officer's] decision to use [handcuffs]."

While an officer's drawing of his gun and use of handcuffs might in some situations weigh more heavily in favor of a ***65** finding that a detention has escalated into a de facto arrest, the district court found that numerous other factors weighed against such a determination in Fornia's case. Specifically, the court observed that the stop took place at the side of "a busy public street with a heavy volume of traffic," and that, initially, Officer Alverio "was the only officer on the scene." In addition, the court found that "the handcuffs were removed when other surveillance team members arrived, and only remained on [Fornia] for ten or fifteen minutes." Finally, the court noted that "the interaction between the ... officers and Fornia was not confrontational or bellicose."

These factual findings were not clearly erroneous. Based on these findings, the court supportably came to the ultimate conclusion that Fornia's detention was a valid investigatory stop that did not require *Miranda* warnings. While a reasonable person in Fornia's situation would certainly have understood that he was under investigation for a crime, the stop, given the facts as found by the district court, "lacked the coercive element necessary to convert it into something more draconian," based on the totality of the circumstances. *Ngai Man Lee,* 317 F.3d at 32. The district court thus properly denied Fornia's motion to suppress his statements on the ground that they were obtained as a result of a violation of his Fifth Amendment right to protection against self-incrimination.

B. Ineffective Assistance of Counsel

In his pro se brief, Fornia claims that he was deprived of his Sixth Amendment right to effective assistance of counsel at his suppression hearing. Under the Supreme Court's decision in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), to establish such a violation, "a defendant must show that counsel performed unreasonably and that prejudice resulted therefrom." *United States v. Mena–Robles,* 4 F.3d 1026, 1034 (1st Cir.1993). Fornia alleges that his pre-trial counsel performed deficiently by denying him the opportunity to exercise his constitutional right to testify at his suppression hearing, which resulted in the denial of his motion to suppress evidence.[21]

The record on appeal, however, is devoid of facts relating to Fornia's interactions with counsel, including whether counsel informed Fornia of his right to testify at his suppression hearing, informed him of the constitutional nature of that right, or somehow coerced him into forgoing the exercise of that right. *See Lema v. United States,* 987 F.2d 48, 52–53 (1st Cir.1993) (discussing considerations for determining whether defense counsel coerced or merely advised client regarding decision whether to testify). Because the record is insufficiently developed to permit "reasoned consideration of the ineffective assistance claim," *United States v. Glenn,* 389 F.3d 283, 287 (1st Cir.2004), Fornia may raise such a claim only on collateral attack in a proceeding pursuant to 28 U.S.C. § 2255. *See United States v. Genao,* 281 F.3d 305, 313 (1st Cir.2002). We therefore dismiss his ineffective assistance of counsel claim without prejudice to the filing of a § 2255 petition.

C. Constructive Amendment/Prejudicial Variance

Fornia alleges that the government constructively amended the indictment in I96 by introducing evidence of the conspiracy ***66** alleged in I528 to prove the conspiracy charged in I96—in effect, trying him for an offense other than that alleged in I96—in violation of his Fifth Amendment right to presentment of charges to a grand jury. The government argues that Fornia has forfeited his claim of constructive amendment through failure to object to the introduction of evidence on that ground or to seek a continuance or mistrial below. As we have explained, however, after the government rested its case, Fornia's counsel moved for an acquittal on the ground that the conspiracy the government had attempted to prove in I96 was indistinguishable from that charged in I528 and that the evidence was therefore insufficient to prove the conspiracy charged in I96. In his motion for a new trial, Fornia also argued that he had been prejudiced at trial by the government's failure to clarify which of the two charged conspiracies it was attempting to prove in I96. Fornia's claim is thus preserved.

The Presentment Clause of the Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" (with exceptions not relevant to this case). Accordingly, "after an indictment has been returned[,] its charges may not be broadened through amendment except by the grand jury itself." *Stirone v. United States,* 361 U.S. 212, 215–16, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960) (citing *Ex Parte Bain,* 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887)). An indictment has been constructively amended in violation of the Presentment Clause "when the charging terms of the indictment are altered, either literally or in effect, by prosecution or court after the grand jury has last passed upon them." *United States v. Fisher,* 3 F.3d 456, 462 (1st Cir.1993) (internal quotation marks and citation omitted). Such an amendment may occur through the "admission of evidence of an offense not charged by the grand jury." *United States v. Dunn,* 758 F.2d 30, 35 (1st Cir.1985).

Fornia argues specifically that the government tried him for the offense of participating in a conspiracy in which he was an "owner of drugs," as charged in I528, as opposed to the conspiracy charged in I96, in which he was identified as a "transporter[ ] of drug[s] or money" and another individual was identified as the only "head and owner drug point." However, the statutory offense charged against Fornia in I96, and the offense the government proved at trial, was conspiracy to distribute in excess of five kilograms of cocaine in violation of 21 U.S.C. § 846. Role in the conspiracy is not an element of that offense. Thus, Fornia's claim does not involve an alleged constructive amendment of I96 to include "an offense not charged by the grand jury," *Dunn,* 758 F.2d at 35, but rather an alleged variance from the indictment, which "occurs when the charging terms remain unchanged but when the facts proved at trial are different from those alleged in the indictment," *Fisher,* 3 F.3d at 463.

Though related, claims of constructive amendment and prejudicial variance differ in at least one important respect. "A constructive amendment is considered prejudicial per se and grounds for reversal of a conviction." *Id.* By contrast, "[v]ariance is grounds for reversal only if it affected the defendant's substantial rights." *Id.* (internal quotation marks omitted). In short, "[s]o long as the statutory violation remains the same, the jury can convict even if the facts found are somewhat different than those charged—so long as the difference does not cause unfair prejudice." *United States v. Twitty,* 72 F.3d 228, 231 (1st Cir.1995).

***67** Fornia argues that the government's proof at trial impermissibly varied from the allegations in I96 by establishing that his role in the alleged conspiracy was not that of a "transporter[ ] of drug[s] or money" in someone else's drug distribution operation, but that of an "owner of drugs," which Fornia sold to Torres, who, in turn, sold them to co-conspirators indicted in I96. Indeed, while the government introduced evidence that Fornia literally "transport[ed]" drug proceeds in the trunk of his car, the government introduced no evidence whatsoever that Fornia "transport[ed]" the cash in the trunk of his car to or for anyone else. Rather, Torres testified that it was he who distributed the cocaine he purchased from Fornia to the individual identified in the indictment as # 1, "head and owner drug point," and other indicted co-conspirators. Torres also testified that he then collected cash from other co-conspirators and delivered it to Fornia as partial payment for the cocaine Fornia had supplied. Because the government's evidence of Fornia's role in the conspiracy differed from the role of a "transporter[ ] of drug[s] or money" in a conspiracy in which another individual was identified as the "head and owner drug point," as alleged in the indictment in I96, there was a variance between the government's proof at trial and the charge alleged in the indictment.

Nevertheless, Fornia fails to establish any prejudice resulting from the variance. The question "whether a variance affected a defendant's substantial rights" is subject to *de novo* review. *United States v. Wihbey,* 75 F.3d 761, 774 (1st Cir.1996). Fornia points out that the grand jury that returned the indictment in I96 never had an opportunity to assess the government's evidence that he was an owner of drugs, since the government acknowledges that it discovered the facts alleged in I528 only after I96 had already been returned.[22] Fornia's argument misapprehends the nature of the substantial rights protected by the prohibition on prejudicial variance from an indictment, namely, the rights to "have sufficient knowledge of the charge against [one] in order to prepare an effective defense and avoid surprise at trial, and to prevent a second prosecution for the same offense." *United States v. Tormos–Vega,* 959 F.2d 1103, 1115 (1st Cir.1992).[23]

The record shows that Fornia had ample notice of and ample opportunity to prepare to meet the government's evidence before trial. "The government need not recite all of its evidence in the indictment, nor is it limited at trial to the overt acts listed in the indictment." *United States v. Innamorati,* 996 F.2d 456, 477 (1st Cir.1993). Here, however, prior to trial, the government disclosed its intention to introduce evidence in I96 relating to Fornia's ownership of drugs as alleged in I528.[24] That ***68** evidence was relevant to central factual disputes in I96, for example, whether the money in Fornia's trunk represented drug proceeds (as distinct from legal business proceeds), and whether Fornia shared an interest in the sales and distribution activities of others. Further, Fornia's particular role in the conspiracy alleged in I96 was unrelated to his defense theory; rather, Fornia was well aware that his "central defense [in I96] needed to be that he was not part of [the] organization—as a [transporter of drug proceeds, owner of drugs], or in any other capacity." *United States v. Alicea–Cardoza,* 132 F.3d 1, 6 (1st Cir.1997) (no impermissible variance where defendant was indicted "for being a conspirator/triggerman but the evidence proved him a conspirator/runner"). Accordingly, Fornia was not misled by the government's evidence at trial to "defend himself on the wrong grounds." *Id.* Fornia was thus able to "prepare an effective defense and avoid surprise at trial." *Tormos–Vega,* 959 F.2d at 1115.

Finally, the trial court detected the potential for prejudice to Fornia's ability to avoid a successive prosecution for the same offense based on the government's introduction of evidence relating to the charges in I528—including evidence of Fornia's role in that conspiracy—to prove the conspiracy charged in I96. However, as we discuss below in Part III, any such prejudice was cured by the government's dismissal of the conspiracy count in I528. Because the variance failed to affect Fornia's substantial rights, we reject his challenge to his conviction in I96 on the ground of constructive amendment or prejudicial variance.

III. I528 DOUBLE JEOPARDY CLAIM

Fornia appeals the denial of his motion to dismiss the indictment in I528 on double jeopardy grounds. The government argues that Fornia has waived his double jeopardy claim by objecting to its motion to consolidate the cases for trial, thereby "elect[ing] to have the two offenses tried separately and persuad[ing] the trial court to honor his election." *Jeffers v. United States,* 432 U.S. 137, 152, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977) (plurality op.). While the record is silent on Fornia's reasons for objecting to the government's motion, which was made during a pre-trial conference three days before Fornia's trial began in I96, Fornia maintains on appeal that his objection was based solely on his inability to prepare to try both cases on such short notice rather than as an attempt to "persuade" the trial court of his "election" to face separate trials. *Id.* The government points out that Fornia could have sought a continuance. In denying the government's motion, however, Judge Carter, who was sitting in Puerto Rico by special designation for a limited period of time, clearly announced his intention "to try this case," meaning the I96 indictment. Under these circumstances, we treat Fornia's claim as preserved.[25]

The availability of double jeopardy protection is a constitutional question reviewable *de novo. United States v. Lanoue,* 137 F.3d 656, 661 (1st Cir.1998). ***69** Under the Fifth Amendment, no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." Among the purposes for double jeopardy protection is the prevention of "repeated prosecutions for the same offense," *Oregon v. Kennedy,* 456 U.S. 667, 671, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), pursuant to "a constitutional policy of finality for the defendant's benefit," *United States v. Jorn,* 400 U.S. 470, 479, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971) (plurality op.).

Fornia's double jeopardy claim is narrow in scope. While the Double Jeopardy Clause protects against "the danger that, in conspiracy cases, the government might ... partition[ ] a single conspiracy into separate prosecutions" by prohibiting successive prosecutions for conspiracies with identical features, *United States v. Morris,* 99 F.3d 476, 480 (1st Cir.1996), Fornia ultimately faced only one conspiracy prosecution because the second conspiracy count against him was eventually dismissed.[26] Fornia therefore does not allege that he was prosecuted twice for the same violation of the same statute, 21 U.S.C. § 846.

Nor does Fornia make the futile argument that he could not be successively prosecuted in I528 for substantive drug offenses that were the objects of a drug conspiracy for which Fornia had already been prosecuted in I96. Under the traditional test announced in *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932), "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Fornia's sequential prosecutions under different statutes fully satisfy the *Blockburger* test. "In order to establish a violation of 21 U.S.C. § 846, the Government need not prove the commission of any overt acts in furtherance of the conspiracy." *United States v. Shabani,* 513 U.S. 10, 15, 115 S.Ct. 382, 130 L.Ed.2d 225 (1994). Conversely, no agreement need be proven to secure a conviction for a substantive drug offense under 21 U.S.C. § 841(a)(1). Indeed, it has long been established that "conspiracy to commit a crime is not the same offense as the substantive crime for double jeopardy purposes," *Lanoue,* 137 F.3d at 662, because "the agreement to do the act is distinct from the [completed] act itself," *United States v. Felix,* 503 U.S. 378, 390–91, 112 S.Ct. 1377, 118 L.Ed.2d 25 (1992) (internal quotation marks omitted) (adhering to line of cases holding that separate prosecutions for conspiracy and for underlying substantive offenses do not violate the Double Jeopardy Clause).

Fornia attempts to reach shelter under the Double Jeopardy Clause by a different route. He points out that the Supreme Court has suggested that even where a successive prosecution would otherwise be barred under the *Blockburger* test, such a prosecution may nevertheless be permissible under the Double Jeopardy Clause where "the additional facts necessary to sustain [a subsequent] charge ha[d] not [yet] occurred or ha[d] not [yet] been discovered despite the exercise of due diligence" at the time of the first prosecution. ***70** *Brown v. Ohio,* 432 U.S. 161, 169 n. 7, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). Fornia asks us to fashion a new rule by holding that the Double Jeopardy Clause also *prohibits* successive prosecutions that would *not* otherwise be barred under the *Blockburger* test where, in the exercise of due diligence, the government could have brought the prosecutions in the same proceeding. *See* Fed R.Crim. P. 8(a) (permitting joinder of charges against a defendant in the same

indictment "if the offenses charged ... are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan").

Fornia's proposed rule is a barely disguised attempt to resurrect the "same transaction" test for determining when successive prosecutions are barred by the Double Jeopardy Clause. Such a test, "which would require the Government to try together all offenses (regardless of the differences in the statutes) based on one event," has been "consistently rejected by the [Supreme] Court." *United States v. Dixon,* 509 U.S. 688, 709 n. 14, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). Instead, "the performance of a *Blockburger* analysis completes the judicial task in a successive prosecution case." *Morris,* 99 F.3d at 480. Even where, as in Fornia's cases, prosecutions for different offenses may be suitable for joinder, successive prosecutions are permitted under the Double Jeopardy Clause so long as the offenses pass the *Blockburger* test, with its "focus[ ] on the statutory elements of each offense." *United States v. Colon–Osorio,* 10 F.3d 41, 43 (1st Cir.1993). We therefore reject Fornia's claim that his prosecution in I528 was barred by the Double Jeopardy Clause solely because the government, in the exercise of due diligence, could have brought the charges in a superseding indictment or could have more promptly moved to consolidate I96 and I528 for trial.[27]

IV. SENTENCING IN I96 AND I528

A. Background

Under 21 U.S.C. §§ 846 and 841(b)(1)(A), Fornia was subject to a statutory mandatory minimum sentence of 10 years' imprisonment and a maximum term of life imprisonment for each of his convictions, given the jury's finding in I96 and his admissions in his guilty pleas in I528 that the quantity of cocaine involved in each offense exceeded 5 kilograms. Under the federal Sentencing Guidelines, Fornia's sentence in each case was limited to a narrower Guidelines Sentencing Range ("GSR") based on an assessment of his Criminal History Category and a total offense level calculated by identifying a " 'base offense level' corresponding to the crime for which [he was] convicted, as modified by mandatory 'adjustments' which take into account certain aggravating or mitigating factors." *United States v. Austin,* 239 F.3d 1, 5 (1st Cir.2001).[28]

***71** We recount the facts pertinent to Fornia's sentencing as gleaned from "uncontested portions of the presentence investigation report[s] and the transcript[s] of the sentencing hearing[s]." *United States v. Cloutier,* 966 F.2d 24, 25 (1st Cir.1992). On the morning of December 5, 2002, the court held a sentencing hearing in I96. The court calculated Fornia's base offense level as 34 for a drug offense involving 21 kilograms of cocaine. *See* U.S.S.G. § 2D1.1(a)(3). The court arrived at this 21–kilogram figure by dividing the total amount of drug proceeds seized from Fornia ($281,926) by the amount Torres testified that he paid Fornia per kilogram of cocaine ($13,000), as recommended in the presentence investigation report ("PSR") for I96. The court then found that Fornia had been "a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive" within the meaning of U.S.S.G. § 3B1.1(b), warranting a three-level upward adjustment to reach a total offense level of 37. The court declined to impose an enhancement sought by the government for the specific offense characteristic of possession of a firearm. U.S.S.G. § 2D1.1(b)(1). The court also declined to impose an acceptance of responsibility downward adjustment because Fornia had gone to trial in I96. *See* U.S.S.G. § 3E1.1, cmt. n. 2 (adjustment for acceptance of responsibility generally unavailable to defendant who "puts the government to its burden of proof at trial by denying the essential factual elements of guilt"). The court then sentenced Fornia to the minimum sentence, 210 months' imprisonment, within the appropriate GSR for an offender in Criminal History Category I (210–262 months), and imposed a fine of $5000 and a five-year term of supervised release.

Later that afternoon, the court held a separate sentencing hearing in I528. The court determined that the quantity of drugs involved in all conduct relevant to the charged offenses was the sum total of the amounts involved in the four substantive counts in I528, or 170 kilograms.[29] Following the recommendation of the PSR in I528, the court reasoned that "21 of those kilograms were the subject of the ... sentence in [I96]" and had already been accounted for by that sentence. Accordingly, the court used the remaining quantity, 149 kilograms, to calculate a base offense level of 36 in I528. The court then found that Fornia "was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive" within the meaning

of U.S.S.G. § 3B1.1(a), warranting a four-level upward adjustment to reach a total offense level of 40. The court also found, based on the government's representation and the description in the PSR prepared in I528, that two indicted co-conspirators who had pled guilty in I528 had placed Fornia in possession of a firearm during a drug-related incident. The court accordingly imposed a two-level enhancement for the specific offense characteristic of possession of a firearm ***72** during a drug offense, U.S.S.G. § 2D1.1(b)(1), reaching a total offense level of 42. Because Fornia pled guilty to the four counts in I528, however, the court imposed a three-level decrease for acceptance of responsibility, U.S.S.G. § 3E1.1(b), lowering the total offense level to 39. Finally, based on Fornia's "prior undischarged sentence" imposed that morning in I96, the court awarded three criminal history points to place Fornia in Criminal History Category II. U.S.S.G. § 4A1.1(a). The court then sentenced Fornia to the maximum sentence, 365 months' imprisonment, within the applicable GSR (292–365 months), to run concurrently as to the four substantive counts, but consecutive to the sentence of 210 months' imprisonment in I96, for a total term of imprisonment in both cases of just under 48 years.[30] The court also imposed a fine of $250,000 and a five-year term of supervised release to run concurrently with the term of supervised release imposed in I96. The court declined Fornia's request for a downward departure on the basis of alleged prosecutorial misconduct. Finally, the court determined that no other mitigating circumstances —neither Fornia's deportability nor his allegations of disparity in his sentence as compared with those of his co-defendants— warranted a downward departure.

Fornia appeals his sentences on multiple grounds, several of which are interrelated. Specifically, Fornia argues that: (1) the district court imposed mandatory sentence enhancements based solely on judicially found facts, increasing the sentence in each case beyond the maximum authorized by jury-found or admitted facts in violation of *Booker;* (2) the court erred by failing to use the same drug quantity involved in the conspiracy in I96, 21 kilograms, to sentence Fornia on the four substantive counts in I528 because the cases involved related conduct, *see* U.S.S.G § 1B1.3; (3) the court imposed a consecutive rather than a concurrent term of imprisonment in I528, including role-in-the-offense sentence enhancements based on the same conduct in each case, in violation of Fornia's Fifth Amendment rights to due process and protection against double jeopardy; (4) the court improperly assigned criminal history points on the basis of Fornia's sentence for the conspiracy conviction in I96 to increase his sentence in I528, *see* U.S.S.G. § 4A1.2; (5) the court improperly denied Fornia's motion to consolidate his cases for sentencing and failed to group the counts in both indictments, *see* U.S.S.G. §§ 3D1.1–3D1.5 and 5G1.2(b)-(c); (6) the role-in-the-offense sentence enhancement in I96 violates the Presentment Clause of the Fifth Amendment; and (7) the evidence was insufficient to support, by a preponderance of the evidence, the court's imposition of role-in-the-offense enhancements in both I96 and I528, *see* U.S.S.G. § 3B1.1, and the "specific offense characteristic" enhancement for possession of a firearm in I528, *see* U.S.S.G. § 2D1.1(b)(1). As we discuss below, our disposition of Fornia's claims of *Booker* error obviates the need to address his other sentencing claims.

B. *Booker* Error

After briefing was completed and oral argument held in this case, the Supreme Court decided *Booker,* in which the Court precluded, on Sixth Amendment grounds, a sentencing court from imposing a sentence ***73** on the basis of judicially found facts that "exceed[s] the maximum authorized by the facts established by a plea of guilty or a jury verdict", *Booker,* 125 S.Ct. at 756, but "only insofar as the sentence resulted from a mandatory system imposing binding requirements on sentencing judges," *United States v. Antonakopoulos,* 399 F.3d 68, 75 (1st Cir.2005). Because "the mandatory nature of the Guidelines ... raised constitutional concerns," *id.*, the Court eliminated such concerns by striking the statutory provision that renders the Sentencing Guidelines binding on federal courts, 18 U.S.C. § 3553(b)(1).[31]

Fornia cited *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), in his written objections to the draft PSR in each of his cases as a ground for objection to the imposition of role enhancements or enhancements for possession of a firearm.[32] We therefore treat his claims of *Booker* error as preserved on appeal and subject to review for harmless error. *Antonakopoulos,* 399 F.3d at 76.[33] As a result of the Supreme Court's remedial decision, *Booker* error is established whenever "a defendant's Guidelines sentence was imposed under a mandatory Guidelines system," whether or not the sentencing court relied on judicial fact-finding to increase the sentence beyond the maximum authorized by jury-found or admitted facts.

Antonakopoulos, 399 F.3d at 75. Under harmless error review of *Booker* claims, in order to avoid a remand for resentencing under advisory Guidelines,

> the government has the burden of proving beyond a reasonable doubt that the error did not affect the defendant's substantial rights. That is, we must be convinced that a lower sentence would not have been imposed had the Guidelines been advisory. This is an extremely difficult, but not impossible, standard to meet.
>
> *Vázquez–Rivera,* 407 F.3d at 489–90, 2005 WL 1163672, at *10. Where a defendant assails, as a constitutional violation, the imposition of enhancements that bring his sentence above the maximum sentence authorized by jury fact-finding or admitted facts—a virtual prerequisite for the preservation of a claim of *Booker* error[34]—"factual certainty alone" in support of such enhancements "would not be sufficient to show beyond a reasonable doubt that the judge, acting under an advisory Guidelines ***74** system, would have applied the same sentence on the basis of those factors." *Id.*

Applying this standard to Fornia's sentences, we cannot conclude with the requisite certainty that the district court would not have imposed lower sentences in each of his cases under a non-mandatory Guidelines regime. As our description of Fornia's multiple claims of Guidelines error suggests, the Guidelines sentencing here was complex. In response, the court imposed the minimum sentence under the GSR for the conspiracy conviction in I96, the maximum sentence under the GSR for the convictions on the four substantive offenses in I528 (with those sentences being concurrent to each other), and then made the maximum sentence consecutive to the minimum sentence. On its face, this mixture of leniency and stringency is unusual, and the reasons for these choices are not entirely clear. This observation is not a criticism. The court faced a particularly difficult sentencing problem because the closely related cases were prosecuted and sentenced in separate proceedings, requiring the court to treat Fornia's cases as simultaneously related, yet separate, for purposes of sentencing within the confines of a mandatory Guidelines regime.

Indeed, the court appears to have been mindful of the desirability of mitigating the consequences of the government's decision to bring successive prosecutions against Fornia in its subtraction of 21 kilograms of cocaine from the total quantity involved in the offenses in I528 because that portion had already been "the subject of the ... sentence in [I96]." The Guidelines encourage such attention to the potential unfairness of duplicative punishment resulting solely from prosecutorial charging decisions. For example, U.S.S.G. § 5G1.3, under which Fornia was sentenced to a consecutive term of imprisonment in I528, "was designed 'to mitigate the possibility that the fortuity of two separate prosecutions will grossly increase a defendant's sentence.' " *United States v. Caraballo,* 200 F.3d 20, 27 (1st Cir.1999) (quoting *Witte v. United States,* 515 U.S. 389, 404–05, 115 S.Ct. 2199, 132 L.Ed.2d 351 (1995)). To that end, subsection (c) contains a policy statement favoring the "achiev[ement of] a reasonable punishment" even where a sentencing court retains the discretion to impose a wholly concurrent, partially concurrent, or wholly consecutive sentence.

We deem it unnecessary and inadvisable to discuss Fornia's many claims of Guidelines sentencing error further; suffice it to say that we cannot conclude beyond a reasonable doubt that the court would have resolved the many interrelated sentencing issues it faced in precisely the same manner by "impos [ing] the same sentence in the absence of mandatory Guidelines." *Vázquez–Rivera,* 407 F.3d at 489, 2005 WL 1163672, at *10. We are particularly reluctant to make presumptions in the face of such a severe total punishment, a sentence of nearly 48 years-virtually a life sentence. We therefore conclude that both cases should be remanded for resentencing under *Booker.* However, our decision to remand for resentencing should not be read as a "suggestion or a prediction that [Fornia's] sentence[s] will necessarily be altered." *United States v. Heldeman,* 402 F.3d 220, 224 (1st Cir.2005).

V.

Fornia's convictions are ***affirmed;*** his sentences on those convictions are ***vacated.*** We ***remand*** for resentencing consistent with this opinion.

So ordered.

All Citations

408 F.3d 52

Footnotes

* Of the District of Maine, sitting by designation.

1 Fornia raises a number of other claims with respect to his convictions. We have considered them and find them to be either without merit or waived by his guilty plea in the second case, in which he reserved only his right to appeal on double jeopardy grounds. *See United States v. Rodriguez–Castillo,* 350 F.3d 1, 3–4 (1st Cir.2003) ("A defendant who subscribes an unconditional guilty plea is deemed to have waived virtually all claims arising out of garden-variety errors that may have antedated the plea.").

2 The agents' suspicions were based in part on wiretap surveillance of individuals with known histories of involvement in drug activity and the seizure of plastic wrapping materials found in the garbage outside the furniture store that tested positive for cocaine residue.

3 As we discuss in Part II.A, the officer also drew his gun in a defensive posture, out of Fornia's sight, as a safety precaution while Fornia opened the bag in the trunk.

4 The other named individuals were described in order as "head and owner drug point" (# 1), "sources of supply" (# 2–4), "supervisors/managers" (# 5–7), "assistants" (# 8–15), "counter surveillance" (# 24), and "preparers and packagers of drugs" (# 25–26).

5 Fornia filed a motion to reopen his suppression hearing on January 18, 2002, in order to supplement the record with facts relating to his interrogation at the DEA office. Judge Hornby (sitting by designation) denied the motion to reopen because "[t]he transcript of the [suppression motion] hearing fully supports the findings that Judge Casellas made" and because he concluded, based on an independent review of the record, that the evidence should not be suppressed.

6 Osvaldo Villegas–Rivera was named in I96 as # 20, a "transporter," and in I528 as # 3, a "source[ ] of supply."

7 The other named individuals were identified as "sources of supply" (# 2–5), "narcotics transporter[ ]" (# 6), "drug distributors in [ ] their respective distribution area or drug point" (# 7–12), and "assistants in receiving and delivering money or drug[s]" (# 13–15).

8 The unindicted co-conspirator in Counts Three, Four, and Five turned out to be Fernando Torres–Fernandez, who was indicted in I96 as co-conspirator # 2, and who testified against Fornia at his trial in I96 after pleading guilty.

9 The government filed a similar motion in I528, pending before Judge Pérez–Giménez, which was "noticed" on or about April 23, 2002.

10 The government's motion contained no explanation of why the government did not seek joinder of the cases during the eight-and-a-half-month period between August 1, 2001 and April 15, 2002.

11 This event was also alleged as both a substantive count (Count Two) in I528 and as an overt act in furtherance of the conspiracy (Count One) charged in that indictment.

12 This event was also alleged as both a substantive count (Count Three) in I528 and as an overt act in furtherance of the conspiracy (Count One) charged in that indictment.

13 As we have noted, the government had earlier acknowledged in its motion to consolidate the cases for trial and sentencing that while it had obtained separate indictments, I96 and I528 were "of the same or similar character pursuant to Fed. R. Crim P. 8(a)." The government did not specify the features that made the two conspiracies "similar." According to the indictments, the conspiracies in I96 and I528 involved overlapping time periods, overlapping participants, and the same objective of distributing and "possess[ing] with intent to distribute" cocaine "for significant financial gain or profit." *See United States v. Portela,* 167 F.3d 687, 695 (1st Cir.1999) (determination whether conspiracies are separate depends on totality of the circumstances, including factors such as existence of a common goal, interdependence among participants, and degree to which participants overlap); *United States v. Morris,* 99 F.3d 476,

480 (1st Cir.1996) (using "five-part test for determining whether two conspiracies are synonymous for double jeopardy purposes," which inquires whether conspiracies "took place contemporaneously (or nearly so)," "involved essentially the same personnel," "occurred at much the same places," are proven by the same evidence, and "are premised" on the same statutory provision).

14 Fornia's receipt of drug proceeds from Torres and a co-conspirator indicted in both I96 and I528 constituted the only overt act alleged against him in I96. The same incident was also alleged as both a substantive count (Count Four) in I528 and as an overt act in furtherance of the conspiracy (Count One) charged in that indictment.

15 This incident was also alleged as both a substantive count (Count Five) in I528 and as an overt act in furtherance of the conspiracy (Count One) charged in that indictment.

16 By July 2, 2002, each of Fornia's 14 co-defendants in I528 had also pled guilty.

17 Fornia maintains on appeal that, as depicted on the video, he looked back at Officer Alverio before opening the bag, and that he saw the gun at that moment and felt he had no choice but to continue opening the bag. Fornia did not testify during the suppression hearing in order to present his version of events. In all events, "a district court's choice between two plausible competing interpretations of the facts cannot be clearly erroneous." *Weidul,* 325 F.3d at 53.

18 *Miranda* warnings inform a suspect that he "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Dickerson v. United States,* 530 U.S. 428, 435, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (quoting *Miranda v. Arizona,* 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)).

19 Pursuant to *Terry v. Ohio*, a warrantless investigatory stop comports with the Fourth Amendment's prohibition on unreasonable searches and seizures if it is justified by more than an "inarticulate hunch[ ]" and is "reasonably related in scope to the circumstances which justified the interference in the first place." 392 U.S. 1, 22, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

20 At the suppression hearing, Officer Alverio himself used the word "arrest" to describe his restraint of Fornia during the stop of his car. However, Officer Alverio clarified that he restrained Fornia only for safety purposes and not because he was arresting Fornia for a crime.

21 Fornia specifically notes that if he had been able to testify at the suppression hearing, he would have described the conversation he had with the two men he met at the bakery, which was recorded without sound on the government's surveillance videotape.

22 Of course, a different grand jury *did* indict Fornia for conspiracy based on those facts in I528.

23 Another purpose for the protection against variance from an indictment, not at issue here, is to prevent prejudicial spillover in cases involving multiple co-defendants. *Tormos–Vega,* 959 F.2d at 1115.

24 Pursuant to Fed.R.Evid. 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes ... provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." Prior to trial, the government argued both that it had complied with the disclosure requirements of Fed.R.Evid. 404(b) and that in any event the evidence of acts alleged in I528 did not fall within the scope of that rule because the "crimes, wrongs, or acts" of which it sought to introduce evidence were not "*other* crimes, wrongs or acts" but were intrinsic to the crime of conspiracy to distribute cocaine charged in I96.

25 As we have noted, Fornia also expressly reserved the right to appeal his conviction in I528 on double jeopardy grounds, despite his guilty plea, pursuant to *Menna v. New York,* 423 U.S. 61, 62, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) (per curiam) (double jeopardy claim not automatically waived by guilty plea).

26 As we have discussed, Judge Carter expressed concerns about double jeopardy during Fornia's trial in I96 after the government introduced evidence of the conspiracy alleged in Count One of I528. After arguing that the conspiracy charged in I528 was different from that in I96, the government later represented that it would seek to dismiss the conspiracy count in I528. It so moved in July 2002, after Fornia moved to dismiss I528 on double jeopardy grounds.

27 Fornia's reliance on two decisions by our sister circuits that allegedly adopt such a rule is misplaced. *See Rashad v. Burt,* 108 F.3d 677 (6th Cir.1997); *United States v. Reed,* 980 F.2d 1568 (11th Cir.1993). Not only are the circumstances of Fornia's sequential prosecutions factually distinguishable, but these cases are of limited applicability even in their originating circuits. *See United States v. Forman,* 180 F.3d 766, 770 (6th Cir.1999) (limiting language in *Rashad* that may conflict with *Dixon* to apply only to the specific circumstances present in *Rashad*); *United States v. Maza,* 983 F.2d 1004, 1008 n. 8 (11th Cir.1993) (characterizing as dicta language in a case cited in *Reed* as authority for a due diligence rule imposed by the Double Jeopardy Clause).

28 A reviewing court ordinarily "appl[ies] the edition [of the Sentencing Guidelines] in effect at the time of sentencing." *United States v. Martin,* 363 F.3d 25, 32 n. 3 (1st Cir.2004). In Fornia's case, that would be the edition that went into effect on November 1, 2002. For reasons that remain unclear, Fornia's presentence investigation reports were prepared according to the 2000 Guidelines. The parties have pointed out no differences in the 2000 and 2002 versions of the Guidelines applicable to Fornia, nor have we detected any. All references to the Guidelines throughout this opinion are thus to the 2002 edition.

29 Although Fornia pled guilty to the factual basis for each of the substantive counts in I528, he admitted only that each count involved a quantity in excess of five kilograms of cocaine.

30 Explaining its decision to impose the maximum sentence in the GSR, the court cited Fornia's criminal history, including his conviction in I96 as well as a prior conviction from 1975 that was mentioned in each of his PSRs but which had been excluded from the Criminal History Category calculation in each case pursuant to U.S.S.G. § 4A1.2(e). The court made no reference to the 1975 conviction during sentencing in I96.

31 The Court also struck 18 U.S.C. § 3742(e), which authorized appellate courts to engage in *de novo* review over certain aspects of federal sentencing. *Booker,* 125 S.Ct. at 764. The Court left the remainder of the Act, including the requirement that a sentencing court calculate and consider the sentence recommended by the Guidelines, 18 U.S.C. § 3553(a)(4), untouched. *Antonakopoulos,* 399 F.3d at 76.

32 As we have discussed, the district court imposed role enhancements in both cases, but imposed an enhancement for possession of a firearm in I528 only.

33 Fornia also raised a claim under *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), in his reply brief. Because Fornia's claims of *Booker* error are preserved and therefore subject to harmless error review, no supplemental briefing was invited from or submitted by the parties in the wake of *Booker* or *Antonakopoulos. See Antonakopoulos,* 399 F.3d at 83 (permitting parties to submit supplemental briefing on consequences of the panel's decision for unpreserved claims of *Booker* error). Fornia did, however, file a letter pursuant to Fed. R.App. P. 28(j) apprising the panel of these decisions.

34 In *Antonakopoulos,* we stated, "[t]he argument that a *Booker* error occurred is preserved if the defendant below argued *Apprendi* or *Blakely* error or that the Guidelines were unconstitutional." 399 F.3d at 76.

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961 F.3d 618
United States Court of Appeals, Third Circuit.

UNITED STATES of America
v.
Michael E. TORRES, Appellant

No. 19-2940
|
Submitted Under Third Circuit L.A.R. 34.1(a): April 23, 2020
|
(Filed: June 5, 2020)

Synopsis

Background: Defendant was convicted of being felon in possession of firearm, and he appealed from decision of the United States District Court for the Middle District of Pennsylvania, Yvette Kane, Senior District Judge, 341 F.Supp.3d 454, denying his motion to suppress evidence, as well as from enhancement of his sentence under the Armed Career Criminal Act (ACCA).

Holdings: The Court of Appeals, Porter, Circuit Judge, held that:

tipster's face-to-face tip to police officer that he flagged down, that suspect had discharged firearm in high-crime area, was reliable and provided officers with reasonable suspicion of criminal activity needed to support a *Terry* stop;

as matter of first impression, drug conspiracy conviction can count as a predicate offense under the Armed Career Criminal Act (ACCA), even though it encompasses a defendant's other substantive predicate convictions, as long as it is distinct in time; and

prior drug conspiracy conviction that was based on conduct by federal firearm defendant that extended long after his other substantive drug offenses was distinct in time and could be counted as predicate offense.

Affirmed.

***620** On Appeal from the United States District Court for the Middle District of Pennsylvania (D.C. Criminal No. 1-17-cr-00392-001), District Judge: Honorable Yvette Kane

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Before: PORTER, RENDELL and FISHER Circuit Judges

OPINION OF THE COURT

PORTER, Circuit Judge.

**1 *621 After a bench trial, the District Court found Michael Torres guilty of possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1). The District Court imposed a fifteen-year mandatory-minimum sentence under 18 U.S.C. § 924(e) of the Armed Career Criminal Act ("ACCA") because it determined that Torres had three qualifying felony convictions.

Torres raises two arguments on appeal. First, he contends that the District Court erred by denying his motion to suppress the firearm. Second, Torres argues that his prior federal drug conspiracy conviction does not qualify as an ACCA predicate offense because it encompasses his other two substantive ACCA predicates. We will affirm. The firearm was discovered during a valid investigative stop. And we will join our sister circuits in holding that a drug conspiracy conviction counts as an ACCA predicate offense, so long as it was distinct in time from the underlying substantive offenses.

I

Officer Steven Pickel of the City of York Police Department patrols York's west end. The west end is a high-crime area known for violent crime, such as homicides, shootings, drug incidents, and aggravated assaults. York police "regularly" investigate reports of "shots fired" in the west end, "especially in the evening." App. 48.

Around 6:00 p.m. on October 31, 2017, Officer Pickel drove his patrol car along the border between the west end and York College's campus. A man in a parked vehicle flagged the officer down. The man pointed to the only pedestrian on a bridge. The man said that the pedestrian was "wearing a black jacket with his hood up, blue jeans, and black sneakers" and that he pulled out a gun and fired it twice into an old factory building across the street. App. 48. The man was "adamant" about this description.[1] *Id.* The pedestrian was later identified as Torres.

Instead of asking for the man's name or recording his license plate number, Officer Pickel immediately radioed for backup and followed Torres in his patrol car. Officer Pickel feared that Torres posed a potential danger to others. And he knew from his training and experience that any delay would make it very difficult to locate Torres.

As other officers arrived, Officer Pickel activated his emergency lights and exited his patrol car. Based on the information that Torres had discharged a firearm, Officer Pickel drew his service pistol and ordered Torres to "get to the ground." App. 71. Torres complied, and two other officers, including Officer Jonathan Hatterer, approached Torres. Officer Hatterer knelt and asked Torres if he had a firearm. According to Officer Hatterer, Torres said that he did and then indicated that it was in his right pocket. Officer Hatterer handcuffed Torres while another officer retrieved the firearm.

A grand jury indicted Torres and charged him with violating 18 U.S.C. § 922(g)(1) by possessing a firearm as a convicted felon. Torres pleaded not guilty and moved to suppress the firearm. The District Court denied the motion. It determined that the officers found the gun in Torres's possession during an investigatory stop under *622 *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), rather than during an arrest. It further concluded that the stop was constitutional because Officer Pickel had reasonable suspicion to conduct the stop.

**2 The District Court then held a bench trial and found Torres guilty. The Presentence Investigation Report ("PSR") advised that Torres qualified for enhanced sentencing under 18 U.S.C. § 924(e) of the ACCA because he had at least three prior convictions for serious drug offenses. The PSR identified two state drug possession convictions, one federal drug distribution conspiracy conviction, and a felony conviction for attempted homicide. Torres objected to the enhancement, arguing that,

because the state drug possession offenses were part of the federal drug distribution conspiracy, the drug conspiracy conviction should not be counted as a separate predicate offense. The District Court denied Torres's objection, applied the enhancement, and sentenced Torres to the mandatory-minimum sentence: 180 months' imprisonment. Torres timely appealed.

II[2]

Torres argues that the officers violated the Fourth Amendment when they seized him, so the firearm should have been suppressed. He maintains that the seizure amounted to an arrest that lacked probable cause. Alternatively, he contends that even if the seizure were an investigatory stop, Officer Pickel lacked reasonable suspicion to detain him. We disagree. Officer Pickel conducted a valid investigatory stop to ensure officer safety and the safety of the community. And the stop was supported by reasonable suspicion because Officer Pickel received a reliable tip.

A

"Generally, for a seizure [of a person] 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) (citing *Katz v. United States*, 389 U.S. 347, 356–57, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). But a police officer may arrest a person in a public place without a warrant if the officer possesses probable cause to believe the person committed a felony. *United States v. McGlory*, 968 F.2d 309, 342 (3d Cir. 1992) (citing *United States v. Watson*, 423 U.S. 411, 421, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976)). Or, "an officer may ... 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, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000) (citing *Terry*, 392 U.S. at 30, 88 S.Ct. 1868).

The Supreme Court has not established a bright-line rule to distinguish a warrantless arrest from an investigatory stop. But the "reasonableness of the intrusion is the touchstone" of our analysis. *Baker v. Monroe Township*, 50 F.3d 1186, 1192 (3d Cir. 1995) (citing *United States v. Sharpe*, 470 U.S. 675, 682–83, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985)). The Supreme Court "ha[s] emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes." *Sharpe*, 470 U.S. at 685, 105 S.Ct. 1568 (citations omitted). By these standards, ***623** Torres was subjected to an investigatory stop.

To begin, "[t]here is no per se rule that pointing guns at people, or handcuffing them, constitutes an arrest." *Baker*, 50 F.3d at 1193 (collecting cases); *see also United States v. Edwards*, 53 F.3d 616, 619 (3d Cir. 1995) (surrounding a suspect "with weapons ready, and even drawn, does not constitute an arrest per se"). *Terry* recognized that when officers are investigating a suspect who the officers reasonably believe "is armed and presently dangerous to the officer[s] or to others, it would ... be clearly unreasonable to deny the officer[s] the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." 392 U.S. at 24, 88 S.Ct. 1868.

****3** Torres's case resembles the factual scenario we encountered in *United States v. Johnson*, 592 F.3d 442 (3d Cir. 2010). In *Johnson*, a witness called a 911 dispatcher to report that she saw two men struggling before hearing a gunshot. *Id.* at 445. After the gunshot, the witness watched a white taxicab depart the scene. *Id.* A short time later, police spotted a white taxicab in the vicinity and stopped it. *Id.* Officers surrounded the taxicab with guns drawn. *Id.* at 445–46. They ordered the occupants out of the car and handcuffed the defendant and the taxi driver so that they could "safely clear the vehicle and gather information about the [reported] shooting." *Id.* at 446. Officers then discovered a handgun in plain view in the backseat of the car. *Id.* Under these facts, we held that the officers conducted an investigatory stop, not an arrest. *Id.* at 448.

So, too, here. Officer Pickel received a tip that Torres, just moments before, had discharged a firearm in a high-crime area. A brief encounter with police ensued. Only thirty-five seconds elapsed between the time when Officer Pickel ordered Torres to stop and when police secured Torres's firearm.[3] Thus, the seizure was an investigatory stop—not an arrest.

B

Because Torres was subjected to an investigatory stop, we next ask whether the stop was supported by reasonable suspicion. *Wardlow*, 528 U.S. at 123, 120 S.Ct. 673. It was.

Reasonable suspicion exists if an officer can "articulate more than an inchoate and unparticularized suspicion or hunch of criminal activity." *Id.* at 124, 120 S.Ct. 673 (quotation marks and citation omitted). "Reasonable suspicion requires only a particularized and objective basis for suspecting criminal activity" based on "the totality of the circumstances." *United States v. Green*, 897 F.3d 173, 183 (3d Cir. 2018) (citations, quotation marks, and alteration omitted). "We afford significant deference to a law enforcement officer's determination of reasonable suspicion." *United States v. Foster*, 891 F.3d 93, 104 (3d Cir. 2018).

Because Officer Pickel acted on an informant's tip, we must decide whether the tip was reliable. *United States v. Torres*, 534 F.3d 207, 210–11 (3d Cir. 2008). In doing so, we consider whether: (1) the information was provided to the police in person, allowing an officer to assess directly the informant's credibility; (2) the informant could be held responsible if his allegations are untrue; (3) the information ***624** would not be available to the ordinary observer; (4) the informant had recently witnessed the alleged criminal activity at issue; and (5) the informant's information accurately predicted future activity. *United States v. Brown*, 448 F.3d 239, 249–50 (3d Cir. 2006).

These factors are not exhaustive, and "a tip need not bear all of the indicia [of reliability]—or even any particular indicium—to supply reasonable suspicion." *Torres*, 534 F.3d at 213 (citation omitted). "Other factors can bolster what would otherwise be an insufficient tip," including "the presence of a suspect in a high[-]crime area[.]" *Id.* at 211 (alteration and citation omitted). At bottom, we must discern whether the tip had "sufficient indicia of reliability ... for us to conclude that the officers possessed an objectively reasonable suspicion" to justify the stop. *Brown*, 448 F.3d at 250 (quoting *United States v. Nelson*, 284 F.3d 472, 481 (3d Cir. 2002)).

Based on the *Brown* factors, the tip was reliable. First, Officer Pickel interacted with the tipster face-to-face and thus could assess his credibility. The tipster waved down Officer Pickel and adamantly explained what he had personally witnessed. Second, Officer Pickel would likely be able to hold the man accountable if his allegation were untrue. Although Officer Pickel did not know the tipster's name or his car's license plate number, he did know what the man looked like and the make of the car that he drove. Third, the tipster had just witnessed the alleged criminal activity. *See Navarette v. California*, 572 U.S. 393, 400, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2014) (observing that a statement "made under the stress of excitement caused by a startling event ... weigh[s] in favor of the [tipster's] veracity").

****4** The fact that Torres was in a high-crime area also favors reliability. *See Torres*, 534 F.3d at 211. Shootings were reported "regularly" in the west end. App. 48. Considering all the circumstances, and "given ... the danger posed by an armed criminal, we think that if [Officer Pickel] had done nothing and continued on [his] way after receiving the informant's tip, [he] would have been remiss." *United States v. Valentine*, 232 F.3d 350, 356 (3d Cir. 2000). In short, Officer Pickel had reasonable suspicion based on the totality of the circumstances. *See Green*, 897 F.3d at 183. Thus, Torres's Fourth Amendment argument fails.[4]

III

Torres next argues that he is not subject to the ACCA's enhanced mandatory-minimum sentence under § 924(e). Specifically, he maintains that, because his federal drug conspiracy conviction encompassed his two state drug possession convictions, the federal drug conspiracy conviction cannot count as one of the necessary predicate offenses. We disagree.

Under the ACCA, a fifteen-year mandatory-minimum sentence applies to any defendant who violates 18 U.S.C. § 922(g)(1) after receiving three or more ***625** convictions "for a violent felony or a serious drug offense, or both, *committed on occasions different from one another*[.]" 18 U.S.C. § 924(e)(1) (emphasis added). To decide whether convictions were committed on different occasions, we apply the separate episode test and analyze whether the offenses were "distinct in time." *United States v. Schoolcraft*, 879 F.2d 64, 73 (3d Cir. 1989) (per curiam).

We have held that three robberies carried out in four days were separate episodes because they "occurred on separate occasions" "and targeted different geographic locations and victims[.]" *United States v. Blair*, 734 F.3d 218, 228–29 (3d Cir. 2013) (quotation marks and citations omitted). In *Blair*, we cited with approval the decisions of two other Courts of Appeals, which held that robbery offenses were separate episodes even when committed less than an hour apart. *Id.* at 229 (citing *United States v. Pope*, 132 F.3d 684, 692 (11th Cir. 1998), and *United States v. Brady*, 988 F.2d 664, 668–70 (6th Cir. 1993) (en banc)).

We have not decided whether a felony conspiracy conviction qualifies as an ACCA predicate offense when it encompasses a defendant's other substantive predicate convictions. Our sister circuits have unanimously concluded that it does. For example, in *United States v. Melbie*, the Eighth Circuit held that a drug possession offense that occurred "during the period" of a drug conspiracy offense counted as a separate ACCA predicate because "the possession offense was a discrete episode in a series of events." 751 F.3d 586, 587 (8th Cir. 2014). The Eleventh and Sixth Circuits have adopted *Melbie*'s approach. *See United States v. Longoria*, 874 F.3d 1278, 1282 (11th Cir. 2017) (per curiam); *United States v. Pham*, 872 F.3d 799, 802–03 (6th Cir. 2017).

****5** We agree and hold that a conspiracy offense counts as an ACCA predicate offense even when it covers other substantive ACCA predicate offenses, so long as the conspiracy offense is a "separate episode" that was distinct in time from the other offenses. *See Schoolcraft*, 879 F.2d at 73–74. A defendant's participation in a conspiracy may be broader than his underlying ACCA predicate convictions. Thus, the relevant inquiry is whether a defendant's underlying convictions were distinct episodes in the course of conduct constituting his participation in the drug conspiracy.

We have no difficulty concluding that Torres's drug possession offenses were "distinct in time" from his drug conspiracy offense. Torres's two state drug possession offenses occurred in July 2004 and July 2005, respectively. Yet his involvement in the federal drug conspiracy continued between July 2004 and February 2006. As Torres admitted while pleading guilty to the conspiracy charge, he committed numerous other overt acts: packing and dispensing drugs and handling money; attempting homicide to recover stolen drugs; contacting co-conspirators and the ringleader on numerous occasions; and exercising responsibility over large amounts of crack cocaine. Thus, Torres's participation in the conspiracy was broader than his two drug possession offenses. And rather than withdraw from the conspiracy, he returned to it, even after his state drug convictions.

* * *

For these reasons, we will affirm the District Court's judgment.

All Citations

961 F.3d 618, 2020 WL 3024560

Footnotes

1 Officer Pickel believed that his body camera captured the encounter, but it malfunctioned.

2 The District Court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). For a motion to suppress, we review factual findings for clear error and legal conclusions de novo. *United States v. Johnson*, 592 F.3d 442, 447 (3d Cir. 2010). We review challenges to the application of an ACCA enhancement de novo. *United States v. Henderson*, 841 F.3d 623, 626 (3d Cir. 2016).

3 Torres tries to distinguish *Johnson*, arguing that Officer Pickel did not have as much detailed information as the officers in *Johnson*. But this goes to whether Officer Pickel had reasonable suspicion—not whether the encounter amounted to an arrest.

4 Torres faults Officer Pickel for failing to corroborate the tip before pursuing him. But we will not "second-guess the officer['s] decision to pursue the suspect immediately. The officer[ ] knew [that] the suspect was still in the vicinity[ ] and[,] had [the officer] stalled for more lengthy questioning of the informant, the armed suspect could have escaped detection." *United States v. Valentine*, 232 F.3d 350, 355 (3d Cir. 2000). Torres also attacks the reliability of the tip because he claims it came from an anonymous source. The identity of the source is irrelevant because the tip bore sufficient indicia of reliability under the totality of circumstances. *United States v. Torres*, 534 F.3d 207, 211 (3d Cir. 2008)

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4 F.4th 487
United States Court of Appeals, Seventh Circuit.

Sally GAETJENS, Plaintiff-Appellant,

v.

CITY OF LOVES PARK, et al., Defendants-Appellees.

No. 20-1295
|
Argued May 27, 2021
|
Decided July 13, 2021
|
Rehearing Denied August 12, 2021

Synopsis

Background: Homeowner filed § 1983 action against city, county, and various local government officials, including police sergeant, fire chief, and animal service workers, alleging her Fourth Amendment rights were violated when officials entered and condemned her home and seized her cats while she was in the hospital. The United States District Court for the Northern District of Illinois, John Robert Blakey, J., granted defendants summary judgment. Homeowner appealed.

Holdings: The Court of Appeals, Kanne, Circuit Judge, held that:

exigent circumstances justified police sergeant's actions in searching homeowner's home by entering it to look for homeowner without a warrant;

exigent circumstances justified fire chief's actions in seizing home by placing a condemnation placard on it without a warrant; and

exigent circumstances justified animal services workers' warrantless entry into home and seizure of homeowner's 37 cats by capturing them.

Affirmed.

***490** Appeal from the United States District Court for the Northern District of Illinois, Western Division. No. 16-cv-50261 — **John Robert Blakey**, *Judge*.

Attorneys and Law Firms

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Before Kanne, Scudder, and Kirsch, Circuit Judges.

Opinion

Kanne, Circuit Judge.

Plaintiff Sally Gaetjens sued various local government officials for entering and condemning her home and confiscating her thirty-seven cats, all without a warrant. She's right that the Fourth Amendment would usually prohibit such conduct. But emergencies breed exceptions—and this case is littered with emergencies.

Namely, Gaetjens went missing in action, and Defendants had reason to believe that she was experiencing a medical emergency. Plus, when Defendants attempted to check her home, they deemed it so noxious that it posed a public-safety risk. Given these exigencies, the Fourth Amendment did not require Defendants to wait for judicial approval before acting. We thus affirm the decision of the district court granting summary judgment to Defendants.

I. Background

The following facts are undisputed and stated in the light most favorable to Gaetjens as the nonmoving party. *Wonsey v. City of Chicago*, 940 F.3d 394, 399 (7th Cir. 2019) (citing *Dayton v. Oakton Cmty. Coll.*, 907 F.3d 460, 465 (7th Cir. 2018)).

Gaetjens bred cats in her home in Loves Park, Illinois. On December 4, 2014, she visited her doctor and was told to go to the hospital because of high blood pressure. Later that day, the doctor couldn't locate Gaetjens, so she phoned Rosalie Eads (Gaetjens's neighbor who was listed as her emergency contact) to ask for help finding her. Eads called Gaetjens and knocked on her front door but got no response.

The next day, Gaetjens was still missing, so Eads called the Loves Park police and told them that Gaetjens might be experiencing a medical emergency. Defendant Sergeant Allton and another officer went to Gaetjens's Loves Park home but could not see anyone inside. They did, though, notice packages on the porch, untended garbage, and a full mailbox.

The police then met up with Eads, who said she had a key to the Loves Park house and confirmed what she had said on the phone. With these facts before them, the police asked Eads for the key so that they could enter to see if Gaetjens was in danger. Eads obliged but also said that she thought perhaps Gaetjens was at her other home in Rockford.

The police went into the home but didn't get far. After making it about ten feet, intense odors forced them back out. Allton ***491** described the smell as a mix of urine, feces, and maybe a decomposing body.

The police then called on the Loves Park Fire Department to enter the home with breathing devices. Defendant Fire Chief Foley arrived first, and Allton told him the whole tale. So Foley approached the cracked front door for himself and got a whiff of something that could "gag a maggot." Foley thus temporarily condemned the home as not fit for human or animal habitation by placing a placard on the front door that read: "CONDEMNED[.] This Structure is Unsafe and Its use or occupancy has been prohibited by the code administrator. It shall be unlawful for any person to enter such structure except for the purpose of making the required repairs or removal."

More firefighters soon arrived and went into the home to look for Gaetjens. But instead of Gaetjens, they found thirty-seven cats.

At that point, the responders summoned Winnebago County Animal Services to round up the cats because Gaetjens was not allowed inside the condemned house to care for the clowder herself. Some of the felines proved more difficult to catch than

others. In particular, the male stud, Calaio, looked ready to attack the workers. So they pulled out metal "cat grabbers" to trap him.

In the end, Animal Services impounded the cats from December 4 to December 13, 2014. Sadly, four cats, including Calaio, died as a result of the impoundment.

Based on these events, Gaetjens—who unbeknownst to the officers had been in the hospital all along—sued the City of Loves Park, Winnebago County, and various employees of each under 28 U.S.C. § 1983. Relevant to this appeal, she alleged that the individual Defendants (Allton, Foley, and three Animal Services employees) violated her Fourth Amendment rights by (1) entering her home, (2) condemning her home, and (3) seizing her cats. She also alleged that the City of Loves Park and Winnebago County are liable for these violations under *Monell v. Department of Social Services of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

The district court granted summary judgment to all Defendants on all claims. Gaetjens now appeals.

II. Analysis

We review a district court's grant of summary judgment *de novo*. *Wonsey*, 940 F.3d at 399 (citing *Dayton*, 907 F.3d at 465). In this case, the district court determined that Gaetjens's Fourth Amendment claims fail because the individual defendants are entitled to qualified immunity. We agree that Gaetjens's claims fail, but for a more basic reason—the individual defendants did not violate the Fourth Amendment.

The Fourth Amendment, made applicable to the States through the Fourteenth Amendment, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This protection exists in both the criminal and civil contexts. *Soldal v. Cook County*, 506 U.S. 56, 67, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992).

"[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.' " *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006) (citing *Flippo v. West Virginia*, 528 U.S. 11, 13, 120 S.Ct. 7, 145 L.Ed.2d 16 (1999); *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). "[S]earches and seizures inside a home without a warrant are presumptively unreasonable." *Id.* (quoting ***492** *Groh v. Ramirez*, 540 U.S. 551, 559, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004)). But this "warrant requirement is subject to certain exceptions." *Id.* (citing *Flippo*, 528 U.S. at 13, 120 S.Ct. 7; *Katz*, 389 U.S. at 357, 88 S.Ct. 507).

One such exception arises when " 'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search [or seizure] is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 394, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) (quoting *McDonald v. United States*, 335 U.S. 451, 456, 69 S.Ct. 191, 93 L.Ed. 153 (1948)) (citing *Johnson v. United States*, 333 U.S. 10, 14–15, 68 S.Ct. 367, 92 L.Ed. 436 (1948)). In these situations, one principle governs—"[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." *Id.* at 392–93, 98 S.Ct. 2408 (quoting *Wayne v. United States*, 318 F.2d 205, 212 (D.C. Cir. 1963)).

To determine whether an exigency permitted a warrantless search or seizure in a home, we "conduct[ ] an objective review, analyzing whether the government met its burden to demonstrate that a reasonable officer had a 'reasonable belief that there was a compelling need to act and no time to obtain a warrant.' " *United States v. Andrews*, 442 F.3d 996, 1000 (7th Cir. 2006) (quoting *United States v. Saadeh*, 61 F.3d 510, 516 (7th Cir. 1995)). This objective review looks at "the totality of facts and circumstances 'as they would have appeared to a reasonable person *in the position of the ... officer*—seeing what he saw, hearing what he heard.' " *Bogan v. City of Chicago*, 644 F.3d 563, 572 (7th Cir. 2011) (quoting *Mahoney v. Kesery*, 976 F.2d 1054, 1057 (7th Cir. 1992)).

The exigent circumstances doctrine applies equally to warrantless searches of a home, seizures of a home, and seizures of private property within a home. *See Sutterfield v. City of Milwaukee*, 751 F.3d 542, 558 (7th Cir. 2014); *United States v. Shrum*, 908 F.3d 1219, 1231 (10th Cir. 2018) ("[T]he warrantless seizure of a home ... 'is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of "exigent circumstances." ' " (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 474–75, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)) (citing *Brigham City*, 547 U.S. at 403, 126 S.Ct. 1943)); *Siebert v. Severino*, 256 F.3d 648, 657 (7th Cir. 2001) ("Exigent circumstances may justify a warrantless seizure of animals." (citing *DiCesare v. Stuart*, 12 F.3d 973, 977 (10th Cir. 1993))).

Here, all parties agree that Allton "searched" the Loves Park home by entering it to look for Gaetjens. Likewise, all agree that Foley "seized" the Loves Park home by placing a condemnation placard on it and that the Animal Services workers "seized" Gaetjens's cats by capturing them. *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984) ("A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property."). Finally, all agree that Defendants did not obtain warrants or any other judicial or administrative approval before conducting these searches and seizures.

So, to satisfy the Fourth Amendment, Defendants' warrantless searches and seizures needed to fall into an exception to the warrant requirement. They all did—each was justified by an exigent circumstance.

First, Allton (who searched the house) had an objectively reasonable basis for ***493** believing that Gaetjens was experiencing a medical emergency that required immediate action. Second, Foley (who seized the house) had an objectively reasonable basis on which to believe that the Loves Park home posed a safety threat that required immediate attention. Third, the Animal Services employees (who seized the cats) reasonably determined that the cats were in imminent danger because they could not be cared for in the home.

Last, because none of the individual defendants violated Gaetjens's Fourth Amendment rights, her *Monell* claims fail as well.

A. The Home Entry

In an exigent circumstance often referred to as an "emergency-aid" situation, government officials may enter a home without a warrant "to 'render assistance or prevent harm to persons or property within.' " *Sutterfield*, 751 F.3d at 558 (quoting *Sheik–Abdi v. McClellan*, 37 F.3d 1240, 1244 (7th Cir. 1994)). In a recent concurring opinion, Justice Kavanaugh provided "[a] few (non-exhaustive) examples [that] illustrate" "some heartland emergency-aid situations." *Caniglia v. Strom*, —— U.S. ——, 141 S. Ct. 1596, 1604, 209 L.Ed.2d 604 (2021) (Kavanaugh, J., concurring). The following example is particularly apt for this appeal:

> Suppose that an elderly man is uncharacteristically absent from Sunday church services and repeatedly fails to answer his phone throughout the day and night. A concerned relative calls the police and asks the officers to perform a wellness check. Two officers drive to the man's home. They knock but receive no response. May the officers enter the home? Of course.

Id. at 1605 (Kavanaugh, J., concurring); *accord United States v. Tepiew*, 859 F.3d 452 (7th Cir. 2017) (permitting police officers' warrantless entry into a home on the basis of a report from a child in the home that her one-year-old brother had sustained a head injury and had a puffy face).

The home entry in this case likewise falls into the heartland of emergency-aid situations. It is undisputed that Allton knew that (1) Eads and Gaetjens's doctor were unable to get in touch with Gaetjens; (2) the doctor's office called Eads because she was Gaetjens's emergency contact; (3) Eads was concerned that Gaetjens was experiencing a medical emergency; and (4) Gaetjens's mail and garbage were piling up.

If, as Justice Kavanaugh posits, failing to come to church and answer a phone provides an objectively reasonable basis for believing that an occupant needs emergency assistance, then this litany of concerning circumstances facing Allton more than provided him with the same. His warrantless entry of the Loves Park home thus did not violate the Fourth Amendment.

In response, Gaetjens makes much of the fact that Eads told Allton that she believed Gaetjens was at her Rockford home, not her Loves Park home. But that statement just gave Allton a reason to also look for Eads in her Rockford house; it in no way contradicted the above facts that gave Allton an objectively reasonable basis to enter the Loves Park home.

B. The Condemnation

"The exigent circumstances doctrine [also] allows officers to enter a home without a warrant ... to address a threat to the safety of law enforcement officers or the general public ...." *Caniglia*, 141 S. Ct. at 1603 (Kavanaugh, J., concurring) (citing, among other cases, *Michigan v. Clifford*, 464 U.S. 287, 293 & n.4, 104 S.Ct. 641, 78 L.Ed.2d 477 (1984)). Two precedents ***494** guide our analysis of whether Foley had an objectively reasonable basis for believing that a safety threat required him to condemn the Loves Park home without a warrant.

First, in *Wonsey*, building inspectors found thirty-two building code violations in the plaintiff's home. 940 F.3d at 398. Based on the "dangerous conditions" that those violations presented, the inspectors asked the police to help them with "emergency evacuations." *Id.* The police did so, and then faced a § 1983 suit from an evacuee for violating her Fourth Amendment rights. *Id.* We rejected that claim because the "police entered her house ... to help with an evacuation given an immediate safety concern." *Id.* at 401.

Second, the Sixth Circuit addressed a similar scenario in *Flatford v. City of Monroe*, 17 F.3d 162 (6th Cir. 1994), which we find persuasive. There, police officers evacuated a residential apartment building after inspectors determined that it "posed an immediate danger to its occupants and the public" because of its dilapidated wooden structure and faulty electrical system. *Id.* at 171. The court determined that the officers were entitled to qualified immunity for this warrantless evacuation because they reasonably believed that their entry was justified by exigent circumstances. *Id.* And the court noted that "[t]he very point of the exigency exception under these circumstances is to allow immediate effective action necessary to protect the safety of occupants, neighbors, and the public at large." *Id.* at 170.

This case aligns with both *Wonsey* and *Flatford*. Allton reported to Foley that the home was so noxious that the police could not bear going in more than ten feet. Foley then probed the front door himself and smelled a stench that could "gag a maggot." These circumstances gave Foley a reasonable basis on which to conclude that the home's "conditions posed an immediate danger to its occupants and the public." *Id.* at 171. Thus his reflex to temporarily condemn the home and "protect or preserve life" from such danger did not violate the Fourth Amendment. *Mincey*, 437 U.S. at 392–93, 98 S.Ct. 2408 (quoting *Wayne*, 318 F.2d at 212).

Gaetjens retorts that summary judgment on this claim is inappropriate because the condition of the home was put in dispute by the testimony of her friend, Joan Klarner, who testified that she did not believe the home posed a health risk when she visited it several hours before Defendants arrived. But Klarner's testimony doesn't directly dispute the state of the home as Defendants found it later on that day. More important, even if the home was not as bad as Allton made it out to be, Foley was nonetheless entitled to rely on Allton's statements about the condition of the home because Allton had superior information after entering the home moments earlier. *Cf. Flatford*, 17 F.3d at 170 ("[R]equiring officers to second guess the more informed judgment of a building safety inspector would hinder effective and swift action. Officers should, therefore, have wide latitude to rely on a building-safety official's expertise where that expert determination appears to have some basis in fact.").

C. Confiscation of the Cats

Last, "[e]xigent circumstances may justify a warrantless seizure of animals" when an official reasonably believes that the animals are in "imminent danger." *Siebert*, 256 F.3d at 657 (citing *DiCesare*, 12 F.3d at 977); *see also, e.g.*, *Commonwealth v. Duncan*, 467 Mass. 746, 7 N.E.3d 469, 471 (2014) (finding exigent circumstances to seize dogs where the dogs were left out "in severely inclement winter weather" and "extremely emaciated"); ***495** *Hegarty v. Addison Cnty. Humane Soc'y*, 176 Vt. 405, 848 A.2d 1139, 1143 (2004) (permitting the warrantless seizure of a horse where officer reasonably believed that the horse's "health was in jeopardy and that immediate action was required to protect her").

The imminent danger to animals here was plain—Gaetjens's thirty-seven cats could not be cared for in the Loves Park home because the condemnation placard prevented Gaetjens from entering the home for that purpose. Given this situation, the Animal Services officials' warrantless entry into the Loves Park home and the seizure of her cats did not violate the Fourth Amendment.

Gaetjens argues in rebuttal that regardless of whether Animal Services could seize her cats, they still violated the Fourth Amendment by using excessive force when doing so. Specifically, she alleges that the officials used a "cat grabber" that injured and ultimately killed the stud Calaio.

We have held before that "the use of deadly force against a household pet is reasonable only if the pet poses an immediate danger and the use of force is unavoidable." *Viilo v. Eyre*, 547 F.3d 707, 710 (7th Cir. 2008) (citing *Brown v. Muhlenberg Township*, 269 F.3d 205, 210–11 (3d Cir. 2001)). But that case, and the cases from this circuit applying its rule, involved officers shooting dogs with firearms. This case involved Animal Services officials using a cat-catching tool to catch a cat (which, according to indisputable testimony, looked ready to "maul" the cat-catcher). That Calaio died as a result of this manifestly reasonable tactic is unfortunate, but it does not an unreasonable seizure make.

Gaetjens also argues that even if the initial seizure of her cats was lawful, Animal Services violated her Fourth Amendment rights by retaining the cats longer than necessary. This argument fails because we have made clear that the Fourteenth Amendment, not the Fourth Amendment, provides the appropriate basis for challenging post-seizure procedures for the retrieval of property. *Bell v. City of Chicago*, 835 F.3d 736, 741 (7th Cir. 2016).

As a final note, Gaetjens argues that the district court incorrectly granted summary judgment *sua sponte* to the Animal Services officials. While Gaetjens is correct that this procedure warrants caution, it is permissible when "the losing party is given notice and an opportunity to come forward with its evidence." *Jones v. Union Pac. R.R. Co.*, 302 F.3d 735, 740 (7th Cir. 2002) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 326, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Goldstein v. Fid. and Guar. Ins. Underwriters, Inc.*, 86 F.3d 749, 750 (7th Cir. 1996)). Gaetjens has not argued here that she received inadequate notice, nor has she shown that she was deprived of an opportunity to marshal evidence to dispute the facts relied on in this opinion.

We therefore conclude that the Animal Services workers, like the other individual defendants, did not violate Gaetjens's Fourth Amendment rights.

D. Monell *Liability*

According to the Supreme Court's decision in *Monell*, municipalities are sometimes liable for the constitutional violations that their employees commit. 436 U.S. at 658, 98 S.Ct. 2018. "But a municipality cannot be liable under *Monell* when there is no underlying constitutional violation by a municipal employee." *Sallenger v. City of Springfield*, 630 F.3d 499, 504 (7th Cir. 2010) (citing ***496** *King ex rel. King v. E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 817 (7th Cir. 2007); *Jenkins v. Bartlett*, 487 F.3d 482, 492 (7th Cir. 2007)). That's the case here. Gaetjens's constitutional rights were not violated, and thus her *Monell* claim cannot succeed.

III. Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court.

All Citations

4 F.4th 487

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14 F.4th 830
United States Court of Appeals, Eighth Circuit.

Dejuan HAYNES Plaintiff - Appellant

v.

Brian MINNEHAN, Individually and in his official capacity as a law enforcement officer for the Des Moines, Iowa Police Department; Ryan Steinkamp, Individually and in his official capacity as a law enforcement officer for the Des Moines, Iowa Police Department; Dana Wingert, individually and in his official capacity as Chief of Police for the Des Moines, Iowa Police Department; City of Des Moines, Iowa Defendants - Appellees

No. 20-1777
|
Submitted: May 14, 2021
|
Filed: September 21, 2021
|
Rehearing and Rehearing En Banc Denied November 16, 2021

Synopsis

Background: Detainee brought § 1983 action against police officers who placed him in handcuffs during investigatory traffic stop following suspected drug transaction. The United States District Court for the Southern District of Iowa, Charles R. Wolle, Senior District Judge, granted officers' motion for summary judgment based on qualified immunity, and detainee appealed.

Holdings: The Court of Appeals, Grasz, Circuit Judge, held that:

officers lacked an objective safety concern which justified continued handcuffing of detainee, and

officers should have known that continued use of handcuffs would violate detainee's Fourth Amendment rights.

Reversed and remanded.

Shepherd, Circuit Judge, dissented with opinion.

***832** Appeal from United States District Court for the Southern District of Iowa - Central

Attorneys and Law Firms

Gina Messamer, Parrish & Kruidenier, Des Moines, IA, for Plaintiff-Appellant.

John O. Haraldson, City Attorney's Office, Legal Department, Des Moines, IA, for Defendants-Appellees.

Before SMITH, Chief Judge, SHEPHERD and GRASZ, Circuit Judges.

Opinion

GRASZ, Circuit Judge.

On a well-lit summer evening in a Des Moines neighborhood with community-reported drug crimes, police officers Brian Minnehan and Ryan Steinkamp lawfully stopped Dejuan Haynes for suspected (yet mistaken) involvement in a drug deal. Beyond that suspicion, the exceedingly polite and cooperative exchange between the three did not make either officer view Haynes as a safety risk. But when Haynes could not find his driver's license (yet shared three separate cards bearing his name), Steinkamp handcuffed him. While the polite interaction continued, the cuffs stayed on. They also stayed on after a clean frisk and a consensual pocket search. They even stayed on after the officers turned down more searches (another pocket and Haynes's car) and another squad car's offer to help. Haynes appeals the district court's adverse grant of summary judgment on his Fourth Amendment claims against the officers, the City, and Police Chief Dana Wingert, *see* 42 U.S.C. § 1983. We reverse.

I. Introduction

The Police Department tapped officers Minnehan, Steinkamp, and Ryan Garrett for the Summer Enforcement Team, "a proactive policing initiative meant to reduce criminal activity in the areas of the City" with criminal-activity reports, "either by arrest or by public request[ ]." Summer-Enforcement-Team officers would focus on "suspicious interactions that could involve illegal drugs."

After receiving community complaints about drug activity and other crimes, the Summer Enforcement Team sent the three officers to the neighborhood where Haynes attended church. Dressed in plainclothes in an unmarked van, Garrett kept lookout while Minnehan and Steinkamp patrolled in a cruiser. If Garrett suspected criminal ***833** activity, he would tell Minnehan and Steinkamp. Then, they would follow up on leads.

From the van, Garrett saw a Volkswagen Phaeton sedan driving south. It looked "expensive and unique."

Garrett saw a person on the sidewalk approach the Volkswagen's passenger's side window. The officer saw a ten-to-fifteen second meeting that involved "an exchange of something between them." Given his experience, his training, his observations, the meeting's length, and "the nature of crime reported in the neighborhood[,] ... Garrett suspected that this interaction may have been an illegal drug transaction."

And so, Garrett trailed the car. He then told Steinkamp and Minnehan that he suspected a hand-to-hand drug deal.

While still light outside, Steinkamp and Minnehan followed the car. When the car stopped at a stop sign, the officers activated their lights. The officers did not radio the stop to dispatch.

Bodycam and dashcam videos captured what happened next. After stopping his car, Haynes turned his head toward the officers and stuck his palms outside the driver's side window to show that his hands were empty. Approaching the car from the back, Steinkamp headed to the driver's side and Minnehan to the passenger's side. Steinkamp asked, "What were you doing?" Haynes explained that he had just given some change away.

Minnehan stated, "You got a cracked windshield, man." Haynes explained that he had not repaired the windshield because the car's Bentley parts would make the repairs costly ($2,500).[1]

When Steinkamp asked for identification, Haynes asked for permission to look for it. But Haynes could not locate his license. So, he gave Steinkamp a Visa credit card and a Costco card. Both cards bore his name. And the Costco card showed his photograph. Steinkamp jotted down Haynes's Social Security number, his birthdate, and his address.

Haynes also handed his insurance card to Minnehan. That card correctly listed Haynes's name.

Aside from the suspected drug deal, the officers would later testify that nothing about Haynes's behavior led them to see him as a safety risk or uncooperative. Both officers looked into the car. Neither saw anything drug-related nor smelled marijuana. And neither saw weapons.

Steinkamp's training taught him "to look for suspicious mannerisms, like heavy breathing, sweating, and fluctuation in [the] carotid artery." He saw none in Haynes. Instead, Haynes's cooperativeness led Steinkamp to immediately realize that this "was 'gonna be a pretty quick stop[.]' " And Minnehan characterized Haynes as "extremely cooperative," "very relaxed," polite, and pleasant. But because Haynes did not have his license, Steinkamp asked him to exit his car.

When Haynes complied, Steinkamp stated, "I'm going to detain you right now because I don't know who you are." Steinkamp then handcuffed Haynes. Both officers ***834** would later testify that if a driver lacked identification during a traffic stop, as a "standard practice," the officers would handcuff the driver.

Their supervisor, Sargent Jeffrey Robinson, testified that "typically" an officer would handcuff an individual during every *Terry* frisk. *See Terry v. Ohio*, 392 U.S. 1, 19–21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Minnehan, meanwhile, asked Haynes if he had anything illegal on him or in the car. Haynes said that he did not. Minnehan told Haynes that the handcuffing stemmed from his missing license and his presence in a high-crime area. Haynes remarked, "The car and me being over here don't match." Minnehan responded that "it's a nice car for the area."

Then Steinkamp began a pat down while asking again if Haynes had anything [illegal] on him. When Steinkamp asked to do a pocket check, Haynes consented. Steinkamp checked Haynes's left and righthand jeans pockets, patted down the area between his legs, and the front of his pants. During the frisk, Minnehan offered another explanation for the handcuffing and frisking: that he had seen "probably 75 hand-to-hand sales of crack at the same spot."

Steinkamp asked if Haynes had another pair of pants underneath his jeans. In his affirmative response, Haynes offered to let Steinkamp "undo [the] belt and check the pockets[.]" Steinkamp did so.

Steinkamp did not find any drugs. He did not find any weapons, either.[2]

As Steinkamp faced away from Haynes and headed back to the cruiser, Haynes told the officers about an inside pocket and gave them consent to check it. Neither did so. Steinkamp later testified that he chose not to search that pocket because he "had no reason to believe there was more evidence at that time."

With Steinkamp back at the cruiser, Minnehan watched over Haynes, who stood in the road in full public view in handcuffs with his belt unbuckled and his pants unzipped. Minnehan again asked if Haynes had anything illegal in the car. As Haynes said that he did not, he invited Minnehan to search the car. Minnehan declined.

Steinkamp returned to reconfirm Haynes's birthdate, name, and Social Security number before heading back to the cruiser again.

A few seconds later, another police car slowed down behind Minnehan. Minnehan said, "We're all good man. Thanks." That police car drove off.

Over two minutes later, Steinkamp returned and stated, "We're good." Then Minnehan finally removed the handcuffs. From the time the pat down ended until Haynes was uncuffed was nearly five minutes.

The officers later said that Haynes correctly identified himself, his address, and his Social Security number. And later, Garrett verified Haynes's explanation (stopping to give a person change).

This lawsuit, alleging federal and state constitutional violations, followed.[3] The officers, the City, and Wingert moved for ***835** summary judgment on qualified immunity grounds. The district court granted that motion. It reasoned that Haynes had no clearly established right to be free of handcuffs post-frisk. And it concluded that the record did not show a longer-than-necessary stop. It dismissed Haynes's *Monell* claims for failure to train and supervise as "without merit" given its conclusions on the alleged constitutional violations. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

II. Discussion

We review grants of qualified immunity de novo, viewing the facts in the light most favorable to Haynes. *Smith v. City of Brooklyn Park*, 757 F.3d 765, 772 (8th Cir. 2014). To determine if the officers should receive qualified immunity, we examine if: (1) the facts, viewed in the light most favorable to Haynes, show that the officers deprived him of a constitutional or statutory right; and (2) that right was clearly established when the alleged deprivation occurred. *See Wright v. United States*, 813 F.3d 689, 695 (8th Cir. 2015).

The Fourth Amendment bars "unreasonable ... seizures." U.S. Const. amend. IV. "A seizure occurs 'if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' " *United States v. Warren*, 984 F.3d 1301, 1303 (8th Cir. 2021) (quoting *INS v. Delgado*, 466 U.S. 210, 215, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984)).

An officer can "conduct a brief, investigatory stop"—what we call a "*Terry* stop"—"when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000) (quoting *Terry*, 392 U.S. at 19–20, 88 S.Ct. 1868). A lawful *Terry* stop "may nonetheless violate the Fourth Amendment if it is excessively intrusive in its scope or manner of execution." *El-Ghazzawy v. Berthiaume*, 636 F.3d 452, 457 (8th Cir. 2011) (affirming qualified-immunity denial).

The *Terry* analysis examines whether: (1) the stop began lawfully; and (2) the way officers conducted the stop "was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* (quoting *Terry*, 392 U.S. at 19–20, 88 S.Ct. 1868).

Because Haynes does not contest the first *Terry* prong, we only consider the second. Oral Arg. at 1:10–33. Under the second prong, "officers may use handcuffs as a reasonable precaution to protect the officers' safety and maintain the status quo during the *Terry* stop." *El-Ghazzawy*, 636 F.3d at 457.

But because handcuffs constitute "greater than a de minimus intrusion," their use "requires the [officer] to demonstrate that the facts available to the officer would warrant a man of reasonable caution in [believing] that the action taken was appropriate." *Id.* (first alteration in original) (quoting *Lundstrom v. Romero*, 616 F.3d 1108, 1122–23 (10th Cir. 2010)). In particular, *Terry* "requires some reasonable belief that the suspect is armed and dangerous or that the restraints are necessary for some other legitimate purpose, evaluated on the facts of each case." *Id.* (quoting *Bennett v. City of Eastpointe*, 410 F.3d 810, 836 (6th Cir. 2005)). We have already held that handcuffing "absent any concern for safety" violates the second *Terry* prong. *Id.* at 460 (citing *Manzanares v. Higdon*, 575 F.3d 1135, 1150 (10th Cir. 2009)).[4]

***836** At the outset, by relying on the connection between weapons and drug deals, we have repeatedly equated a person's suspected drug-deal involvement with a reasonable belief that the same person may be armed and dangerous.[5]

But as new information flows in, a reasonable belief can dissolve into an unreasonable one. *United States v. Tovar-Valdivia*, 193 F.3d 1025, 1028 n.1 (8th Cir. 1999) (explaining *Terry* did not "authorize the police officer to handcuff and search an individual *after* the initial pat-down of the bulge did not confirm the existence of a weapon or contraband"). This case is an example of how.

The officers gained additional information about Haynes by what he shared (his name, address, Social Security number, his Costco card with his photo, his Visa credit card, and his insurance card). And they gained information about him by observing how he acted (cooperative, polite, and relaxed).

They also gained information about Haynes by what they did not see (drugs or weapons), find (drugs or weapons), or smell (drugs). The officers chose *not* to gather extra information from readily available sources (searching Haynes's extra pocket and his car).

From the start, the officers outnumbered Haynes, who neither officer described as a large or imposing figure. They experienced no visibility issues. At no point did they seek help (by contacting dispatch). And when unsolicited help arrived (the other cruiser), they sent it away.

Yet, the officers kept Haynes in the road with his belt unbuckled and his pants unzipped for over five minutes. In handcuffs.

Given these circumstances, the officers failed to point to specific facts supporting an objective safety concern during the encounter. *See El-Ghazzawy*, 636 F.3d at 458–59; *see Lundstrom*, 616 F.3d at 1124 ("We stress the lack of corroborating evidence at this point in the encounter."). As a result, we conclude that their conduct "was not reasonably necessary to protect [their] personal safety or maintain the status quo during the investigatory stop." *El-Ghazzawy*, 636 F.3d at 459; *compare Waters v. Madson*, 921 F.3d 725, 738 (8th Cir. 2019) ("[U]npredictability, evasiveness, argumentative demeanor, refusal to [ ]obey legitimate officer commands, and ... size difference between [suspect] and the officers, ... viewed as a whole, ... could cause [officers] to reasonably believe they needed to handcuff [the suspect] and place ... in ... squad car to preserve the status quo."), *with United States v. Bailey*, 743 F.3d 322, 332 (2d Cir. 2014) (holding that an initially permissible *Terry* stop in drug-trafficking case became unlawful after a clean frisk of defendant and his companion "confirmed that neither man was armed" ***837** and "having both men exit the vehicle ... eliminated the risk that the men might obtain any weapon from therein").

So, the way that the officers conducted the seizure "was not 'reasonably related in scope to the circumstances which justified the interference in the first place.' " *El-Ghazzawy*, 636 F.3d at 459 (quoting *Terry*, 392 U.S. at 19–20, 88 S.Ct. 1868). Consequently, the initially lawful *Terry* stop ultimately violated Haynes's Fourth Amendment rights. *See id.* Because the officers violated the Constitution, Haynes satisfied the first qualified-immunity prong. *See Wright*, 813 F.3d at 695.

For the second qualified-immunity prong, we ask if case law would have fairly notified every reasonable officer in Minnehan and Steinkamp's shoes that their conduct would violate the Constitution. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011); *see also El-Ghazzawy*, 636 F.3d at 459. We conclude that it does.

More than six years before Steinkamp handcuffed Haynes, we said that it was "well established that if suspects are cooperative and officers have no objective concerns for safety, the officers may not use intrusive tactics such as handcuffing absent any extraordinary circumstances." *El-Ghazzawy*, 636 F.3d at 460. We concluded that "the prior case law provided fair warning to [an officer] at the time of the incident" that a reasonable officer in her place "could not have believed it was lawful to handcuff and frisk a suspect absent any concern for safety." *Id.* And even earlier, we rejected an argument that reasonable suspicion justified handcuffing a suspect after a frisk confirmed that the suspect lacked a weapon or contraband. *Tovar-Valdivia*, 193 F.3d at 1028 n.1; *Manzanares*, 575 F.3d at 1150 ("[A]ny reasonable officer would understand that it is unconstitutional to handcuff someone absent probable cause or an articulable basis to suspect a threat to officer safety combined with reasonable suspicion.").[6]

The dissent suggests this case is controlled by our recent decision in *Pollreis v. Marzolf*, 2021 WL 3610875 (8th Cir. Aug. 16, 2021). But we believe *Pollreis* differs from this case in a number of important ways. There, on a dark and rainy night, a

police officer set up a perimeter around a car crash to apprehend fleeing suspects of gang-related activity, one of whom was believed to be carrying a gun. *Id.* at 740-41. The officer encountered two individuals who matched a vague description of the fleeing suspects. *Id.* The officer held them for several minutes until backup arrived and then handcuffed and frisked them before letting them go. *Id.* at 740-43. In stark contrast to the situation in *Pollreis*, no dispatcher warned that Haynes was likely armed. There was not a solitary officer left with multiple suspects in the dark. Haynes, unlike the suspects in *Pollreis*, had been thoroughly searched and cleared for weapons, contraband, and evidence of drug dealing. Yet, he remained handcuffed. In sum, the reasonable concern of danger to the officer present in *Pollreis* was lacking here.

Because Minnehan and Steinkamp had fair notice that they could not handcuff ***838** Haynes without an objective safety concern, we conclude that the district court erred in granting qualified immunity. By extension, that conclusion also upends the district court's *Monell* holding, which it fused to its qualified-immunity analysis.

III. Conclusion

For these reasons, we reverse the summary-judgment grant. We remand for proceedings consistent with this opinion.

SHEPHERD, Circuit Judge, dissenting.
Officers Minnehan and Steinkamp stopped Haynes's vehicle in a high crime area after being advised by a third officer that he had observed what appeared to be a hand-to-hand drug transaction involving Haynes's vehicle a few minutes earlier. Further, Officers Minnehan and Steinkamp observed that Haynes's vehicle had a cracked windshield. See Iowa Code § 321.438(1) ("A person shall not drive a motor vehicle equipped with a windshield, sidewings, or side or rear windows which do not permit clear vision."). I agree with the majority that this traffic stop was constitutional based upon this suspicion and the possible traffic violation.[7]

Further, the majority properly concludes that Officer Steinkamp constitutionally placed Haynes in handcuffs, noting that "we have repeatedly equated a person's suspected drug-deal involvement with a reasonable belief that the same person may be armed and dangerous." See ante at —— (citing United States v. Johnson, 528 F.3d 575, 579-80 (8th Cir. 2008)). However, the majority denies qualified immunity to the officers because the handcuffs were not removed at the conclusion of Officer Steinkamp's patdown and search of Haynes's person, and Haynes remained handcuffed for an additional approximately four minutes and forty-five seconds. I disagree because it was not clearly established that the officers could not constitutionally keep Haynes handcuffed post-frisk and until his identity and his criminal status could be determined. For this reason, I respectfully dissent.

The dash- and body-cam footage reveals that the traffic stop in this case lasted for approximately 11 minutes. Just seconds into the stop, Haynes was asked to produce identification. In response, Haynes handed over a Visa credit card and a Costco card. Officer Steinkamp wrote Haynes's name, address, and social security number on a notepad, then asked Haynes to exit the vehicle. Officer Steinkamp then applied handcuffs, patted down Haynes, and searched Haynes's pockets. These actions took approximately five minutes. Officer Steinkamp left Haynes and Officer Minnehan standing next to the open driver's door of Haynes's vehicle and returned to his patrol car. It took approximately one minute more for Officer Steinkamp to enter the information into the police cruiser's computer terminal. Officer Steinkamp then returned to Haynes to get the correct spelling of his name and reconfirm his birth date and social security number. This took approximately forty-five seconds. Officer Steinkamp returned to his cruiser to re-enter the information. Approximately two minutes and forty-five seconds later—approximately nine minutes and thirty seconds into the stop—Officer Steinkamp returned, and Officer Minnehan ***839** removed the handcuffs, advising Haynes he could go on his way. Accordingly, Haynes was in handcuffs for a total of four minutes and forty-five seconds from the conclusion of Officer Steinkamp's patdown and search of Haynes's person to the moment Officer Minnehan removed the handcuffs.

At the conclusion of the patdown and search of Haynes's person, the information available to the officers was that Haynes was party, a few minutes before, to a transaction that law enforcement reasonably suspected to be a hand-to-hand drug deal. The officers did not know whether Haynes was the seller or buyer in the suspected transaction. Although Officers Minnehan and Steinkamp did not find any drugs on Haynes's person, they did find a wad of cash, and Haynes's vehicle had not been searched. Further, the officers were unable to verify Haynes's identity or background because Haynes could not produce a driver's license, offering instead a Visa credit card and a Costco card. The majority offers no authority that these cards could substitute for the production of a driver's license, and indeed it cannot, as Iowa law requires that the driver of a motor vehicle have in his or her possession a valid driver's license with a photo of the driver. See Iowa Code §§ 321.174(3), .189(2)(a), .482. Finally, Haynes stood next to the open driver's door of his vehicle throughout the stop. Accordingly, until the end of the stop when the officers verified Haynes's identity via computer search, they had no information as to his outstanding wants or warrants, nor could they even verify his true identity.

I doubt that Haynes has shown the violation of a constitutional right by virtue of the failure of the officers to remove the handcuffs from Haynes's wrists for four minutes and forty-five seconds after the conclusion of the patdown and search. However, even if he has, it was not clearly established on July 26, 2018, that Haynes's Fourth Amendment rights would be violated under these circumstances.

A right is clearly established where the "contours" of that right are "sufficiently clear [such] that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). "In other words, existing law must have placed the constitutionality of the officer's conduct 'beyond debate.' " District of Columbia v. Wesby, —— U.S. ——, 138 S.Ct. 577, 589, 199 L.Ed.2d 453 (2018); see also Anderson, 483 U.S. at 640, 107 S.Ct. 3034 ("This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." (citation omitted)). "A plaintiff must identify either 'controlling authority' or 'a robust "consensus of cases of persuasive authority" 'that 'placed the statutory or constitutional question beyond debate' at the time of the alleged violation." Kelsay v. Ernst, 933 F.3d 975, 979 (8th Cir. 2019) (en banc) (citation omitted).

"The state of the law should not be examined at a high level of generality." Id. "[D]oing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." Plumhoff v. Rickard, 572 U.S. 765, 779, 134 S.Ct. 2012, 188 L.Ed.2d 1056 (2014). Instead, "[t]he dispositive question is whether the violative nature of *particular* conduct is clearly established." Kelsay, 933 F.3d at 979 (citation omitted). This Court has previously explained that such specificity is of particular importance in the Fourth Amendment context because "it is sometimes difficult for an officer to determine how the relevant legal doctrine ... will apply to the factual situation the ***840** officer confronts." Id. at 979-80 (citation omitted).

It is well established that "[a]n officer may lawfully continue a traffic stop until 'tasks tied to the traffic infraction are—or reasonably should have been—completed.' " United States v. Soderman, 983 F.3d 369, 374 (8th Cir. 2020) (citation omitted), petition for cert. filed, (U.S. June 1, 2021) (No. 20-8179) (citation omitted). During a traffic stop, "an officer's mission [typically] includes ... checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." Rodriguez v. United States, 575 U.S. 348, 355, 135 S.Ct. 1609, 191 L.Ed.2d 492 (2015); see also United States v. Jones, 269 F.3d 919, 924 (8th Cir. 2001) ("[O]ur case law teaches us that a police officer, incident to investigating a lawful traffic stop, may request the driver's license and registration, request that the driver step out of the vehicle, request that the driver wait in the patrol car, conduct computer inquiries to determine the validity of the license and registration, conduct computer searches to investigate the driver's criminal history and to determine if the driver has outstanding warrants, and make inquiries as to the motorist's destination and purpose."). In fact, "[t]hese checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." Rodriguez, 575 U.S. at 355, 135 S.Ct. 1609. We have previously explained that the conclusion of a traffic stop may be demarcated by an officer's return of a driver's license to the stopped driver. See, e.g., Jones, 269 F.3d at 925; see also United States v. White, 81 F.3d 775, 778 (8th Cir. 1996) (explaining traffic stop ended when officer returned driver's license and registration to driver); United States v. Espinoza, 885 F.3d 516, 523 (8th Cir. 2018) (finding traffic stop not unconstitutionally extended where officer

asked driver without driver's license to sit in patrol car because that request was "directly related to proper completion of the traffic stop").

Further, "an officer may use handcuffs to protect the officers and maintain the status quo during the stop," see Garcia v. City of New Hope, 984 F.3d 655, 668 (8th Cir. 2021) (citation omitted) (finding no constitutional violation where officers handcuffed suspect during traffic stop); see also United States v. Shranklen, 315 F.3d 959, 961 (8th Cir. 2003) ("At any investigative stop —whether there is an arrest, an inventory search, neither, or both—officers may take steps reasonably necessary to protect their personal safety."), particularly where drug trafficking is suspected, see, e.g., United States v. Navarrete-Barron, 192 F.3d 786, 791 (8th Cir. 1999); see also State v. Dewitt, 811 N.W.2d 460, 472 (Iowa 2012) ("The suspected criminal activity involved drug dealing, which is a serious crime for which offenders often run from the police."). Even if an officer lacks probable cause, Supreme Court precedent permits a brief detention where that officer has reasonable suspicion that criminal activity is afoot. See Pollreis v. Marzolf, 9 F.4th 737, 744 (8th Cir. Aug. 16, 2021) (Grasz, J.). "In making reasonable-suspicion determinations, reviewing courts 'must look at the "totality of the circumstances" of each case to see whether the detaining officer has a "particularized and objective basis" for suspecting legal wrongdoing.' " Id. (citation omitted). Further, "[w]e have said before that 'a person's temporal and geographic proximity to a crime scene, combined with a matching description of the suspect, can support a finding of reasonable suspicion.' " Id. (citation omitted). Ultimately, the Fourth Amendment requires that an officer possess "some reasonable belief that the suspect is armed and dangerous or that the restraints are necessary for some other ***841** legitimate purpose" before handcuffing a suspect during a Terry stop. Id. at 745 (citation omitted).

Against this authority, the majority relies on three cases to explain why the clearly established prong was satisfied: El-Ghazzawy v. Berthiaume, 636 F.3d 452 (8th Cir. 2011); United States v. Tovar-Valdivia, 193 F.3d 1025 (8th Cir. 1999) (per curiam); and Manzanares v. Higdon, 575 F.3d 1135 (10th Cir. 2009). However, all three are factually distinct from the situation presented to Officers Minnehan and Steinkamp, and to find that these cases notified the officers that their conduct was unlawful requires us to regard those cases with an impermissibly "high level of generality." See Kelsay, 933 F.3d at 979. Additionally, Manzanares is just *one* out-of-circuit case and does not constitute a "robust 'consensus of persuasive authority.' " See Wesby, 138 S.Ct. at 589-90 (citation omitted).

It is true that in El-Ghazzawy this Court found the officer's handcuffing and frisk violated the suspect's Fourth Amendment rights where that suspect was "by all accounts, calm and cooperative during the entirety of the incident." 636 F.3d at 458-59. However, El-Ghazzawy was suspected of committing "theft by swindle," which we noted "was not a dangerous crime which would cause concern of him being armed and dangerous." Id. at 457 (comparing Johnson, 528 F.3d at 580 ("In light of the dangerousness of the suspected drug trafficking, and the likelihood that [the defendant] had access to a weapon, it was reasonable for the police to restrain [the defendant's] hands.")). We found persuasive the fact that "there was nothing in the dispatch to indicate El-Ghazzawy could be armed or dangerous" and that, despite the non-dangerous nature of his suspected offense, the officer handcuffed El-Ghazzawy seconds after arriving to the scene. See id. at 457-58; see also Pollreis, 9 F.4th at 746 (distinguishing El-Ghazzawy, where "no facts indicated that the suspect was dangerous or had a weapon," from situation where officer handcuffed suspects after receiving information that suspects might be armed and suspect made "hand-to-waist" movement). Moreover, a suspect's "compliance is only *one* factor, albeit an important one, in the totality-of-the-circumstances analysis." See Pollreis, 9 F.4th at 746 (Grasz, J.) (emphasis added).

Tovar-Valdivia and Manzanares are similarly unhelpful, with Tovar-Valdiva discussing a warrantless arrest at a bus stop, see 193 F.3d at 1026-27, and Manzanares discussing a suspect's in-home detention and subsequent three-hour detention in a squad car, see 575 F.3d at 1140-41. There was no Terry stop in Tovar-Valdivia—only a warrantless arrest. See 193 F.3d at 1027. Further, Manzanares was not even suspected of a crime at the time he was handcuffed. See 575 F.3d at 1140. Thus, these cases are not instructive. Here, Officers Minnehan and Steinkamp were working in a high-crime area and responding to a dispatch reporting a suspected hand-to-hand drug transaction involving Haynes. As we expressly noted in El-Ghazzawy and Johnson, and as the majority here recognizes, an officer's response to suspected drug trafficking entails a heightened level of dangerousness —correspondent with a need for heightened safety—not present when responding to reports of non-dangerous crimes such as "theft by swindle." Cf. ante at ——.

In some circumstances, a frisk during a Terry stop will no doubt dispel an officer's suspicion that the suspect is armed and dangerous and that he or she may flee. However, the facts here are not so straightforward. Haynes was suspected of drug activity, which we deem a dangerous crime. See, e.g., Johnson, 528 F.3d at 580; ***842** see also Chestnut v. Wallace, 947 F.3d 1085, 1091 (8th Cir. 2020) ("We think that officers should generally be allowed to believe the information that they receive from or through a dispatcher, even it if later turns out that the facts as relayed are disputed or even untrue, and that that information alone can sometimes justify a detention."). While the check of a driver's name is a routine "mission" of traffic stops, Haynes was unable to produce his driver's license or any other form of government-issued identification upon the officers' request, a misdemeanor offense under Iowa law, see Iowa Code Ann. §§ 321.174(3), .189(2)(a), .482., and this delayed the officers' confirmation of Haynes's identity and his lack of outstanding wants or warrants to the end of the traffic stop. While the search of Haynes's person did not reveal a weapon or contraband, it did reveal a wad of cash in Haynes's pocket. Further, Haynes stood next to the open door of his vehicle, which had not been searched. And ultimately, the entire stop took approximately 11 minutes. See, e.g., Pollreis, 9 F.4th at 745-47 (Grasz, J.) (finding suspects' constitutional rights not violated where the encounter lasted only seven minutes).

It is incongruous that, after finding qualified immunity appropriate in Pollreis, the Court now denies qualified immunity to Officers Steinkamp and Minnehan. In Pollreis, an officer responded to a dispatch call describing suspects who had fled from the scene of a car crash, one of which was likely armed. Id. at 740-41. The officer stopped two young boys—12 and 14 years old—and held them facedown at gunpoint despite their mother's and stepfather's identification of them; the boys' cooperation; and the frisk of the boys and the search of their backpack, neither of which revealed weapons or drugs. Id. at 741-42. In total, the officer kept the boys handcuffed for approximately 2 minutes and the stop lasted a total of approximately 7 minutes. Id. at 742-43, 745-47. When considering a challenge to the length of the stop, the Court explained:

> We do not see this as an unlawfully prolonged investigative stop. *Consider the stop's specific purpose: to identify the boys and to determine if they were, in fact, two people fleeing from the crash.* Even without learning any new suspicious facts during the encounter, *[the officer] was justified in taking the amount of time needed to accomplish those purposes.*

Id. at 744 (Grasz, J.) (emphasis added).

I can see no meaningful distinction between the facts in Pollreis and the facts here. Like the officer in Pollreis, Officers Steinkamp and Minnehan kept Haynes handcuffed only long enough to satisfy "the stop's specific purpose: to identify [Haynes]." Id. The Pollreis Court noted the boys' close proximity to a reported crime scene and appearance, which matched that of the suspects. Id. at 744-45. Factually, Haynes's story is almost identical: he was stopped near the scene of an alleged hand-to-hand drug transaction and matched the suspect's description given by dispatch. True, there was not "low visibility" during Haynes's stop, and Haynes did not make a "hand-to-waist" movement as one of the boys did. See id. at *744-47. However, the objective of both stops was the same: verify the identity of the handcuffed suspect(s). In Pollreis, the Court held that 7 minutes was not too long to achieve that objective while here, the majority holds that 11 minutes is too long to achieve the same objective. Given the approximate 4-minute difference in the two stops' lengths, I cannot square the Court's two outcomes.

Contrary to the majority's suggestion, it is not my position that handcuffing should be "a routine part of a Terry stop." See ante at —— n.4. Indeed, handcuffing is ***843** inappropriate where there is no indication the suspect is dangerous. However, this is not a situation in which there was an "absence of reasons to believe the subject [was] dangerous." See id. My conclusion is limited to the scenario currently before this Court: the officers were responding to a suspected hand-to-hand drug transaction in a high crime area—a scenario that this Court has repeatedly characterized as inherently dangerous and often associated with weapons—and therefore, until the officers could satisfy the "stop's specific purpose" and identify Haynes, they were "justified in taking the amount of time needed to accomplish [that] purpose." Pollreis, 9 F.4th at 744 (Grasz, J.).

I would grant the officers qualified immunity as, under prong two of the qualified immunity inquiry, it was not clearly established that Haynes should have been released from handcuffs at the conclusion of the patdown and search of his person. For these reasons, I would affirm the district court.

All Citations

14 F.4th 830

Footnotes

1 The dissent notes that Haynes's vehicle "had a cracked windshield." We agree this added to the already-existing probable cause to stop Haynes's vehicle. Whether the crack was a violation of Iowa law is not ascertainable from the record. Viewed in a light most favorable to Haynes, the video and the recorded conversation between Haynes and the officers indicate Haynes had been previously advised by a law enforcement officer that the crack was not sufficiently obstructive to be a violation. Minnehan Body Camera 1:12-1:35. In any event, if the officers thought it was a violation, they did not issue any citation. More importantly, the window has no relevance to whether the prolonged handcuffing of Haynes was constitutional.

2 The dissent states that the officers found "a wad of cash" on Haynes. Yet, the video evidence clearly shows that the officers determined the "wad" of cash was just some small bills ("now I see it's just fives and singles") and that the officers did not find the cash consistent with drug dealing or otherwise suspicious. Both officers are heard stating their initial suspicion as to the cash had been dispelled when they "look[ed] into it" and "figure[d] it out." Steinkamp Body Camera 5:54-6:05.

3 Before summary judgment, Haynes voluntarily dismissed several claims.

4 Questions about "identity are a routine and accepted part of many *Terry* stops." *Hiibel v. Sixth Jud. Dist. Ct.*, 542 U.S. 177, 185, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004). Those questions, including requests for identification, do not by themselves " 'constitute a Fourth Amendment seizure,' so 'a police officer is free to ask a person for identification without implicating the Fourth Amendment.' " *Chestnut v. Wallace*, 947 F.3d 1085, 1089 (8th Cir. 2020) (quoting *Hiibel*, 542 U.S. at 185, 124 S.Ct. 2451). Under the dissent's view, handcuffing could easily become a routine part of a *Terry* stop as officers routinely check identification and warrant status even in the absence of reasons to believe the subject is dangerous. But absent an objective safety risk, handcuffing is *not* a routine part of a *Terry* stop. *El-Ghazzawy*, 636 F.3d at 457; *see also Ramos v. City of Chicago*, 716 F.3d 1013, 1017–18 (7th Cir. 2013) (explaining that handcuff use "*to ensure officer safety* in a *Terry* stop of brief duration ... does not mean that law enforcement has carte blanche to handcuff routinely") (emphasis added).

5 *See, e.g.*, *United States v. Johnson*, 528 F.3d 575, 579–80 (8th Cir. 2008) (upholding handcuffing during search-warrant execution when officers suspected involvement in drug trafficking and a "likelihood that [defendant] had access to a weapon").

6 The dissent acknowledges that "the Fourth Amendment requires that an officer possess 'some reasonable belief that the suspect is armed and dangerous or that the restraints are necessary for some other legitimate purpose' before handcuffing a suspect during a *Terry* stop." That is precisely why the continued cuffing of Haynes was a clearly established violation of the Fourth Amendment. Once all reasonable belief that Haynes was armed or dangerous was dispelled, he was kept publicly displayed, pants undone, in handcuffs for no legitimate purpose. Haynes was not threatening in any respect. He was a model of politeness and cooperation.

7 I do not highlight Iowa Code § 321.438(1) or Haynes's cracked windshield as justification for the *length* of the stop. Instead, it is pertinent to my conclusion that the officers were justified in their *initial* stop of Haynes—a conclusion the majority agrees with. See United States v. Chatman, 119 F.3d 1335, 1340 (8th Cir. 1997) ("[S]o long as police have probable cause to believe that a traffic violation has occurred, the stop is valid even if the police would have ignored the traffic violation but for their suspicion that greater crimes are afoot." (citation omitted)).

998 F.3d 888
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Juan Marquis HOLIDAY, Defendant-Appellant.

No. 20-50157

|

Submitted April 16, 2021* Pasadena, California

|

Filed May 27, 2021

Synopsis

Background: Defendant who was convicted in the United States District Court for the Southern District of California, Anthony J. Battaglia, J., of armed robbery and attempted armed robbery appealed his conviction and sentence.

Holdings: The Court of Appeals, Milan D. Smith, Circuit Judge, held that:

search of defendant's home did not fall into emergency exception to Fourth Amendment's warrant requirement;

error of admitting body camera footage obtained from a warrantless search of defendant's home was harmless;

video evidence of defendant's flight from police was admissible to prove identity;

probative value of video of defendant fleeing from police was not substantially outweighed by any prejudicial effect;

joinder of multiple offenses in a single indictment was proper; and

sentence imposed for conviction for armed robbery and attempted armed robbery was not disproportionate to crimes committed.

Affirmed.

***890** Appeal from the United States District Court for the Southern District of California, D.C. No. 3:17-cr-01370-AJB-1, Anthony J. Battaglia, District Judge, Presiding

Attorneys and Law Firms

Douglas C. Brown, San Diego, California, for Defendant-Appellant.

Robert S. Brewer, Jr., United States Attorney; Daniel E. Zipp, Chief, Appellate Section, Criminal Division; David Chu, Assistant United States Attorney; United States Attorney's Office, San Diego, California; for Plaintiff-Appellee.

Before: MILAN D. SMITH, JR., and SANDRA S. IKUTA, Circuit Judges, and JOHN E. STEELE,** District Judge.

OPINION

M. SMITH, Circuit Judge:

***891** Juan Marquis Holiday was tried and convicted for seven instances of armed robbery and three instances of attempted armed robbery. The district court sentenced him to a mandatory minimum term of eighty-five years' imprisonment. Holiday appealed his conviction and sentence. On appeal, Holiday raises three alleged trial errors: (1) denial of his motion to suppress body camera footage of him taken during an unrelated police encounter; (2) denial of his motion *in limine* to exclude video evidence of his flight from police; and (3) denial of his motion to sever the offenses. In addition, Holiday argues that cumulative errors affected the fairness of his trial. Holiday also contends that the mandatory minimum term imposed on him violates the Eighth Amendment's prohibition on cruel and unusual punishment. Finally, Holiday urges the court to overturn a prior case that held that attempted Hobbs Act robbery is a "crime of violence." We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In early 2017, Holiday robbed seven businesses and attempted to rob three others. He was charged with seven counts of obstruction of commerce by robbery, in violation of 18 U.S.C. § 1951, three counts of attempted obstruction of commerce by robbery, in violation of 18 U.S.C. § 1951, and ten counts of using a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c). Each robbery or attempted robbery was caught on surveillance footage. The footage showed a suspect with a hooded sweatshirt cinched to hide his face. Each incident involved the use of a firearm. During five of them, the suspect fired the gun he was holding. During two of the robberies, the suspect pistol-whipped his victims.

On April 10, 2017, San Diego Police Officer Joshua Taisor witnessed a man in a dark blue sweater get into a parked car. That car then ran a stop sign and, when Taisor attempted to pull the car over, its driver led the police on a chase. The fleeing car eventually crashed, and four people bolted from the car and fled. One of those individuals was Holiday, who wore a blue hooded sweatshirt with black sleeves and the initials "SD" on the front, which the Government argued was identical to the sweatshirt the suspect was wearing in four of the robberies. A search of the vehicle also revealed a two-tone handgun that matched the description of the weapon used in one of the robberies.

In a search of Holiday's home, the FBI recovered long dark shorts and a blue bandana that the government argued matched what the suspect was wearing in three of the robberies. The FBI also found a black handgun with a silver ejection port that matched the gun used in five of the robberies. The Government introduced additional direct and circumstantial evidence at trial to link Holiday to the robberies, including DNA evidence matching Holiday's profile from the scene of one robbery. The Government also adduced body camera footage from an unrelated police encounter at Holiday's home. In the footage, Holiday was wearing blue Nike Cortez shoes with white trim, which matched ***892** the description of the shoes the suspect was wearing during one of the robberies.

The body camera footage was taken on February 7, 2017, after police received a report that a man was hitting a child in the backseat of a blue Jaguar. In a "contemporaneous line" of actions from the report of the incident, police ran the license plate and found it was registered to a person with the initials M.B., at 1703 Paseo Aurora Road. When the officers arrived at that address, one of them knocked on the front door, tried the handle, and found it was unlocked. The officer pushed the door open but remained standing on the threshold. Holiday and his wife were on their way to the door when the officer opened it; they told the officers that their children were at school and that they did not own a blue Jaguar. There is no indication that the officers saw a blue Jaguar at or near Holiday's residence. The officers took Holiday's name and left.

Holiday moved to suppress the bodycam footage of this exchange on the ground that it was collected in violation of the Fourth Amendment. The district court denied the suppression motion based on exigent circumstances. Holiday also moved to exclude video evidence showing the car chase after which he was apprehended on the grounds that it was inflammatory, more prejudicial than probative, and reflected evidence of uncharged offenses. The district court denied the motion but gave a limiting instruction that the jury was prohibited from considering any potential uncharged crime when determining Holiday's guilt for the charged crimes.

Holiday also moved to sever five of the robberies on somewhat unclear grounds, appearing to argue that five of the robberies were committed by two individuals together, and the other five were committed by one person alone. The district court denied the motion. Next, Holiday argued that *conspiracy* to commit robbery is not a crime of violence under the Hobbs Act. The district court held that the robberies were crimes of violence as a matter of law, noting that Holiday was not charged with conspiracy.

The jury convicted Holiday for his role in all ten robberies. At sentencing, the district court denied Holiday's motion for a downward departure from the offenses' mandatory minimum sentences, holding that the eighty-five-year mandatory minimum did not violate the Eighth Amendment. Holiday appealed.

On appeal, Holiday contends that the district court incorrectly denied his motion to suppress the body camera footage, requests that we "change [ ] current Ninth Circuit law" to hold that attempted Hobbs Act robbery is not a crime of violence for purposes of 18 U.S.C. § 924(c) and also claims that it was improper under Federal Rule of Evidence 404(b) to admit the video evidence of the car chase after which police apprehended him. In addition, Holiday argues that the charges against him were improperly joined in a single indictment, that the district court should have granted his motion for a new trial based on cumulative errors, and that his mandatory minimum term of eighty-five years' imprisonment violates the Eighth Amendment.

ANALYSIS

A.

We first consider whether the district court properly denied Holiday's motion to suppress the body camera footage.

1.

The San Diego Police Department did not obtain a warrant to search Holiday's home in connection with the report of child abuse in a blue Jaguar registered ***893** to Holiday's address. "[S]earches and seizures inside a home without a warrant are presumptively unreasonable," and therefore violate the Fourth Amendment, unless subject to an established exception. *Kentucky v. King*, 563 U.S. 452, 459, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011) (internal quotation marks omitted). The Government concedes that opening Holiday's front door constituted a search, but it contends that the search was constitutional pursuant to the emergency exception to the warrant requirement.

Pursuant to the emergency exception, police need not obtain a search warrant to enter a dwelling if "(1) considering the totality of the circumstances, law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm; and (2) the search's scope and manner were reasonable to meet the need." *United States v. Snipe*, 515 F.3d 947, 952 (9th Cir. 2008). Domestic violence cases do not "create a *per se* exigent need for warrantless entry." *United States v. Brooks*, 367 F.3d 1128, 1136 (9th Cir. 2004). Instead, we have found the emergency exception to the warrant requirement satisfied where police have an objectively reasonable belief that the victim is inside the home and in danger. *See, e.g.*, *United States v. Black*, 482 F.3d 1035, 1039 (9th Cir. 2007) (affirming application of the exigent circumstances doctrine when the defendant "could have returned to the apartment after [the victim's] 911 call, but before police arrived at the

scene," which would have allowed the defendant to "pull [the victim] back into the apartment"); *United States v. Brooks*, 367 F.3d 1128, 1135 (9th Cir. 2004).

In this case, the Government has not satisfied the second prong of the *Snipe* test. The officers had no reason to believe that the child victim was in the home at the address where the Jaguar was registered. In fact, they had reason to believe the child was *not* in the home, since the tip they received was that the child was *in a blue Jaguar*. The Government appears to adopt the district court's finding that "there 'was no indication that the [incident] in the Jaguar had ended' " when officers arrived at the residence. If the incident in the Jaguar had not ended, it was clearly unreasonable for the officers to have believed that the victim of the reported crime was inside Holiday's residence. In order to show that "the search's scope and manner were reasonable to meet the need," as the *Snipe* test requires, 515 F.3d at 952, the Government must provide a logical and sound link between the information police have and the search they conduct. The Government has failed to do so here.

The Government cites several cases for the proposition that "the need to ensure a child's welfare is an emergency that justifies a limited, warrantless search." But in each case cited, the police had information that either suggested or confirmed that the child in need of assistance was *inside* the dwelling that was the subject of the warrantless search (or the child was with police and needed to be reunited with parents inside the dwelling). *See, e.g.*, *United States v. Bradley*, 321 F.3d 1212, 1214–15 (9th Cir. 2003) (warrantless entry was constitutional where nine-year-old's mother told police that the child was home with no parent or guardian in the middle of the night); *United States v. Brooks*, 367 F.3d 1128, 1136 (9th Cir. 2004) (warrantless entry into a hotel room was permissible where a 911 call reported abuse taking place inside the room); *United States v. Taylor*, 624 F.3d 626, 632 (4th Cir. 2010) (warrantless entry was constitutional to reunite a lost four-year-old with the child's parents).

***894** The opposite is true here: rather than information that the child was inside the residence at 1703 Paseo Aurora, the police had information suggesting or confirming that the child in need of assistance was in a blue Jaguar. But instead of locating the blue Jaguar, the police went to the location where they knew or should have known the child was not present. The officers' conduct does not fall within the scope of the emergency exception to the warrant requirement.[1]

2.

According to the Federal Rules of Criminal Procedure, "[a]ny error ... that does not affect substantial rights must be disregarded" on appeal. Fed. R. Crim. P. 52(a). Thus, when evidence in a case like this one is introduced that should not have been, the court conducts a harmless error analysis. *United States v. Brobst*, 558 F.3d 982, 997 (9th Cir. 2009). "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt," in that it "did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The Government bears the burden of proving that an error was harmless. *United States v. Lustig*, 830 F.3d 1075, 1086 (9th Cir. 2016).

The Government used the body camera footage obtained from the illegal search to show that Holiday owned blue Nike Cortez sneakers with white trim—the shoes that the suspect was wearing in the January 5 robbery of the ARCO gas station. The footage was not used for any other purpose. Thus, at most, the footage could only have affected the verdict on the two counts associated with the ARCO robbery. However, there was other probative evidence linking Holiday to that particular robbery. Specifically, Holiday's DNA was found on a black plastic bag outside the ARCO gas station soon after the surveillance footage showed the clerk handing the robber an identical black plastic bag. Holiday argues that the Government's theory at trial rested on a common pattern among all the robberies. This is true, but it is irrelevant where the improperly admitted body camera footage merely bolstered already conclusive evidence that Holiday committed a particular count charged in the indictment. *See United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996). Because of the strength of the other evidence that Holiday committed the ARCO robbery, we hold that the error in admitting the body camera evidence was harmless.

B.

Holiday contends that the district court should have granted his motion *in limine* to exclude the video evidence of Holiday's flight from police on April 10, 2017 pursuant to Federal Rule of Evidence 404(b). Rule 404(b) states:

> **(1) Prohibited Uses.** Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> **(2) Permitted Uses.** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

First, Holiday provides no support for his argument that the car chase was within the scope of Rule 404(b). The Government ***895** did not use the video to argue that Holiday was the type of person who flees from police, or that he fled from police in the charged crimes. Instead, the Government used the video of the car chase "to explain how the Government obtained the two[-]tone handgun ... (and to corroborate testimony that Holiday was sitting where the gun was found), and to show that Holiday was wearing the same blue hooded sweatshirt with black sleeves that was worn at the last four robberies." The car chase video therefore was not subject to Rule 404(b)(1).

Even if the video would have been excluded under Rule 404(b)(1) if the Government had used it to prove Holiday's character, it was admissible under Rule 404(b)(2) for another purpose. Under our case law, "[w]hen the [G]overnment offers evidence of prior crimes or bad acts as part of its case in chief, 'it has the burden of first establishing relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of Rule 404(b)[.]' " *United States v. Sims*, 617 F.2d 1371, 1378 (9th Cir. 1980) (quoting *United States v. Hernandez-Miranda*, 601 F.2d 1104, 1108 (9th Cir. 1979)). Second, the Government must show "that the proper relevant evidence is more probative than it is prejudicial to the defendant." *Id.* (quoting *Hernandez-Miranda*, 601 F.2d at 1108). The required probative versus prejudicial balancing is reviewed for abuse of discretion. *Id.*

The Government used the video to prove Holiday's identity as the person who committed several robberies while wearing the same sweatshirt he wore in the video, and, in one robbery, using the same gun that was found near where he was sitting in the fleeing car. This is permissible under Rule 404(b)(2). With respect to the probative versus prejudicial balancing test, the district court did not abuse its discretion. Although the video showed "a vehicle police chase, SWAT officers in full gear, dogs, air surveillance[,] and sirens," none of these features is particularly prejudicial, as all are ordinary markers of a police chase. Officer Taisor testified that the car in which Holiday was riding fled from him when he attempted to conduct a traffic stop, and Holiday did not object to this testimony. Therefore, even assuming *arguendo* that the video was within the scope of Rule 404(b)(1) if used to prove Holiday's character, its admission was not an abuse of discretion because it was relevant and not more prejudicial than probative.

C.

Federal Rule of Criminal Procedure 8(a) permits joinder of multiple offenses in a single indictment when the offenses "are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." Holiday admits that "[t]he counts are of the same or similar character," but seems to argue that joinder is only proper where the counts satisfy all three criteria in Rule 8(a).

Holiday's argument is belied by the plain text of the rule, which uses the disjunctive "or" to signal that joinder is proper where just one criterion is satisfied. The district court did not err by denying Holiday's severance motion.

D.

The Eighth Amendment prohibits cruel and unusual punishments. "[T]he 'Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.' " ***896** *United States v. Harris*, 154 F.3d 1082, 1084 (9th Cir. 1998) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (Kennedy, J., concurring in part and concurring in the judgment)). The threshold question is whether a "comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Id.* (quoting *Harmelin*, 501 U.S. at 1005, 111 S.Ct. 2680 (Kennedy, J., concurring in part and concurring in the judgment)).

In *Harris*, the defendant was convicted of five counts of interference with interstate commerce by robbery in violation of 18 U.S.C. § 1951(a), and five counts of use of a firearm in a crime of violence in violation of 18 U.S.C. § 924(c). *Id.* at 1083. The district court sentenced Harris to a term of ninety-five years' imprisonment, pursuant to the mandatory minimums set forth in 18 U.S.C. § 924(c). *Id.* We held that sentence did not violate the Eighth Amendment for three reasons: (1) "[a]rmed robberies are extremely dangerous crimes"; (2) "[t]he robberies at issue in [that] case were undeniably violent"; and (3) Congress mandated Harris's sentence in an otherwise valid statute, and "[a] sentence which is within the limits set by a valid statute may not be overturned on appeal as cruel and unusual." *Id.* at 1084 (quoting *United States v. Klein*, 860 F.2d 1489, 1495 (9th Cir. 1988), *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000)).

In *Harris*, the defendant was convicted for his role in five robberies and sentenced to ninety-five years' imprisonment; here, Holiday was convicted for his role in ten robberies and sentenced to eighty-five years' imprisonment. Otherwise, the cases do not differ meaningfully. *Harris* therefore compels the conclusion that Holiday's sentence does not violate the Eighth Amendment. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003).

E.

Holiday argues that attempted robbery under the Hobbs Act is not a "crime of violence" that triggers 18 U.S.C. § 924(c) and its accompanying penalties. However, citing *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020), Holiday acknowledges that a ruling in his favor would be contrary to our court's precedent. Because we are not at liberty to overrule the opinion of a prior three-judge panel absent intervening and clearly irreconcilable Supreme Court authority, we affirm the district court on this ground. *See Miller*, 335 F.3d at 893.

F.

Finally, Holiday argues that the district court should have granted his motion for a new trial based on cumulative error. "[E]ven if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal.' " *Killian v. Poole*, 282 F.3d 1204, 1211 (9th Cir. 2002) (quoting *United States v. de Cruz*, 82 F.3d 856, 868 (9th Cir. 1996)). However, "[o]ne error is not cumulative error." *United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000). Because we find only that admission of the body camera footage was erroneous, there is no basis for a holding of cumulative error requiring a new trial.

CONCLUSION

The police violated the Fourth Amendment when they opened the door to Holiday's residence without a warrant on February 7, 2017, and the fruit of that search should not have been introduced at trial. However, given the strength of the other evidence that

Holiday committed the ARCO robbery, the district court's error in ***897** admitting the body camera evidence was harmless. We reject the remainder of Holiday's challenges to his conviction and sentence as meritless.

AFFIRMED.

All Citations

998 F.3d 888, 115 Fed. R. Evid. Serv. 1227, 21 Cal. Daily Op. Serv. 4996, 2021 Daily Journal D.A.R. 5115

Footnotes

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

** The Honorable John E. Steele, United States District Judge for the Middle District of Florida, sitting by designation.

1 Nor was the warrantless search of Holiday's home justified under the community caretaking exception. *See Caniglia v. Strom*, 593 U.S. ——, 141 S.Ct. 1511, 209 L.Ed.2d 251 (2021).

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133 S.Ct. 1409
Supreme Court of the United States

FLORIDA, Petitioner
v.
Joelis JARDINES.

No. 11–564.
|
Argued Oct. 31, 2012.
|
Decided March 26, 2013.

Synopsis

Background: Defendant, who was charged with trafficking in cannabis and theft of electricity, moved to suppress evidence seized pursuant to a search warrant that was obtained after a dog-sniff on front porch of defendant's home. The Florida Circuit Court, Miami–Dade County, William Thomas, J., granted the motion. State appealed. The Florida District Court of Appeal, 9 So.3d 1, reversed and certified a conflict. The Florida Supreme Court, Perry, J., 73 So.3d 34, quashed the decision of the District Court of Appeal. Certiorari was granted.

Holdings: The Supreme Court, Justice Scalia, held that:

law enforcement officers' use of drug-sniffing dog on front porch of home, to investigate an unverified tip that marijuana was being grown in the home, was a trespassory invasion of the curtilage which constituted a "search" for Fourth Amendment purposes, and

officers did not have an implied license for the physical invasion of the curtilage.

Florida Supreme Court affirmed.

Justice Kagan filed a concurring opinion, in which Justices Ginsburg and Sotomayor joined.

Justice Alito filed a dissenting opinion, in which Chief Justice Roberts and Justices Kennedy and Breyer joined.

****1411 *1** *Syllabus*[*]

Police took a drug-sniffing dog to Jardines' front porch, where the dog gave a positive alert for narcotics. Based on the alert, the officers obtained a warrant for a search, which revealed marijuana plants; Jardines was charged with trafficking in cannabis. The Supreme Court of Florida approved the trial court's decision to suppress the evidence, holding that the officers had engaged in a Fourth Amendment search unsupported by probable cause.

****1412** *Held* : The investigation of Jardines' home was a "search" within the meaning of the Fourth Amendment. Pp. 1414 – 1418.

(a) When "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred." *United States v. Jones,* 565 U.S. ——, ——, n. 3, 132 S.Ct. 945, 181 L.Ed.2d 911. P. 1414.

(b) At the Fourth Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States,* 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734. The area "immediately surrounding and associated with the home"—the curtilage—is "part of the home itself for Fourth Amendment purposes." *Oliver v. United States,* 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214. The officers entered the curtilage here: The front porch is the classic exemplar of an area "to which the activity of home life extends." *Id.,* at 182, n. 12, 104 S.Ct. 1735. Pp. 1414 – 1415.

***2** (c) The officers' entry was not explicitly or implicitly invited. Officers need not "shield their eyes" when passing by a home "on public thoroughfares," *California v. Ciraolo,* 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210, but "no man can set his foot upon his neighbour's close without his leave," *Entick v. Carrington,* 2 Wils. K.B. 275, 291, 95 Eng. Rep. 807, 817. A police officer not armed with a warrant may approach a home in hopes of speaking to its occupants, because that is "no more than any private citizen might do." *Kentucky v. King,* 563 U.S. ——, ——, 131 S.Ct. 1849, 179 L.Ed.2d 865. But the scope of a license is limited not only to a particular area but also to a specific purpose, and there is no customary invitation to enter the curtilage simply to conduct a search. Pp. 1415 – 1417.

(d) It is unnecessary to decide whether the officers violated Jardines' expectation of privacy under *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. Pp. 1417 – 1418.

73 So.3d 34, affirmed.

SCALIA, J., delivered the opinion of the Court, in which THOMAS, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. KAGAN, J., filed a concurring opinion, in which GINSBURG and SOTOMAYOR, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C.J., and KENNEDY and BREYER, JJ., joined.

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Opinion

Justice SCALIA delivered the opinion of the Court.

***3** ****1413** We consider whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a "search" within the meaning of the Fourth Amendment.

I

In 2006, Detective William Pedraja of the Miami–Dade Police Department received an unverified tip that marijuana was being grown in the home of respondent Joelis Jardines. One month later, the Department and the Drug Enforcement Administration sent a joint surveillance team to Jardines' home. Detective Pedraja was part of that team. He watched the home for fifteen minutes and saw no vehicles in the driveway or activity around the home, and could not see inside because the blinds were drawn. Detective Pedraja then approached Jardines' home accompanied by Detective Douglas Bartelt, a trained canine handler who had just arrived ***4** at the scene with his drug-sniffing dog. The dog was trained to detect the scent of marijuana, cocaine, heroin, and several other drugs, indicating the presence of any of these substances through particular behavioral changes recognizable by his handler.

Detective Bartelt had the dog on a six-foot leash, owing in part to the dog's "wild" nature, App. to Pet. for Cert. A–35, and tendency to dart around erratically while searching. As the dog approached Jardines' front porch, he apparently sensed one of the odors he had been trained to detect, and began energetically exploring the area for the strongest point source of that odor. As Detective Bartelt explained, the dog "began tracking that airborne odor by ... tracking back and forth," engaging in what is called "bracketing," "back and forth, back and forth." *Id.,* at A–33 to A–34. Detective Bartelt gave the dog "the full six feet of the leash plus whatever safe distance [he could] give him" to do this—he testified that he needed to give the dog "as much distance as I can." *Id.,* at A–35. And Detective Pedraja stood back while this was occurring, so that he would not "get knocked over" when the dog was "spinning around trying to find" the source. *Id.,* at A–38.

After sniffing the base of the front door, the dog sat, which is the trained behavior upon discovering the odor's strongest point. Detective Bartelt then pulled the dog away from the door and returned to his vehicle. He left the scene after informing Detective Pedraja that there had been a positive alert for narcotics.

On the basis of what he had learned at the home, Detective Pedraja applied for and received a warrant to search the residence. When the warrant was executed later that day, Jardines attempted to flee and was arrested; the search revealed marijuana plants, and he was charged with trafficking in cannabis.

At trial, Jardines moved to suppress the marijuana plants on the ground that the canine investigation was an unreasonable ***5** search. The trial court granted the motion, and the Florida Third District Court of Appeal reversed. On a petition for discretionary review, the Florida Supreme Court quashed the decision of the Third District Court of Appeal and approved the trial court's decision to suppress, holding (as relevant here) that the use of the trained narcotics dog to investigate Jardines' home was a Fourth Amendment search unsupported by probable cause, rendering invalid the warrant based upon information gathered in that search. 73 So.3d 34 (2011).

****1414** We granted certiorari, limited to the question of whether the officers' behavior was a search within the meaning of the Fourth Amendment. 565 U.S. ——, 132 S.Ct. 995, 181 L.Ed.2d 726 (2012).

II

The Fourth Amendment provides in relevant part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Amendment establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred." *United States v. Jones,* 565 U.S. ——, ——, n. 3, 132 S.Ct. 945, 950–951, n. 3, 181 L.Ed.2d 911 (2012). By reason of our decision in *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), property rights "are not the sole measure of Fourth Amendment violations," *Soldal v. Cook County,* 506 U.S. 56, 64, 113 S.Ct. 538, 121 L.Ed.2d

450 (1992)—but though *Katz* may add to the baseline, it does not subtract anything from the Amendment's protections "when the Government *does* engage in [a] physical intrusion of a constitutionally protected area," *United States v. Knotts,* 460 U.S. 276, 286, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) (Brennan, J., concurring in the judgment).

That principle renders this case a straightforward one. The officers were gathering information in an area belonging ***6** to Jardines and immediately surrounding his house—in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner.

A

The Fourth Amendment "indicates with some precision the places and things encompassed by its protections": persons, houses, papers, and effects. *Oliver v. United States,* 466 U.S. 170, 176, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). The Fourth Amendment does not, therefore, prevent all investigations conducted on private property; for example, an officer may (subject to *Katz*) gather information in what we have called "open fields"—even if those fields are privately owned—because such fields are not enumerated in the Amendment's text. *Hester v. United States,* 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924).

But when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States,* 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961). This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.

We therefore regard the area "immediately surrounding and associated with the home"—what our cases call the curtilage—as "part of the home itself for Fourth Amendment purposes." *Oliver, supra,* at 180, 104 S.Ct. 1735. That principle has ancient and durable roots. Just as the distinction between the home and the open fields is "as old as the common law," *Hester, supra,* at 59, 44 S.Ct. 445, so too is ****1415** the identity of home and what Blackstone called the "curtilage or homestall," for the "house ***7** protects and privileges all its branches and appurtenants." 4 W. Blackstone, Commentaries on the Laws of England 223, 225 (1769). This area around the home is "intimately linked to the home, both physically and psychologically," and is where "privacy expectations are most heightened." *California v. Ciraolo,* 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).

While the boundaries of the curtilage are generally "clearly marked," the "conception defining the curtilage" is at any rate familiar enough that it is "easily understood from our daily experience." *Oliver,* 466 U.S., at 182, n. 12, 104 S.Ct. 1735. Here there is no doubt that the officers entered it: The front porch is the classic exemplar of an area adjacent to the home and "to which the activity of home life extends." *Ibid.*

B

Since the officers' investigation took place in a constitutionally protected area, we turn to the question of whether it was accomplished through an unlicensed physical intrusion.[1] While law enforcement officers need not "shield their eyes" when passing by the home "on public thoroughfares," *Ciraolo,* 476 U.S., at 213, 106 S.Ct. 1809, an officer's leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendment's protected areas. In permitting, for example, visual observation of the home from "public navigable airspace," we were careful to note that it was done "in a physically nonintrusive manner." *Ibid. Entick v. Carrington,* 2 Wils. K.B. 275, 95 Eng. Rep. 807 (K.B. 1765), a case "undoubtedly familiar" to "every American statesman" at the time of the Founding, *Boyd v. United States,* 116 U.S. 616, 626, 6 S.Ct. 524, 29 L.Ed. 746 (1886), states the general ***8** rule clearly: "[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave." 2 Wils. K.B., at 291, 95 Eng. Rep., at 817. As it is undisputed

that the detectives had all four of their feet and all four of their companion's firmly planted on the constitutionally protected extension of Jardines' home, the only question is whether he had given his leave (even implicitly) for them to do so. He had not.

"A license may be implied from the habits of the country," notwithstanding the "strict rule of the English common law as to entry upon a close." *McKee v. Gratz,* 260 U.S. 127, 136, 43 S.Ct. 16, 67 L.Ed. 167 (1922) (Holmes, J.). We have accordingly recognized that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." *Breard v. Alexandria,* 341 U.S. 622, 626, 71 S.Ct. 920, 95 L.Ed. 1233 (1951). This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters.[2] ****1416** Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is "no more than any private citizen might do." *Kentucky v. King,* 563 U.S. ——, ——, 131 S.Ct. 1849, 1862, 179 L.Ed.2d 865 (2011).

***9** But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*. An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker.[3] To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police. The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose. Consent at a traffic stop to an officer's checking out an anonymous tip that there is a body in the trunk does not permit the officer to rummage through the trunk for narcotics. Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search.[4]

***10** The State points to our decisions holding that the subjective intent of the officer is irrelevant. See *Ashcroft v. al–Kidd,* 563 U.S. ——, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011); *Whren v. United States,* 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). But those cases merely hold that a stop or search *that is objectively reasonable* is not vitiated by the fact that the officer's real reason for making the stop or search has nothing to do with the validating reason. Thus, the defendant will not be heard to complain that although he was speeding the officer's real reason for the stop was racial harassment. See *id.,* at 810, 813, 116 S.Ct. 1769. Here, however, the question before the court is precisely ****1417** *whether* the officer's conduct was an objectively reasonable search. As we have described, that depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered. Here, their behavior objectively reveals a purpose to conduct a search, which is not what anyone would think he had license to do.

III

The State argues that investigation by a forensic narcotics dog by definition cannot implicate any legitimate privacy interest. The State cites for authority our decisions in *United States v. Place,* 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), *United States v. Jacobsen,* 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984), and *Illinois v. Caballes,* 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005), which held, respectively, that canine inspection of luggage in an airport, chemical testing of a substance that had fallen from a parcel in transit, and canine inspection of an automobile during a lawful traffic stop, do not violate the "reasonable expectation of privacy" described in *Katz.*

Just last Term, we considered an argument much like this. *Jones* held that tracking an automobile's whereabouts using a physically-mounted GPS receiver is a Fourth Amendment search. The Government argued that the *Katz* standard "show[ed] that no search occurred," as the defendant had "no 'reasonable expectation of privacy' " in his whereabouts on the public roads, ***11** *Jones,* 565 U.S., at ——, 132 S.Ct., at 950—a proposition with at least as much support in our case law as the one the State marshals here. See, *e.g., United States v. Knotts,* 460 U.S. 276, 278, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983). But because the GPS receiver had been physically mounted on the defendant's automobile (thus intruding on his "effects"), we held that tracking

the vehicle's movements was a search: a person's "Fourth Amendment rights do not rise or fall with the *Katz* formulation." *Jones, supra,* at ——, 132 S.Ct., at 950. The *Katz* reasonable-expectations test "has been *added to,* not *substituted for,*" the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas. *Jones, supra,* at ——, 132 S.Ct., at 951–952.

Thus, we need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz*. One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred.

For a related reason we find irrelevant the State's argument (echoed by the dissent) that forensic dogs have been commonly used by police for centuries. This argument is apparently directed to our holding in *Kyllo v. United States,* 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), that surveillance of the home is a search where "the Government uses a device that is not in general public use" to "explore details of the home that would previously have been unknowable *without physical intrusion*." *Id.,* at 40, 121 S.Ct. 2038 (emphasis added). But the implication of that statement (*inclusio unius est exclusio alterius*) is that when the government uses a physical intrusion to explore details of the home (including its curtilage), the antiquity of the tools that they bring along is irrelevant.

* * *

The government's use of trained police dogs to investigate the home and its immediate ****1418** surroundings is a "search" ***12** within the meaning of the Fourth Amendment. The judgment of the Supreme Court of Florida is therefore affirmed.

It is so ordered.

Justice KAGAN, with whom Justice GINSBURG and Justice SOTOMAYOR join, concurring.
For me, a simple analogy clinches this case—and does so on privacy as well as property grounds. A stranger comes to the front door of your home carrying super-high-powered binoculars. See *ante,* at 1416, n. 3. He doesn't knock or say hello. Instead, he stands on the porch and uses the binoculars to peer through your windows, into your home's furthest corners. It doesn't take long (the binoculars are really very fine): In just a couple of minutes, his uncommon behavior allows him to learn details of your life you disclose to no one. Has your "visitor" trespassed on your property, exceeding the license you have granted to members of the public to, say, drop off the mail or distribute campaign flyers? Yes, he has. And has he also invaded your "reasonable expectation of privacy," by nosing into intimacies you sensibly thought protected from disclosure? *Katz v. United States,* 389 U.S. 347, 360, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring). Yes, of course, he has done that too.

That case is this case in every way that matters. Here, police officers came to Joelis Jardines' door with a super-sensitive instrument, which they deployed to detect things inside that they could not perceive unassisted. The equipment they used was animal, not mineral. But contra the dissent, see *post,* at 1420 (opinion of ALITO, J.) (noting the ubiquity of dogs in American households), that is of no significance in determining whether a search occurred. Detective Bartelt's dog was not your neighbor's pet, come to your porch on a leisurely stroll. As this Court discussed earlier this Term, drug-detection dogs are highly trained tools of law enforcement, geared to respond in distinctive ways to specific scents so as to convey clear and reliable information ***13** to their human partners. See *Florida v. Harris,* 568 U.S. ——, 133 S.Ct. 1050, 1053–1054, 1056–1057, 185 L.Ed.2d 61 (2013). They are to the poodle down the street as high-powered binoculars are to a piece of plain glass. Like the binoculars, a drug-detection dog is a specialized device for discovering objects not in plain view (or plain smell). And as in the hypothetical above, that device was aimed here at a home—the most private and inviolate (or so we expect) of all the places and things the Fourth Amendment protects. Was this activity a trespass? Yes, as the Court holds today. Was it also an invasion of privacy? Yes, that as well.

The Court today treats this case under a property rubric; I write separately to note that I could just as happily have decided it by looking to Jardines' privacy interests. A decision along those lines would have looked ... well, much like this one. It would have

talked about " 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' " *Ante,* at 1414 (quoting *Silverman v. United States,* 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961)). It would have insisted on maintaining the "practical value" of that right by preventing police officers from standing in an adjacent space and "trawl[ing] for evidence with impunity." *Ante,* at 1414. It would have explained that " 'privacy expectations are most heightened' " in the home and the surrounding area. *Ante,* at 1414 – 1415 (quoting *California v. Ciraolo,* 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986)). And it would have determined ****1419** that police officers invade those shared expectations when they use trained canine assistants to reveal within the confines of a home what they could not otherwise have found there. See *ante,* at 1415 – 1416, and nn. 2–3.

It is not surprising that in a case involving a search of a home, property concepts and privacy concepts should so align. The law of property "naturally enough influence[s]" our "shared social expectations" of what places should be free from governmental incursions. *Georgia v. Randolph,* 547 U.S. 103, 111, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006); see ***14** *Rakas v. Illinois,* 439 U.S. 128, 143, n. 12, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). And so the sentiment "my home is my own," while originating in property law, now also denotes a common understanding—extending even beyond that law's formal protections—about an especially private sphere. Jardines' home was his property; it was also his most intimate and familiar space. The analysis proceeding from each of those facts, as today's decision reveals, runs mostly along the same path.

I can think of only one divergence: If we had decided this case on privacy grounds, we would have realized that *Kyllo v. United States,* 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), already resolved it.[1] The *Kyllo* Court held that police officers conducted a search when they used a thermal-imaging device to detect heat emanating from a private home, even though they committed no trespass. Highlighting our intention to draw both a "firm" and a "bright" line at "the entrance to the house," *id.,* at 40, 121 S.Ct. 2038, we announced the following rule:

> "Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Ibid.*

That "firm" and "bright" rule governs this case: The police officers here conducted a search because they used a "device ... not in general public use" (a trained drug-detection dog) to "explore details of the home" (the presence of certain substances) ***15** that they would not otherwise have discovered without entering the premises.
And again, the dissent's argument that the device is just a dog cannot change the equation. As *Kyllo* made clear, the "sense-enhancing" tool at issue may be "crude" or "sophisticated," may be old or new (drug-detection dogs actually go back not "12,000 years" or "centuries," *post,* at 1420, 1424, 1428, but only a few decades), may be either smaller or bigger than a breadbox; still, "at least where (as here)" the device is not "in general public use," training it on a home violates our "minimal expectation of privacy"—an expectation "that *exists,* and that is acknowledged to be *reasonable*." 533 U.S., at 34, 36, 121 S.Ct. 2038.[2] That does not mean the device ****1420** is off-limits, as the dissent implies, see *post,* at 1425 – 1426; it just means police officers cannot use it to examine a home without a warrant or exigent circumstance. See *Brigham City v. Stuart,* 547 U.S. 398, 403–404, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006) (describing exigencies allowing the warrantless search of a home).

***16** With these further thoughts, suggesting that a focus on Jardines' privacy interests would make an "easy cas[e] easy" twice over, *ante,* at 1417, I join the Court's opinion in full.

Justice ALITO, with whom THE CHIEF JUSTICE, Justice KENNEDY, and Justice BREYER join, dissenting.
The Court's decision in this important Fourth Amendment case is based on a putative rule of trespass law that is nowhere to be found in the annals of Anglo–American jurisprudence.

The law of trespass generally gives members of the public a license to use a walkway to approach the front door of a house and to remain there for a brief time. This license is not limited to persons who intend to speak to an occupant or who actually do so. (Mail carriers and persons delivering packages and flyers are examples of individuals who may lawfully approach a front door without intending to converse.) Nor is the license restricted to categories of visitors whom an occupant of the dwelling is likely to welcome; as the Court acknowledges, this license applies even to "solicitors, hawkers and peddlers of all kinds." *Ante,* at 1415 (internal quotation marks omitted). And the license even extends to police officers who wish to gather evidence against an occupant (by asking potentially incriminating questions).

According to the Court, however, the police officer in this case, Detective Bartelt, committed a trespass because he was accompanied during his otherwise lawful visit to the front door of respondent's house by his dog, Franky. Where is the authority evidencing such a rule? Dogs have been domesticated for about 12,000 years;[1] they were ubiquitous in both this country and Britain at the time of the adoption of the Fourth Amendment;[2] and their acute sense of smell has ***17** been used in law enforcement for centuries.[3] Yet the Court has been unable to find a single case—from the United States or any other common-law nation—that supports the rule on which its decision is based. Thus, ****1421** trespass law provides no support for the Court's holding today.

The Court's decision is also inconsistent with the reasonable-expectations-of-privacy test that the Court adopted in *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). A reasonable person understands that odors emanating from a house may be detected from locations that are open to the public, and a reasonable person will not count on the strength of those odors remaining within the range that, while detectible by a dog, cannot be smelled by a human.

For these reasons, I would hold that no search within the meaning of the Fourth Amendment took place in this case, and I would reverse the decision below.

I

The opinion of the Court may leave a reader with the mistaken impression that Detective Bartelt and Franky remained on respondent's property for a prolonged period of time and conducted a far-flung exploration of the front yard. See *ante,* at 1414 ("trawl for evidence with impunity"), 1416 ("marching his bloodhound into the garden"). But that is not what happened.

Detective Bartelt and Franky approached the front door via the driveway and a paved path—the route that any visitor would customarily use[4]—and Franky was on the kind of leash that any dog owner might employ.[5] As Franky approached ***18** the door, he started to track an airborne odor. He held his head high and began "bracketing" the area (pacing back and forth) in order to determine the strongest source of the smell. App. 95–96. Detective Bartelt knew "the minute [he] observed" this behavior that Franky had detected drugs. *Id.,* at 95. Upon locating the odor's strongest source, Franky sat at the base of the front door, and at this point, Detective Bartelt and Franky immediately returned to their patrol car. *Id.,* at 98.

A critical fact that the Court omits is that, as respondent's counsel explained at oral argument, this entire process—walking down the driveway and front path to the front door, waiting for Franky to find the strongest source of the odor, and walking back to the car—took approximately a minute or two. Tr. of Oral Arg. 57–58. Thus, the amount of time that Franky and the detective remained at the front porch was even less. The Court also fails to mention that, while Detective Bartelt apparently did not personally smell the odor of marijuana coming from the house, another officer who subsequently stood on the front porch, Detective Pedraja, did notice that smell and was able to identify it. App. 81.

II

The Court concludes that the conduct in this case was a search because Detective Bartelt exceeded the boundaries of the license to approach the house that is recognized by the law of trespass, but the Court's interpretation of the scope of that license is unfounded.

A

It is said that members of the public may lawfully proceed along a walkway leading to the front door of a house because **1422 custom grants them a license to do so. *Breard v. Alexandria,* 341 U.S. 622, 626, 71 S.Ct. 920, 95 L.Ed. 1233 (1951); *Lakin v. Ames,* 64 Mass. 198, 220 (1852); J. Bishop, Commentaries on the Non–Contract Law § 823, p. 378 (1889). This rule encompasses categories *19 of visitors whom most homeowners almost certainly wish to allow to approach their front doors —friends, relatives, mail carriers, persons making deliveries. But it also reaches categories of visitors who are less universally welcome—"solicitors," "hawkers," "peddlers," and the like. The law might attempt to draw fine lines between categories of welcome and unwelcome visitors, distinguishing, for example, between tolerable and intolerable door-to-door peddlers (Girl Scouts selling cookies versus adults selling aluminum siding) or between police officers on agreeable and disagreeable missions (gathering information about a bothersome neighbor versus asking potentially incriminating questions). But the law of trespass has not attempted such a difficult taxonomy. See *Desnick v. American Broadcasting Cos.,* 44 F.3d 1345, 1351 (C.A.7 1995) ("[C]onsent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable and generally ethical or at least lawful reasons to revoke his consent"); cf. *Skinner v. Ogallala Public School Dist.,* 262 Neb. 387, 402, 631 N.W.2d 510, 525 (2001) ("[I]n order to determine if a business invitation is implied, the inquiry is not a subjective assessment of why the visitor chose to visit the premises in a particular instance"); *Crown Cork & Seal Co. v. Kane,* 213 Md. 152, 159, 131 A.2d 470, 473–474 (1957) (noting that "there are many cases in which an invitation has been implied from circumstances, such as custom," and that this test is "objective in that it stresses custom and the appearance of things" as opposed to "the undisclosed intention of the visitor").

Of course, this license has certain spatial and temporal limits. A visitor must stick to the path that is typically used to approach a front door, such as a paved walkway. A visitor cannot traipse through the garden, meander into the backyard, or take other circuitous detours that veer from the pathway that a visitor would customarily use. See, *e.g.,* *20 *Robinson v. Virginia,* 47 Va.App. 533, 549–550, 625 S.E.2d 651, 659 (2006) (en banc); *United States v. Wells,* 648 F.3d 671, 679–680 (C.A.8 2011) (police exceeded scope of their implied invitation when they bypassed the front door and proceeded directly to the back yard); *State v. Harris,* 919 S.W.2d 619, 624 (Tenn.Crim.App.1995) ("Any substantial and unreasonable departure from an area where the public is impliedly invited exceeds the scope of the implied invitation ..." (internal quotation marks and brackets omitted)); 1 W. LaFave, Search and Seizure § 2.3(c), p. 578 (2004) (hereinafter LaFave); *id.*, § 2.3(f), at 600–603 ("[W]hen the police come on to private property to conduct an investigation or for some other legitimate purpose and restrict their movements to places visitors could be expected to go (e.g., walkways, driveways, porches), observations made from such vantage points are not covered by the Fourth Amendment" (footnotes omitted)).

Nor, as a general matter, may a visitor come to the front door in the middle of the night without an express invitation. See *State v. Cada,* 129 Idaho 224, 233, 923 P.2d 469, 478 (App.1996) ("Furtive intrusion late at night or in the predawn hours is not conduct that is expected from ordinary visitors. Indeed, if observed by a resident of the premises, it could be a cause for great alarm").

Similarly, a visitor may not linger at the front door for an extended period. See **1423 9 So.3d 1, 11 (Fla.App.2008) (case below) (Cope, J., concurring in part and dissenting in part) ("[T]here is no such thing as squatter's rights on a front porch. A stranger may not plop down uninvited to spend the afternoon in the front porch rocking chair, or throw down a sleeping bag to spend the night, or lurk on the front porch, looking in the windows"). The license is limited to the amount of time it would customarily take to approach the door, pause long enough to see if someone is home, and (if not expressly invited to stay longer), leave.

As I understand the law of trespass and the scope of the implied license, a visitor who adheres to these limitations is ***21** not necessarily required to ring the doorbell, knock on the door, or attempt to speak with an occupant. For example, mail carriers, persons making deliveries, and individuals distributing flyers may leave the items they are carrying and depart without making any attempt to converse. A pedestrian or motorist looking for a particular address may walk up to a front door in order to check a house number that is hard to see from the sidewalk or road. A neighbor who knows that the residents are away may approach the door to retrieve an accumulation of newspapers that might signal to a potential burglar that the house is unoccupied.

As the majority acknowledges, this implied license to approach the front door extends to the police. See *ante,* at 1415. As we recognized in *Kentucky v. King,* 563 U.S. ——, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011), police officers do not engage in a search when they approach the front door of a residence and seek to engage in what is termed a "knock and talk," *i.e.,* knocking on the door and seeking to speak to an occupant for the purpose of gathering evidence. See *id.,* at ——, 131 S.Ct., at 1862 ("When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do"). See also 1 LaFave § 2.3(e), at 592 ("It is not objectionable for an officer to come upon that part of the property which has been opened to public common use" (internal quotation marks omitted)). Even when the objective of a "knock and talk" is to obtain evidence that will lead to the homeowner's arrest and prosecution, the license to approach still applies. In other words, gathering evidence—even damning evidence—is a lawful activity that falls within the scope of the license to approach. And when officers walk up to the front door of a house, they are permitted to see, hear, and smell whatever can be detected from a lawful vantage point. *California v. Ciraolo,* 476 U.S. 207, 213, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986) ("The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares"); ***22** *Cada, supra,* at 232, 923 P.2d, at 477 (" [P]olice officers restricting their activity to [areas to which the public is impliedly invited] are permitted the same intrusion and the same level of observation as would be expected from a reasonably respectful citizen" (internal quotation marks omitted)); 1 LaFave §§ 2.2(a), 2.3(c), at 450–452, 572–577.

B

Detective Bartelt did not exceed the scope of the license to approach respondent's front door. He adhered to the customary path; he did not approach in the middle of the night; and he remained at the front door for only a very short period (less than a minute or two).

The Court concludes that Detective Bartelt went too far because he had the "*objectiv[e] ... purpose* to conduct a search." *Ante,* at 1417 (emphasis added). What ****1424** this means, I take it, is that anyone aware of what Detective Bartelt did would infer that his subjective purpose was to gather evidence. But if this is the Court's point, then a standard "knock and talk" and most other police visits would likewise constitute searches. With the exception of visits to serve warrants or civil process, police almost always approach homes with a purpose of discovering information. That is certainly the objective of a "knock and talk." The Court offers no meaningful way of distinguishing the "objective purpose" of a "knock and talk" from the "objective purpose" of Detective Bartelt's conduct here.

The Court contends that a "knock and talk" is different because it involves talking, and "all are invited" to do that. *Ante,* at 1416, n. 4 (emphasis deleted). But a police officer who approaches the front door of a house in accordance with the limitations already discussed may gather evidence by means other than talking. The officer may observe items in plain view and smell odors coming from the house. *Ciraolo, supra,* at 213, 106 S.Ct. 1809; *Cada,* 129 Idaho, at 232, 923 P.2d, at 477; 1 LaFave §§ 2.2(a), 2.3(c), at 450–452, 572–577. So the Court's "objective purpose" argument cannot stand.

***23** What the Court must fall back on, then, is the particular instrument that Detective Bartelt used to detect the odor of marijuana, namely, his dog. But in the entire body of common-law decisions, the Court has not found a single case holding that a visitor to the front door of a home commits a trespass if the visitor is accompanied by a dog on a leash. On the contrary, the common law allowed even unleashed dogs to wander on private property without committing a trespass. G. Williams,

Liability for Animals 136–146 (1939); J. Ingham, A Treatise on Property in Animals Wild and Domestic and the Rights and Responsibilities Arising Therefrom 277–278 (1900). Cf. B. Markesinis & S. Deakin, Tort Law 511 (4th ed. 1999).

The Court responds that "[i]t is not the dog that is the problem, but the behavior that here involved use of the dog." *Ante,* at 1416, n. 3. But where is the support in the law of trespass for *this* proposition? Dogs' keen sense of smell has been used in law enforcement for centuries. The antiquity of this practice is evidenced by a Scottish law from 1318 that made it a crime to "disturb a tracking dog or the men coming with it for pursuing thieves or seizing malefactors." K. Brown et al., The Records of the Parliaments of Scotland to 1707, (St Andrews, 2007–2013), online at http://www.rps.ac. uk/mss/1318/9. If bringing a tracking dog to the front door of a home constituted a trespass, one would expect at least one case to have arisen during the past 800 years. But the Court has found none.

For these reasons, the real law of trespass provides no support for the Court's holding today. While the Court claims that its reasoning has "ancient and durable roots," *ante,* at 1414, its trespass rule is really a newly struck counterfeit.

III

The concurring opinion attempts to provide an alternative ground for today's decision, namely, that Detective Bartelt's conduct violated respondent's reasonable expectations of privacy. ***24** But we have already rejected a very similar, if not identical argument, see *Illinois v. Caballes,* 543 U.S. 405, 409–410, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005), and in any event I see no basis for concluding that the occupants of a dwelling have a reasonable expectation of privacy in odors that emanate from the dwelling and reach spots where members of the public may lawfully stand.

****1425** It is clear that the occupant of a house has no reasonable expectation of privacy with respect to odors that can be smelled by human beings who are standing in such places. See *United States v. Johns,* 469 U.S. 478, 482, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985) ("After the officers came closer and detected the distinct odor of marihuana, they had probable cause to believe that the vehicles contained contraband"); *United States v. Ventresca,* 380 U.S. 102, 111, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965) (scent of fermenting mash supported probable cause for warrant); *United States v. Johnston,* 497 F.2d 397, 398 (C.A.9 1974) (there is no "reasonable expectation of privacy from drug agents with inquisitive nostrils"). And I would not draw a line between odors that can be smelled by humans and those that are detectible only by dogs.

Consider the situation from the point of view of the occupant of a building in which marijuana is grown or methamphetamine is manufactured. Would such an occupant reason as follows? "I know that odors may emanate from my building and that atmospheric conditions, such as the force and direction of the wind, may affect the strength of those odors when they reach a spot where members of the public may lawfully stand. I also know that some people have a much more acute sense of smell than others,[6] and I have no idea who might be standing in one of the spots in question when ***25** the odors from my house reach that location. In addition, I know that odors coming from my building, when they reach these locations, may be strong enough to be detected by a dog. But I am confident that they will be so faint that they cannot be smelled by any human being." Such a finely tuned expectation would be entirely unrealistic, and I see no evidence that society is prepared to recognize it as reasonable.

In an attempt to show that respondent had a reasonable expectation of privacy in the odor of marijuana wafting from his house, the concurrence argues that this case is just like *Kyllo v. United States,* 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), which held that police officers conducted a search when they used a thermal imaging device to detect heat emanating from a house. *Ante,* at 1419 (opinion of KAGAN, J.). This Court, however, has already rejected the argument that the use of a drug-sniffing dog is the same as the use of a thermal imaging device. See *Caballes,* 543 U.S., at 409–410, 125 S.Ct. 834. The very argument now advanced by the concurrence appears in Justice Souter's *Caballes* dissent. See *id.*, at 413, and n. 3, 125 S.Ct. 834. But the Court was not persuaded.

Contrary to the interpretation propounded by the concurrence, *Kyllo* is best understood as a decision about the use of new technology. The *Kyllo* Court focused on the fact that the thermal imaging device was a form of "sense-enhancing technology" that was "not in general public use," and it expressed concern that citizens would be "at the mercy of advancing technology" if its use was not restricted. 533 U.S., at 34–35, 121 S.Ct. 2038. A dog, however, is not a new form of "technology" or a "device." And, as noted, the use of dogs' acute sense of smell in law enforcement dates back many centuries.

****1426** The concurrence suggests that a *Kyllo*-based decision would be "much like" the actual decision of the Court, but that is simply not so. The holding of the Court is based on what the Court sees as a " 'physical intrusion of a constitutionally protected area.' " *Ante,* at 1414 (quoting ***26** *United States v. Knotts,* 460 U.S. 276, 286, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) (BRENNAN, J., concurring in judgment)). As a result, it does not apply when a dog alerts while on a public sidewalk or street or in the corridor of a building to which the dog and handler have been lawfully admitted.

The concurrence's *Kyllo*-based approach would have a much wider reach. When the police used the thermal imaging device in *Kyllo,* they were on a public street, 533 U.S., at 29, 121 S.Ct. 2038, and "committed no trespass." *Ante,* at 1419. Therefore, if a dog's nose is just like a thermal imaging device for Fourth Amendment purposes, a search would occur if a dog alerted while on a public sidewalk or in the corridor of an apartment building. And the same would be true if the dog was trained to sniff, not for marijuana, but for more dangerous quarry, such as explosives or for a violent fugitive or kidnapped child. I see no ground for hampering legitimate law enforcement in this way.

IV

The conduct of the police officer in this case did not constitute a trespass and did not violate respondent's reasonable expectations of privacy. I would hold that this conduct was not a search, and I therefore respectfully dissent.

All Citations

569 U.S. 1, 133 S.Ct. 1409, 185 L.Ed.2d 495, 81 USLW 4209, 13 Cal. Daily Op. Serv. 3328, 2013 Daily Journal D.A.R. 3953, 24 Fla. L. Weekly Fed. S 117

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 At oral argument, the State and its *amicus* the Solicitor General argued that Jardines conceded in the lower courts that the officers had a right to be where they were. This misstates the record. Jardines conceded nothing more than the unsurprising proposition that the officers could have lawfully approached his home to knock on the front door in hopes of speaking with him. Of course, that is not what they did.

2 With this much, the dissent seems to agree—it would inquire into " 'the appearance of things,' " *post,* at 1422 (opinion of ALITO, J.), what is "typica[l]" for a visitor, *ibid.,* what might cause "alarm" to a "resident of the premises," *ibid.,* what is "expected" of "ordinary visitors," *ibid.,* and what would be expected from a " 'reasonably respectful citizen,' " *post,* at 1423. These are good questions. But their answers are incompatible with the dissent's outcome, which is presumably why the dissent does not even try to argue that it would be customary, usual, reasonable, respectful, ordinary, typical, nonalarming, etc., for a stranger to explore the curtilage of the home with trained drug dogs.

3 The dissent insists that our argument must rest upon "the particular instrument that Detective Bartelt used to detect the odor of marijuana"—the dog. *Post,* at 1424. It is not the dog that is the problem, but the behavior that here involved use of the dog. We think a typical person would find it " 'a cause for great alarm' " (the kind of reaction the dissent quite rightly relies upon to justify its no-night-visits rule, *post,* at 1422) to find a stranger snooping about his front porch *with or without* a dog. The dissent would let

the police do whatever they want by way of gathering evidence so long as they stay on the base-path, to use a baseball analogy—so long as they "stick to the path that is typically used to approach a front door, such as a paved walkway." *Ibid.* From that vantage point they can presumably peer into the house through binoculars with impunity. That is not the law, as even the State concedes. See Tr. of Oral Arg. 6.

4 The dissent argues, citing *King*, that "gathering evidence—even damning evidence—is a lawful activity that falls within the scope of the license to approach." *Post,* at 1423. That is a false generalization. What *King* establishes is that it is not a Fourth Amendment search to approach the home in order to speak with the occupant, *because all are invited to do that*. The mere "purpose of discovering information," *post,* at 1424, in the course of engaging in that permitted conduct does not cause it to violate the Fourth Amendment. But no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search.

1 The dissent claims, alternatively, that *Illinois v. Caballes,* 543 U.S. 405, 409–410, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005), controls this case (or nearly does). See *post,* at 1424, 1425. But *Caballes* concerned a drug-detection dog's sniff of an automobile during a traffic stop. See also *Florida v. Harris,* 568 U.S. ——, 133 S.Ct. 1050, 185 L.Ed.2d 61 (2013). And we have held, over and over again, that people's expectations of privacy are much lower in their cars than in their homes. See, *e.g., Arizona v. Gant,* 556 U.S. 332, 345, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009); *Wyoming v. Houghton,* 526 U.S. 295, 303, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999); *New York v. Class,* 475 U.S. 106, 115, 106 S.Ct. 960, 89 L.Ed.2d 81 (1986); *Cardwell v. Lewis,* 417 U.S. 583, 590–591, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974) (plurality opinion).

2 The dissent's other principal reason for concluding that no violation of privacy occurred in this case—that police officers themselves might detect an aroma wafting from a house—works no better. If officers can smell drugs coming from a house, they can use that information; a human sniff is not a search, we can all agree. But it does not follow that a person loses his expectation of privacy in the many scents within his home that (his own nose capably tells him) are not usually detectible by humans standing outside. And indeed, *Kyllo* already decided as much. In response to an identical argument from the dissent in that case, see 533 U.S., at 43, 121 S.Ct. 2038 (Stevens, J., dissenting) (noting that humans can sometimes detect "heat emanating from a building"), the *Kyllo* Court stated: "The dissent's comparison of the thermal imaging to various circumstances in which outside observers might be able to perceive, without technology, the heat of the home ... is quite irrelevant. The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment.... In any event, [at the time in question,] no outside observer could have discerned the relative heat of Kyllo's home without thermal imaging." *Id.,* at 35, n. 2, 121 S.Ct. 2038.

1 See, *e.g.,* Sloane, Dogs in War, Police Work and on Patrol, 46 J. Crim. L., C. & P.S. 385 (1955–1956) (hereinafter Sloane).

2 M. Derr, A Dog's History of America 68–92 (2004); K. Olsen, Daily Life in 18th–Century England 32–33 (1999).

3 Sloane 388–389.

4 See App. 94; App. to Brief for Respondent 1A (depiction of respondent's home).

5 The Court notes that Franky was on a 6–foot leash, but such a leash is standard equipment for ordinary dog owners. See, *e.g.,* J. Stregowski, Four Dog Leash Varieties, http://dogs.about. com/od/toyssupplies/tp/Dog-Leashes.htm (all Internet materials as visited Mar. 21, 2013, and available in Clerk of Court's case file).

6 Some humans naturally have a much more acute sense of smell than others, and humans can be trained to detect and distinguish odors that could not be detected without such training. See E. Hancock, A Primer on Smell, http://www.jhu.edu/jhumag/996web/smell.html. Some individuals employed in the perfume and wine industries, for example, have an amazingly acute sense of smell. *Ibid.*

38 F.4th 527
United States Court of Appeals, Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Dewayne LEWIS, Defendant-Appellant.

No. 21-1614
|
Argued May 16, 2022
|
Decided June 21, 2022

Synopsis

Background: Following denial of defendant's motion to suppress, 2017 WL 2928199, and subsequently, his motion for reconsideration, 2019 WL 1760557, defendant was convicted, after a bench trial, in the United States District Court for the Northern District of Indiana, Theresa Lazar Springmann, Chief Judge, of possession with intent to distribute five kilograms or more of cocaine. Defendant appealed.

Holdings: The Court of Appeals, St. Eve, Circuit Judge, held that:

dog sniff in exterior hallway outside of defendant's hotel room door was not search triggering Fourth Amendment protections;

suspect lacked reasonable expectation of privacy in exterior hallway outside of his hotel room door; and

good faith exception to exclusionary rule applied to permit use of real-time cell site location information (CSLI) collected pursuant to wiretap order.

Affirmed.

West Codenotes

Limitation Recognized
18 U.S.C.A. § 2703(d)

***529** Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division. No. 1:15-CR-00010-TLS-SLC-1 — **Theresa L. Springmann**, *Judge*.

Attorneys and Law Firms

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Before Easterbrook, Brennan, and St. Eve, Circuit Judges.

Opinion

St. Eve, Circuit Judge.

***530** Dewayne Lewis appeals the denial of his motion to suppress large quantities of cash and drugs found in his hotel room. Lewis was a distributor in a drug-trafficking operation whose leader fled to Mexico. An FBI informant passed along Lewis's cell phone number, and the government obtained a tracking order pursuant to the Stored Communications Act, 18 U.S.C. § 2703(d). Cell-site location information ("CSLI") from Lewis's cell phone provider showed that his phone was within a 1,099-meter radius of Greenwood, Indiana. From there, officers searched parking lots and hotels where a deal might take place. Officers eventually saw a woman resembling Lewis's wife enter a room at a hotel, drop off a duffel bag, and drive away in a car registered in Lewis's name. After a drug-sniffing dog alerted at the room, officers applied for a search warrant, and the team executed the warrant the same day. Inside the room, officers found Lewis, $2 million in cash, and 19.8 kilograms of cocaine.

After a bench trial, the district court found Lewis guilty of possession with intent to distribute five kilograms or more of cocaine. Lewis argues that the dog sniff violated his reasonable expectation of privacy. In the alternative, he argues that the application for the § 2703(d) order lacked probable cause. Assuming that the court should have suppressed the evidence in his hotel room, Lewis further argues that the evidence presented at trial was insufficient to convict him.

We affirm. Lewis lacked a reasonable expectation of privacy in the exterior hallway of his hotel, where the dog sniff occurred. And regardless of whether the government's use of real-time CSLI amounted to a search, the good-faith exception applies. Because the district court correctly denied the motion to suppress, we do not assess the sufficiency of the remaining evidence.

I. Background

A. The Drug-Distribution Operation

Lewis reported to a man named Allan Bates. In December 2014, Bates introduced Lewis to Thomas "TJ" Boyle. Lewis drove a black Mercedes SUV to the meeting and gave Bates $125,000 in cash. Unbeknownst to Bates and Lewis, Boyle was actually an FBI informant. Boyle had agreed to provide the FBI with evidence of Bates's drug operation in exchange for working off a probation revocation. The FBI considered Boyle very reliable because his information previously led to the seizure of $400,000 from Bates's right-hand man, Larry Norton. Boyle also passed on information about a barn near Butler, Indiana, where the drug-trafficking operation stored cash and drugs in a hidden compartment.

On January 27, 2015, the FBI served search warrants in Indiana, Ohio, and Texas in connection with its investigation of Bates's operation. Bates fled, and Lewis helped him escape to Mexico. On February 1, 2015, Bates told Lewis that he and an associate, Chris Cook, needed to retrieve over $1 million and 20 kilograms of cocaine from the Butler barn. Lewis and Cook did as Bates instructed, and Lewis told Bates that there were only 19 kilograms, not the expected 20. At Bates's direction, Cook kept $60,000 in cash, and Lewis transferred the remaining cash and drugs to his car.

Meanwhile, the FBI obtained search warrants to review text messages on a phone that Bates was using in Mexico. On January 29, Bates texted Lewis and asked him to check on Boyle. Bates also told Boyle that "Nap" in Indianapolis (meaning Lewis) could help Boyle get cash and a rental car so he could flee to Texas. Crucially, ***531** Bates gave Boyle Nap's cell phone number.

B. The Tracking Order

Boyle passed along the cell phone number to FBI Agent Keszei. FBI Staff Operations Specialist Graff researched the number and determined that it was assigned to a Sprint phone owned by "Dewayne Lewis." The phone was pre-paid, so there was no billing address. Graff searched for Dewayne Lewises in Indianapolis and found one who was born in 1977, had a prior drug conviction, and was wanted on an outstanding warrant (the "1977 Lewis"). The 1977 Lewis is *not* the Defendant, who was born

in 1974 and did not have an outstanding warrant at the time. Complicating matters, Boyle incorrectly identified a photograph of the 1977 Lewis as "Nap." Both the 1977 Lewis and Defendant Lewis are black.

On January 30, 2015, an officer with the U.S. Marshals' Violent Fugitive Task Force applied for and received a court order under the Stored Communications Act, 18 U.S.C. § 2703(d). The application sought precision location-based information for Nap's cell phone, including cell-site activations, "twenty-four hour a day assistance ... to triangulate target location," and "[h]istorical call detail records for 30 days," among other things. In support of the application, Officer Harshman wrote:

> Applicant certifies that the information sought is relevant and material to a *fugitive investigation*, to wit: that the INDIANA STATE POLICE [and] US MARSHALS SERVICE are conducting an investigation to locate DEWAYNE LEWIS, *a fugitive from justice.* DEWAYNE LEWIS has an *active warrant* for a PAROLE VIOLATION on an original charge of DEALING COCAINE, IC: 35-48-4-1. On January 30, 2015, Trp. Brian Harshman was contacted by FBI S/A James Keszei reference [sic] assisting in locating and arresting DEWAYNE LEWIS. DEWAYNE LEWIS has an *active warrant* out of the Indiana Department of Corrections for a parole violation. S/A Keszei advised that he is currently involved in an investigation involving a drug trafficking organization in which DEWAYNE LEWIS is involved. S/A Keszei advised that during the course of the investigation it has been learned through informants and additional investigations that DEWAYNE LEWIS is utilizing a cellular telephone with an associated number of (317)507-8010. TFO Harshman was able to utilize law enforcement contacts within the Sprint Wireless Law Enforcement Compliance Department that [sic] (317)507-8010 does indeed belong to their company. Since DEWAYNE LEWIS is utilizing this cellular phone with associated number (317)507-8010, it is believed that the requested records and information will assist officers in locating and arresting DEWAYNE LEWIS.

(emphases added). On January 30, an Indiana state court judge granted the application "for the period of January 1, 2015 to the present and extending thirty (30) days past the date of this Order." In doing so, the judge found "that the information likely to be obtained is relevant and material to an ongoing criminal investigation."

Sprint began providing location information for the cell phone sometime on the morning of February 3, 2015. Sprint's data showed that Nap's phone was within a 1,099-meter radius (roughly two-thirds of a mile) of Greenwood, a suburb of Indianapolis. After 11:34 a.m., the phone was no longer connected to Sprint's network, possibly because the phone had been turned off. The phone reconnected to the network at 3:59 p.m. By that point, as explained below, officers had already zeroed in on ***532** Lewis's likely location. Between 3:59 p.m. and 4:21 p.m., Sprint reported that the phone was still within the same area of Greenwood, but Officer Harshman was no longer receiving email updates from Sprint. In any event, after approximately 3:00 p.m., Officer Harshman did not review the location data because he and the other officers were following another lead.

C. The Dog Sniff

On February 3, 2015, in reliance on the Sprint location data, eight to ten Marshals' Task Force Officers checked parking lots across Greenwood for a black Mercedes SUV. They also asked clerks at five local hotels if a black male had recently checked in. Sometime after 2:00 p.m., Officer Jason York checked a police database and discovered that Defendant Lewis lived in Greenwood and had two cars registered in his name: a black Mercedes and a white Cadillac Escalade. Officer York realized for the first time, however, that there was a discrepancy between Defendant Lewis's birth year and the birth year of the man whose outstanding arrest warrant had provided the basis for the § 2703(d) order. Officer Harshman emailed FBI Task Force Officer Martinez about the discrepancy at 2:23 p.m. Officer Martinez told Officer Harshman that the date of birth in the police database might be wrong, but he was confident that the vehicle description was correct, so the Marshals should locate Lewis and take him into custody.

Around 3:00 p.m., an officer on the team learned that a "Michael Jackson" of Evansville, Indiana had checked into Room 211 of the Greenwood Red Roof Inn at 10:10 a.m. (Jackson is a real person, but Defendant Lewis had apparently checked in using his name.) Room 211 is on the second floor of the hotel and is accessible via an exterior hallway and staircase leading directly to the parking lot. Sometime after 3:00 p.m., an officer on the team saw a white Cadillac Escalade drive into the Red Roof Inn parking lot. The driver was a woman who resembled a picture of Lewis's wife from the Indiana Bureau of Motor Vehicles. A

license plate check confirmed that the car was registered to Lewis. The woman took a duffel bag out of the car, brought it inside Room 211, and left the room less than five minutes later.

At 3:35 p.m., about twenty minutes after the woman left, several officers approached Room 211 and knocked on the door. No one answered. At 3:41 p.m., a K-9 handler walked a trained drug-detection dog up the exterior staircase and along the second-floor hallway. After passing seven other doors, the dog alerted at Room 211. Based on the dog sniff, a Greenwood police sergeant applied for a search warrant for Room 211. A local judge approved the warrant at 4:50 p.m., and officers executed the warrant at 5:05 p.m. The officers found Lewis, $2 million in cash, and 19.8 kilograms of cocaine in duct-taped packages. Lewis later confessed to his role in the drug-trafficking organization.

On the morning of February 4, 2015, one day after Sprint began providing location information for Lewis's cell phone, the Marshals emailed Sprint to discontinue the tracking order.

D. Procedural History

After his arrest, Lewis waived his right to counsel and generally proceeded pro se. A magistrate judge construed Lewis's motion to dismiss the indictment as a motion to suppress evidence resulting from the dog sniff. In February 2016, the magistrate conducted a two-day evidentiary hearing focused primarily on the dog sniff, followed by a supplemental hearing in January 2017 focused on the § 2703(d) order. The magistrate recommended that the district court suppress all evidence from the ***533** hotel room and Lewis's subsequent confession, reasoning that the dog sniff violated the Fourth Amendment. *United States v. Lewis*, No. 1:15-CR-00010-TLS-SLC, 2017 WL 9565360, at *8–9 (N.D. Ind. May 24, 2017) (citing *United States v. Whitaker*, 820 F.3d 849, 853 (7th Cir. 2016)).

In a July 2017 opinion—before *Carpenter v. United States*, —— U.S. ——, 138 S. Ct. 2206, 201 L.Ed.2d 507 (2018)—the district court rejected that recommendation and denied the motion to suppress. The district judge noted that the Supreme Court had distinguished *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001) in *Illinois v. Caballes*, 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005), meaning that dog sniffs do not necessarily infringe reasonable expectations of privacy. The district court further distinguished this court's decision in *Whitaker*, which held that a warrantless dog sniff in the interior hallway of an apartment building violated the Fourth Amendment. 820 F.3d at 853. In the district court's view, the dog sniff in this case did not invade the curtilage, so there was no Fourth Amendment violation. The district court further concluded that any error in the application for the § 2703(d) order was harmless because the officers were not relying on cell-site location information after 11:34 a.m., when Sprint stopped reporting data.

Lewis waived his right to a jury trial. After a three-day bench trial, the district court found him guilty of possessing more than five kilograms of cocaine with the intent to distribute. The judge expressly found that, even if the evidence from the hotel room and Lewis's cell phone had been suppressed, Lewis was still guilty beyond a reasonable doubt. The court also found that Bates and Cook testified credibly and consistently as to Lewis's involvement in the operation. The government had presented text messages between Lewis and Bates discussing the quantity of drugs stored at the barn and a ledger showing large payments from Bates to Lewis. This evidence showed beyond a reasonable doubt that Lewis knew the packages he and Cook retrieved on February 1, 2015, contained more than five kilograms of cocaine.

II. Discussion

When a defendant appeals the denial of a motion to suppress, we review the district court's legal conclusions de novo and its factual findings for clear error. *United States v. Hammond*, 996 F.3d 374, 383 (7th Cir. 2021).

A. The Dog Sniff

The Fourth Amendment safeguards "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Generally, a law enforcement officer may not perform a search without a warrant supported by probable cause, unless an exception to the warrant requirement applies. *Lange v. California*, —— U.S. ——, 141 S. Ct. 2011, 2017, 210 L.Ed.2d 486 (2021). Conversely, if something is not a search, then there is no need for a warrant. *Illinois v. Caballes*, 543 U.S. 405, 408, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005) ("Official conduct that does not compromise any legitimate interest in privacy is not a search subject to the Fourth Amendment.") (internal quotation marks omitted).

Two lines of precedent govern whether officer conduct amounts to a search. Under the property-based approach, a search occurs when an officer enters a constitutionally protected area, such as the home, for the purpose of gathering evidence against the property owner. ***534** *Florida v. Jardines*, 569 U.S. 1, 6, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013) (explaining that the curtilage is the area "immediately surrounding and associated with the home" and is "part of the home itself for Fourth Amendment purposes") (quoting *Oliver v. United States*, 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984)). This approach derives from common-law trespass. *United States v. Jones*, 565 U.S. 400, 405–06 & n.3, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012) ("Where ... the Government obtains information by physically intruding on a constitutionally protected area, [ ] a search has undoubtedly occurred.").

Alternatively, under the privacy-based approach, courts ask whether a person has a legitimate expectation of privacy in a given situation. *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring) (explaining that the Fourth Amendment applies when "a person [has] exhibited an actual (subjective) expectation of privacy and ... the expectation [is] one that society is prepared to recognize as 'reasonable' "). The privacy-based approach also limits the government's ability to exploit technological advances. *Kyllo v. United States*, 533 U.S. 27, 34–35, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001) (holding that the use of a thermal imager to detect heat radiating from a home was a search).

The Supreme Court has sometimes held that the use of drug-sniffing dogs constitutes a search. *Compare Jardines*, 569 U.S. at 11–12, 133 S.Ct. 1409 (dog sniff for drugs on front porch of home is a search), *with Caballes*, 543 U.S. at 410, 125 S.Ct. 834 (dog sniff for drugs during a lawful traffic stop is not a search because the sniff "reveals no information other than the location of a substance that no individual has any right to possess"); *United States v. Place*, 462 U.S. 696, 707, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) (dog sniff of luggage in an airport is not a search because it "discloses only the presence or absence of narcotics, a contraband item").[1]

In *Jardines*, officers brought a drug-sniffing dog onto the front porch of a home whose owner they suspected of growing marijuana. Justice Scalia's majority opinion reasoned that the front porch is the "classic exemplar" of the curtilage, meaning that it is part of the home for Fourth Amendment purposes. 569 U.S. at 7, 133 S.Ct. 1409. Visitors to a home have an implied license "to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id.* at 8, 133 S.Ct. 1409. But the officers in *Jardines* exceeded the scope of that license by bringing a drug-sniffing dog into the curtilage. *Id.* at 9–10, 133 S.Ct. 1409. Justice Kagan's concurrence explained that the same outcome would follow under the privacy-based approach in *Kyllo* and *Katz*. *Id.* at 13, 121 S.Ct. 2038 (Kagan, J., concurring). In her view, the case was a straightforward application of *Kyllo* because the officers used "a 'device ... not in general public use' (a trained drug-detection dog) to 'explore details of the home' (the presence of certain substances) that they would not otherwise have discovered without entering the premises." *Id.* at 14–15, 133 S.Ct. 1409 (quoting *Kyllo*, 533 U.S. at 40, 121 S.Ct. 2038).

Lewis argues that the dog sniff outside his hotel room constituted a search. He ***535** asks that we extend this court's decision in *Whitaker*, which held that a dog sniff for drugs in the interior hallway of an apartment building constituted a search. 820 F.3d at 852–54. Notably, we did not conclude in *Whitaker* that the area outside the defendant's apartment door amounted to curtilage. *Id.* at 853 (observing that defendant lacked the right to exclude people from the hallway). Instead, the court drew upon Justice Kagan's concurring opinion in *Jardines* and reasoned that apartment residents have a reasonable expectation of privacy in the area outside their doors. We also distinguished the facts in *Whitaker* from *Caballes* and *Place* because those sniffs occurred in public places rather than a home.

1. Property-Based Approach

The key question under the property-based approach is whether the area outside Lewis's hotel room door was constitutionally protected. *Jardines*, 569 U.S. at 6, 133 S.Ct. 1409. Recall that the hallway of this particular hotel was open-air and accessible via an exterior staircase that led directly to a parking lot. Unlike the homeowner in *Jardines*, Lewis lacked the right to exclude members of the public from passing through the exterior hallway. And as noted above, the *Whitaker* court did not even conclude that the interior hallway of an apartment building amounts to curtilage. *Whitaker*, 820 F.3d at 853. The exterior hallway of the Red Roof Inn is even farther afield from a front porch than an interior apartment hallway, so there was no search under the property-based approach.

2. Privacy-Based Approach

Lewis fares no better under the privacy-based approach. Justice Harlan's formulation of that approach asks (1) whether "a person [has] exhibited an actual (subjective) expectation of privacy," and (2) whether "the expectation [is] one that society is prepared to recognize as 'reasonable.' " *Katz*, 389 U.S. at 361, 88 S.Ct. 507 (Harlan, J., concurring). Even assuming that Lewis had a subjective expectation of privacy, the Supreme Court's decisions in *Caballes* and *Place* demonstrate that his expectation was not reasonable.

In *Place*, the Court explained that exposing luggage to a drug-sniffing dog in an airport was not a search, in large part because "the sniff discloses only the presence or absence of narcotics, a contraband item." 462 U.S. at 707, 103 S.Ct. 2637. Unlike an officer "rummaging through the contents of the luggage," a dog sniff "does not require opening the luggage" and "does not expose noncontraband items that otherwise would remain hidden from public view." *Id.* Similarly, in *Caballes*, the Court reasoned that "any interest in possessing contraband cannot be deemed legitimate, and thus, governmental conduct that *only* reveals the possession of contraband compromises no legitimate privacy interest." *Caballes*, 543 U.S. at 408, 125 S.Ct. 834 (internal quotation marks omitted). *Caballes* also distinguished *Kyllo*, which involved a thermal-imaging device "capable of detecting lawful activity," including "intimate details in a home." *Id.* at 409–10, 125 S.Ct. 834. "The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car." *Id.* at 410, 125 S.Ct. 834.

This is not to say that Lewis had no reasonable expectation of privacy whatsoever inside his hotel room. Lewis is correct that the Fourth Amendment extends to temporary dwelling places, such as hotel and motel rooms. *Finsel v. Cruppenink*, 326 F.3d 903, 907 (7th Cir. 2003) ***536** (citing *Stoner v. California*, 376 U.S. 483, 490, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964)). A hotel guest has a reasonable expectation, for example, that there is not a hidden camera in her room. But that does not mean an expectation of privacy that is reasonable in a home (i.e., to be free of warrantless dog sniffs) is necessarily reasonable in a hotel room. In that respect, the exterior hallway of a hotel adjacent to a parking lot is much closer to the public settings in *Caballes* and *Place* than the front porch in *Jardines.*

Lewis was also a mere guest, not a resident. While it is true that hotel guests have some legitimate expectations of privacy, they cannot exclude others from entering a hallway—particularly where, as here, an exterior hallway is accessible from a staircase leading directly to the parking lot. Indeed, the Supreme Court in *Stoner* recognized that "when a person engages a hotel room he undoubtedly gives implied or express permission to such persons as maids, janitors or repairmen to enter his room in the performance of their duties." *Stoner*, 376 U.S. at 489, 84 S.Ct. 889 (internal quotation marks omitted). If hotel guests have only a limited right to exclude hotel staff from a room, then it is hard to see how guests at the Red Roof Inn could reasonably expect to be free of dog sniffs in the exterior hallway.

B. The § 2703(d) Order

Section 2703 of the Stored Communications Act authorizes courts to "order cell-phone providers to disclose non-content information" in response to a governmental entity's request. *Hammond*, 996 F.3d at 384–85 (citing 18 U.S.C. § 2703(c)(1)(B)). Prior to the Supreme Court's decision in *Carpenter v. United States*, —— U.S. ——, 138 S. Ct. 2206, 201 L.Ed.2d 507 (2018), the

government could obtain a court order by "offer[ing] specific and articulable facts showing that there are *reasonable grounds to believe* that ... the records or other information sought[ ] are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d) (emphasis added).

Cell-site location information ("CSLI") is "location information generated by cellular phone providers that indicates which cell tower a particular phone was communicating with when a communication was made." *United States v. Curtis*, 901 F.3d 846, 847 (7th Cir. 2018). "Because cell phones are in constant communication with the nearest cell site—often affixed to a cell tower—they can collect CSLI as frequently as several times a minute." *Id.* (citing *Carpenter*, 138 S. Ct. at 2211–12). "The precision of this information depends on the size of the geographic area covered by the cell site." *Carpenter*, 138 S. Ct. at 2211. In dense urban areas, CSLI might be very precise, but CSLI is generally less precise than GPS tracking.

Courts distinguish between historical CSLI and real-time CSLI: historical CSLI allows law enforcement to retrace a defendant's physical movements, while real-time CSLI shows (roughly) where a defendant's cell phone is currently located. *Hammond*, 996 F.3d at 387; *Carpenter*, 138 S. Ct. at 2220 (expressing no opinion on "real-time CSLI"). "As with GPS information, [historical CSLI] provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.' " *Carpenter*, 138 S. Ct. at 2217 (quoting *Jones*, 565 U.S. at 415, 132 S.Ct. 945 (Sotomayor, J., concurring)).

In *Carpenter*, the Supreme Court held that the collection of historical CSLI over the course of a substantial period of time (127 days) was a search. *Carpenter*, 138 S. Ct. at 2217. Because § 2703(d)'s "reasonable grounds" language poses a ***537** lower bar than probable cause, the government can no longer rely on the language of the statute alone. *Id.* at 2221 ("[A]n order issued under Section 2703(d) of the Act is not a permissible mechanism for accessing historical cell-site records."). Instead, the government must generally obtain a warrant to access those records, subject to common-sense exceptions for emergencies. *Id.* at 2222–23.

1. The Good-Faith Exception

The exclusionary rule is a judicially created remedy to deter violations of criminal defendants' constitutional rights. *Davis v. United States*, 564 U.S. 229, 236–37, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011); *Curtis*, 901 F.3d at 849. A defendant may invoke the rule to prevent tainted evidence from being used against him at trial, but the exclusionary rule "is not a 'personal constitutional right,' and its application 'exacts a heavy toll on both the judicial system and society at large.' " *Hammond*, 996 F.3d at 384 (quoting *Davis*, 564 U.S. at 236–37, 131 S.Ct. 2419).

The Supreme Court has emphasized that the exclusionary rule does not apply when it would serve no deterrent function. *United States v. Leon*, 468 U.S. 897, 922, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) (good-faith reliance on a facially valid warrant); *Illinois v. Krull*, 480 U.S. 340, 356–57, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987) (good-faith reliance on then-valid statute); *Davis*, 564 U.S. at 232, 131 S.Ct. 2419 (good-faith reliance on then-binding circuit precedent). In *Curtis*, this court concluded that the good-faith exception applies to historical CSLI obtained via a § 2703(d) order before the *Carpenter* decision. The *Curtis* court reasoned that under *Krull*, the exclusionary rule does not apply to the fruits of evidence obtained in good-faith reliance on a subsequently invalidated statute. 901 F.3d at 848 (citing *Krull*, 480 U.S. at 349–50, 107 S.Ct. 1160); *see also United States v. Rosario*, 5 F.4th 706, 711–12 (7th Cir. 2021); *Hammond*, 996 F.3d at 386; *United States v. Adkinson*, 916 F.3d 605, 611 (7th Cir. 2019).

The government contends Lewis forfeited his argument that the § 2703(d) order lacked probable cause by failing to raise it below.[2] We will nonetheless consider it for several reasons. Lewis was pro se below, and he did move to suppress the fruits of the § 2703(d) order on the grounds that it relied on inaccurate information (the outstanding warrant for the 1977 Lewis). In any event, his argument lacks merit because the good-faith exception applies.

a. Historical CSLI

The tracking order in this case seems to have granted the government permission to obtain historical CSLI between January 1, 2015, and "thirty (30) days past the date of this Order," which was entered on January 30, 2015. At oral argument, however, the government clarified that it did not rely on historical CSLI either to find Lewis or to prosecute him for possession with intent to distribute. Indeed, both parties agree that Sprint did not begin sending data to law enforcement until February 3, 2015, the day of his arrest. Because the government did not use historical CSLI or the fruits of such information against Lewis at trial, there is nothing to exclude. *See Wong Sun v. United States*, 371 U.S. 471, 487–88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *Hammond*, 996 F.3d at 383 ("[T]here is no need to exclude evidence never admitted at ***538** trial or used improperly to obtain additional evidence.").

Moreover, this court has repeatedly held that the good-faith exception applies to historical CSLI collected pursuant to a § 2703(d) order pre-*Carpenter*. *See Rosario*, 5 F.4th at 711–12; *Hammond*, 996 F.3d at 386; *Curtis*, 901 F.3d at 849. The mere act of applying for a § 2703(d) order suggests that Officer Harshman made a good-faith attempt to comply with a then-valid statute. *Cf. United States v. Matthews*, 12 F.4th 647, 653 (7th Cir. 2021) ("Although it is the Government's burden to demonstrate that the officer was acting in objective good faith, an officer's decision to obtain a warrant is prima facie evidence of his good faith."). And there is no evidence that Officer Harshman knowingly or recklessly misled the judge or that the affidavit was facially invalid at the time he filed it. *United States v. Rees*, 957 F.3d 761, 771 (7th Cir. 2020).

b. Real-time CSLI

In *Hammond*, we declined to categorically extend *Carpenter* to real-time CSLI. *Hammond* involved three different types of CSLI: (1) historical CSLI collected pursuant to a § 2703(d) order, (2) historical CSLI collected pursuant to a § 2702 request, and (3) real-time CSLI collected pursuant to a § 2702 request. *Hammond*, 996 F.3d at 383. A § 2702 request "permits carriers to release records to a governmental entity, 'if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency.' " *Id.* at 386 (quoting 18 U.S.C. § 2702(c)(4)). Although the real-time CSLI in *Hammond* was obtained via a § 2702 request rather than a court order, any distinction between §§ 2702 and 2703 did not affect our analysis of how *Carpenter* applies to real-time CSLI.

Law enforcement in *Hammond* used real-time CSLI for several hours on a single day to track the defendant across Indiana. *Hammond*, 996 F.3d at 381. Of relevance here, the *Hammond* court held that a request for real-time CSLI did not amount to a search because the defendant was "a suspect for multiple armed robberies, for whom officers had probable cause, where the officers only collected real-time CSLI for a matter of hours while the suspect travelled on public roadways, and law enforcement limited its use of the CSLI to the purpose of finding the armed suspect who they had reason to believe was likely to engage in another armed robbery." *Id.* at 392. On those facts, the defendant had no reasonable expectation of privacy, so evidence stemming from the use of real-time CSLI to arrest Hammond did not have to be suppressed. *Id.* at 391. In the alternative, we concluded that the good-faith exception applied to the collection of real-time CSLI pursuant to a § 2702 request. *Id.* at 392–93.

In light of *Hammond*, even assuming the use of real-time CSLI in this case amounted to a search, the good-faith exception applies. The officers here relied on § 2703(d)'s "reasonable grounds" requirement when seeking a court order. Prior to *Carpenter*, good-faith reliance on this provision for the collection of *historical* CSLI was reasonable. *Curtis*, 901 F.3d at 848. Historical CSLI raises grave privacy concerns because it allows the government to retrace a person's movements over time. *Carpenter*, 138 S. Ct. at 2217. Real-time CSLI, while still implicating privacy interests, is more analogous to tracking a suspect on public roads. *Cf. United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) (holding that the use of a beeper in a drum of chloroform to track ***539** a suspect's car on public roads was not a search); *Hammond*, 996 F.3d at 389–90 (discussing *Knotts*). It follows that the good-faith exception applies not only to historical CSLI collected under § 2703(d), but also to real-time CSLI. We leave for another day whether the collection of real-time CSLI after *Carpenter* ever amounts to a search.

2. Errors in the § 2703(d) Affidavit

Alternatively, Lewis argues that the officers should have ceased their investigation when they learned that the intended target was not born in 1977. The mix-up was potentially material to Officer Harshman's § 2703(d) application because the 1977 Lewis, unlike the Defendant, had an outstanding warrant for a parole violation. Indeed, Officer Harshman's affidavit emphasized that information from Lewis's cell phone was critical to a "fugitive investigation" and that Lewis was a "fugitive from justice." Around 2:00 p.m. on February 3, Officer York learned that Defendant Lewis was born in 1974, and Officer Harshman emailed FBI TFO Martinez about the discrepancy at 2:23 p.m. Officer Martinez asked the team to continue looking for Lewis, in part because the black Mercedes registered in Lewis's name corroborated the tip from Boyle. It is unclear from the record when the officers learned that Defendant Lewis did not have any outstanding warrants. It is also unclear when or if Officer Harshman pieced together that Boyle's incorrect photo identification of the 1977 Lewis as "Nap" undermined Boyle's credibility.

Lewis is correct that officers must cease executing a search warrant when they learn of a material error in a probable cause affidavit. *See Maryland v. Garrison*, 480 U.S. 79, 86, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987); *Muhammad v. Pearson*, 900 F.3d 898, 904 (7th Cir. 2018) ("Officers executing warrants ... may violate the Fourth Amendment if they know or should know, before execution, that the warrant has an error or critical ambiguity that risks a search of the wrong location."). We are skeptical, however, that the facts that were then known to the officers materially undermined the basis for the § 2703(d) order. From what we can tell, the only discrepancy that the officers knew of on the afternoon of February 3 was Lewis's birth year—not the fact that he lacked outstanding warrants or that Boyle had incorrectly identified Nap. A three-year difference in birth year, alone, did not require them to stop searching and report to the magistrate judge.

Regardless, any belatedly discovered errors in the § 2703(d) affidavit were attenuated from the events that led to Lewis's eventual arrest. *See Wong Sun*, 371 U.S. at 487–88, 83 S.Ct. 407; *United States v. Green*, 111 F.3d 515, 520–21 (7th Cir. 1997). Sprint was not sending any information to law enforcement between 11:34 a.m. and 3:59 p.m., possibly because Lewis's phone was turned off. Between 3:00 p.m. and 3:41 p.m., officers saw a woman resembling Lewis's wife drop off a bag in Room 211, the woman drove away in a car registered in Lewis's name, and a drug-sniffing dog had alerted at the door. Thus, by the time Sprint began sending information again, the officers were already in the process of seeking a search warrant for Room 211.

III. Conclusion

For the foregoing reasons, the district court's denial of the motion to suppress is

Affirmed.

All Citations

38 F.4th 527

Footnotes

1 This case involves a dog sniff for controlled substances, not explosives. Even the dissenters in *Caballes* recognized that "[a] dog sniff for explosives, involving security interests not presented here, would be an entirely different matter." *Caballes*, 543 U.S. at 423, 125 S.Ct. 834 (Ginsburg, J., dissenting). "[T]he immediate, present danger of explosives would likely justify a bomb sniff under the special needs doctrine." *Id.* at 425, 125 S.Ct. 834.

2 Not to be outdone, Lewis argues the government forfeited reliance on the good-faith exception by not raising it in the district court. This counterattack is unpersuasive because, when the district court ruled on the motion to suppress in 2017, neither *Carpenter* nor *Curtis* had been issued, so there was no basis for raising a good-faith exception argument.

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9 F.4th 682
United States Court of Appeals, Eighth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Herbert G. GREEN, Defendant-Appellant.

No. 20-2796
|
Submitted: May 14, 2021
|
Filed: August 13, 2021

Synopsis

Background: Following denials of his motions to suppress evidence, defendant pled guilty in the United States District Court for the Western District of Missouri, Roseann A. Ketchmark, J., to possessing firearms in furtherance of a drug trafficking offense. Defendant appealed.

Holdings: The Court of Appeals, Grasz, Circuit Judge, held that:

detective did not deprive shipping company of custody of box by removing it from the conveyor belt at shipping facility and walking it 200 feet to K9 at the back of the facility;

officer had probable cause to arrest defendant who placed box inside his apartment;

officers did not have reasonable suspicion to believe that dangerous individuals were present in the apartment before they began protective sweep; and

Court considering independent source doctrine would remand to allow district court to determine whether the law enforcement agents would have sought a warrant if they had not conducted protective sweep.

Remanded with instructions.

***685** Appeal from United States District Court for the Western District of Missouri–Kansas City

Attorneys and Law Firms

Rebecca L. Kurz, Asst. Fed. Public Defender, Kansas City, MO, argued (Laine Cardarella, Fed. Public Defender, on the brief), for defendant-appellant.

J. Benton Hurst, Asst. U.S. Atty., Kansas City, MO, argued (Timothy A. Garrison, U.S. Atty., on the brief), for plaintiff-appellee.

Before SMITH, Chief Judge, SHEPHERD and GRASZ, Circuit Judges.

Opinion

GRASZ, Circuit Judge.

***686** Herbert G. Green twice moved to suppress evidence of guns, ammunition, and drug paraphernalia that the Kansas City police seized from his apartment. The district court denied both motions. Green conditionally pled guilty to possessing firearms in furtherance of a drug trafficking offense, *see* 18 U.S.C. § 924(c)(1)(A), (c)(1)(A)(i), and was sentenced to 60 months of imprisonment. He now appeals.

Because we conclude that the record does not contain adequate findings of fact for us to resolve Green's appeal, we remand the case to the district court for the limited purpose of making the supplemental findings of fact necessary to resolve Green's Fourth Amendment claims, while retaining jurisdiction.

I. Background

One morning in August 2017, Detective Antonio Garcia, who had twenty-two years of experience on the police force, was working interdiction (i.e., intercepting contraband) at a Federal Express sorting center. Something he had done several thousand times before.

Under an agreement, FedEx allows the police to perform interdiction duties only between when the packages arrive (around 6:00 a.m.) and when they leave for delivery (around 8:00 a.m.). The agreement also states that officers may only seize packages when a narcotics dog ("K9") alerts to them. The K9s are not allowed near the conveyor belt where the packages move through the facility. Officers must bring flagged packages to their K9s. If the K9 does not alert to a package, the package must be immediately returned to the conveyor belt. The interdiction team cannot delay the delivery of any non-seized package.

On the morning in question, Detective Garcia began his interdiction duties around 6:00 a.m. He soon noticed a large "moving" box with a return label from Brownsville, Texas—"a source city for illegal narcotics." The box's seams were glued, which in Detective Garcia's seventeen years of interdiction experience indicates illegal narcotics "100% of the time[.]" Detective Garcia also testified that he looks at moving boxes "right away" because they are sturdy and thick, making them well suited to contain large amounts of drugs.

Detective Garcia carried the box 200 feet to the back of the FedEx facility, where his K9, Zina, immediately alerted to it. Zina is a certified narcotics dog and is "very reliable," according to Detective Garcia. Detective Garcia told FedEx about the box and Zina's alert, filled out the necessary paperwork, and seized it. The entire process from when Detective Garcia took the box off the conveyor belt until Zina alerted took approximately three minutes. Had Zina not alerted, the box would have been returned to the conveyor belt and delivered.

Officers obtained a state search warrant for the box. They also obtained a state anticipatory warrant for the address where the box was to be delivered, which allowed the police to enter the address to retrieve the box if it was taken inside. The police then conducted a controlled delivery to the box's mailing address. A detective delivered the box to the door of the apartment, but no one was home. He left the box at ***687** the door. Approximately eight minutes later, Green arrived at the apartment while talking on the phone. Officers overheard him tell the person on the other end of the call that "the box had arrived." He then unlocked the apartment door, placed the box inside, and left the apartment building.

Officers promptly arrested Green in the parking lot a few feet from his vehicle. A tactical team then entered the apartment to ensure that they could safely execute the search warrant. The tactical team immediately saw the box just inside the doorway but proceeded to go through every room to look in any place that a person could hide. They also looked in the kitchen trashcan, kitchen cabinets, and in a shoebox located on top of Green's bedroom dresser. During the sweep, which took around ten minutes,

the tactical team saw weapons and marijuana inside the apartment. Despite seeing these items in plain view, the team did not seize anything.

Detective Garcia then entered the residence, performed a walk-through, and opened the box. It contained a foam cooler, which in turn contained 24.4 pounds of marijuana. Detective Garcia took the box, its contents, and Green's cell phone back to headquarters.

The officers next obtained a federal search warrant for the apartment. When they executed the warrant, the officers recovered an AR-15 rifle from the bedroom closet, a pistol, a fully loaded magazine, three other magazines, ammunition, a bullet-proof vest, a roll of heat-sealed bags, a digital scale, a hand-written ledger, five baggies of powder substance, one vacuum sealed bag of marijuana buds, and a shoe box with marijuana residue.

A grand jury indicted Green for attempting to possess a controlled substance with intent to distribute, *see* 21 U.S.C. §§ 841(a)(1), (b)(1)(D), 846 (Count One), possessing a firearm in furtherance of a drug trafficking crime, *see* 18 U.S.C. § 924(c)(1)(A), (c)(1)(A)(i) (Count Two), and possessing a firearm as a felon, *see* 18 U.S.C. §§ 922(g)(1), 924(a)(2) (Count Three).

Green first moved to suppress the evidence seized from his apartment on grounds that the officers exceeded the state warrant's scope. A magistrate judge recommended denying the motion and the district court agreed. The district court then granted Green leave to challenge whether reasonable suspicion supported the seizure of the box at the FedEx facility and whether probable cause supported Green's arrest. Green also moved again to suppress the box's initial seizure and his arrest. The district court adopted the magistrate judge's recommendation and denied that motion as well.

Green then conditionally pled guilty to Count Two, reserving his right to appeal the suppression motion denials. The district court sentenced him to 60 months of imprisonment. Green now appeals, challenging the constitutionality of the box's initial seizure, his arrest, and the protective sweep.

II. Analysis

"A mixed standard of review applies to [ ] denial[s] of [ ] motion[s] to suppress evidence." *United States v. Williams*, 777 F.3d 1013, 1015 (8th Cir. 2015). We review the district court's findings of fact for clear error and its denials of Green's suppression motions de novo. *United States v. Smith*, 820 F.3d 356, 359–60 (8th Cir. 2016).

A. The Package's Initial Seizure

Green first argues that a seizure occurred when Detective Garcia removed the box from the conveyor belt at a FedEx facility and took it to the back of the ***688** warehouse for Zina to sniff and that Detective Garcia lacked reasonable suspicion to support that seizure. We disagree.

The Fourth Amendment to the Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" *See United States v. Ameling*, 328 F.3d 443, 447 (8th Cir. 2003) (noting that the Fourth Amendment applies to the states through the Fourteenth Amendment). In *United States v. Va Lerie*, we held that a seizure occurs when law enforcement "meaningful[ly] interfere[s] with an individual's possessory interests in property[.]" 424 F.3d 694, 706 (8th Cir. 2005) (en banc). By implication, the meaningful-interference requirement means that "not every governmental interference with a person's property constitutes a seizure of that property under the Constitution." *Id.* at 702. *Va Lerie* involved checked luggage at a bus station but approvingly cited several cases applying the same principles to the drug-interdiction-of-mail context. *Id.* at 707–08; *see United States v. Gomez*, 312 F.3d 920, 923–24 (8th Cir. 2002) (holding no seizure occurred when a drug-interdiction officer moved a package to a command center twenty yards from a conveyor belt in a

post office's sorting area); *United States v. Vasquez*, 213 F.3d 425, 426 (8th Cir. 2000) (holding no seizure occurred when drug-interdiction officers at a FedEx facility had a narcotics dog sniff a package).

In *Va Lerie*, we held that "the [meaningful-interference] seizure standard prohibits the government's conversion of an individual's private property, as opposed to the mere technical trespass to an individual's private property." 424 F.3d at 702. In fleshing out that standard, we supplied three factors courts should focus on when considering whether detaining a package constitutes a seizure: (1) whether it delayed a passenger's travel or significantly impacted the passenger's freedom of movement; (2) whether it delayed the package's timely delivery; and (3) whether it deprived the carrier of custody of the item. *Id.* at 707. "If none of these factors is satisfied, then no Fourth Amendment seizure has occurred. Conversely, if even a single factor is satisfied, then a Fourth Amendment seizure has occurred." *Id.*

"A law enforcement officer must have reasonable suspicion that a piece of mail, or a package shipped via a commercial carrier, contains contraband to lawfully seize it for investigative purposes." *United States v. Smith*, 383 F.3d 700, 704 (8th Cir. 2004). Reasonable suspicion "is a level of suspicion 'considerably less than proof of wrongdoing by a preponderance of the evidence.' In evaluating whether suspicion is reasonable, 'we must consider the totality of the circumstances—the whole picture.' The inquiry is not 'readily ... reduced to a neat set of legal rules.' " *United States v. Huerta*, 655 F.3d 806, 809 (8th Cir. 2011) (internal citations omitted) (quoting *United States v. Sokolow*, 490 U.S. 1, 7–8, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989)). We have held that a K9's positive indication allows an officer to seize a package to further investigate it. *See United States v. Zacher*, 465 F.3d 336, 338 (8th Cir. 2006). In other words, if a K9 alerts to a package, then an officer has reasonable suspicion to seize that package.

So, the key question here is *when* the seizure took place. If it took place before Zina alerted to the box, the only suspicious facts that could support reasonable suspicion involve the box's appearance. On the other hand, if the seizure happened post-alert, then the reasonable-suspicion determination can include Zina's positive indication. *See, e.g.*, *Zacher*, 465 F.3d at 338 (holding a K9's positive indication supports reasonable suspicion).

***689** Green does not argue that either of the first two *Va Lerie* factors are met. So, whether the box was seized boils down to whether the third *Va Lerie* factor is met. That is, whether Detective Garcia deprived FedEx of custody of the box by removing it from the conveyor belt and walking it 200 feet to Zina at the back of the facility. *See Va Lerie*, 424 F.3d at 707. We conclude that Detective Garcia did not deprive FedEx of custody because he was acting at FedEx's direction. Consideration of our case law reveals why.

In *Zacher*, we held that no seizure occurred when an officer placed a package on the floor at the FedEx facility for a K9 sniff. 465 F.3d at 339. We reasoned that "[n]o change in custody occurred when [the detective] placed the package on the floor, since a reasonable person could expect FedEx to handle his or her package the same way." *Id.* So, we focused on "the sender's reasonable expectations of how the carrier would handle the package" and said that those expectations "define[d] the scope of the carrier's custody." *Id.* (citing *Va Lerie*, 424 F.3d at 707 n.7). From *Zacher*, we know that an officer moving and handling a package does not automatically constitute a seizure.

In *Va Lerie*, we also applied the sender's-reasonable-expectation test to the custody question. We observed that "a commercial bus passenger who checks his luggage should reasonably expect his luggage to endure a fair amount of handling—if his luggage were not handled, it would not reach its destination." 424 F.3d at 706. In applying the test, we wrote that the officers there "removed [the passenger]'s checked luggage from the lower luggage compartment to a room inside the terminal *at* [*the bus company*]*'s request*." *Id.* at 708 (emphasis added). As a result, we concluded that "no Fourth Amendment seizure occurred." *Id.* at 708–09. The conclusion we draw from *Va Lerie* is that when officers are acting at the carrier's direction and complying with its guidance, a seizure is not likely to have occurred.

In *United States v. Alvarez-Manzo*, we concluded that officers acted outside the carrier's direction by moving a bag from the luggage compartment to the passenger compartment. 570 F.3d 1070, 1076–77 (8th Cir. 2009). We distinguished the case from *Va Lerie* by observing that the officer, "not [the bus company], was directing the action with respect to [the passenger]'s bag[.]"

Id. at 1076. The holding in *Alvarez-Manzo* "did not turn on *where* law enforcement took the bag but *at whose direction* law enforcement acted when it did so." *Id.* at 1076. *Alvarez-Manzo* helpfully describes the holding in *Va Lerie* as well: "*Va Lerie* provides that law enforcement did not deprive [the bus company] of its custody of [the passenger]'s bag because, although law enforcement had physical possession of the bag, [*the bus company*] *was directing the action* in terms of what law enforcement could do with [the passenger]'s bag." *Id.* (emphasis added). Reading these three cases together, it is clear that the third *Va Lerie* factor (whether the carrier was deprived of custody) turns more on *whose direction* law enforcement followed, rather than *where* the package was briefly taken.

Green disputes this conclusion, arguing that acting under the direction of the carrier means that the carrier's employee must specifically identify the parcel as suspicious. We disagree. Green's reading of *Alvarez-Manzo* does not account for *Va Lerie*'s facts. There, the carrier did not direct law enforcement *to* the suspicious luggage. 424 F.3d at 696. Instead, the opposite happened. *Id.* The carrier's "direction" in *Va Lerie* was limited to general designations about where to bring the luggage after the officer had identified it as suspicious. ***690** *Id.* at 708. *Va Lerie* is like our case because Detective Garcia identified the box as suspicious and acted at the direction of FedEx by taking the package to the location FedEx designated for K9 sniffs. Taking *Alvarez-Manzo* and *Va Lerie* together requires that we reject Green's suggestion that a carrier official must be the first to identify a parcel as suspicious. This rule would not comport with *Va Lerie* nor many cases it approvingly cited. *See, e.g.*, *United States v. Ward*, 144 F.3d 1024, 1027–28 (7th Cir. 1998) (involving law enforcement first identifying suspicious luggage); *United States v. Johnson*, 990 F.2d 1129, 1130–31 (9th Cir. 1993) (same).

We therefore hold that the third *Va Lerie* factor is not met here because when Detective Garcia briefly moved the box, he did so at FedEx's direction. This leads us to conclude that Detective Garcia did not seize the box until after Zina alerted to its contents, at which point there was clearly reasonable suspicion to support the seizure. *See Zacher*, 465 F.3d at 338 (noting a K9's positive indication is enough for reasonable suspicion).[1]

B. Green's Arrest

Green next argues that the officers lacked probable cause to arrest him after he took delivery of the box and put it inside his apartment. Again, we disagree.

Probable cause is required for a warrantless arrest. *United States v. Houston*, 548 F.3d 1151, 1154 (8th Cir. 2008). "An officer has probable cause to make a warrantless arrest when the facts and circumstances are sufficient to lead a reasonable person to believe that the defendant has committed or is committing an offense." *Royster v. Nichols*, 698 F.3d 681, 688 (8th Cir. 2012) (quoting *Fisher v. Wal-Mart Stores, Inc.*, 619 F.3d 811, 816 (8th Cir. 2010)). Our precedent does not require that arresting officers witness a crime or have all the evidence needed to sustain a conviction; instead, officers only need a "probability or substantial chance of criminal activity, rather than an actual showing of criminal activity[.]" *United States v. Winarske*, 715 F.3d 1063, 1067 (8th Cir. 2013); *accord United States v. Mendoza*, 421 F.3d 663, 667 (8th Cir. 2005). "Law enforcement officers have 'substantial latitude in interpreting and *drawing inferences from* factual circumstances.' " *United States v. Henderson*, 613 F.3d 1177, 1181 (8th Cir. 2010) (emphasis added) (quoting *United States v. Washington*, 109 F.3d 459, 465 (8th Cir. 1997)).

Here, Detective Garcia initially suspected that the box contained drugs because it was (1) a moving box, (2) shipped from a source city, and (3) had a glued-shut lid. Zina, a reliable drug dog, then alerted to the box. *See United States v. Donnelly*, 475 F.3d 946, 955 (8th Cir. 2007) (holding a K9 alerting to a package supports probable cause to believe drugs are present). Later, Detective Garcia witnessed Green place the box inside the apartment where it was delivered. *See United States v. Brown*, 929 F.3d 1030, 1037 (8th Cir. 2019) (holding the delivery of a drug-filled package to a specific address provided probable cause for the search of the apartment). Detective Garcia also heard Green say, "[t]he box is here" just before Green placed it inside the apartment. As the district court noted, his "familiarity with the [box] suggested he probably knew what was inside."

***691** Green argues that the officers lacked enough information to support probable cause to arrest him. For all they knew, Green theorizes, he could have been helping a friend by getting their mail. But probable cause only requires showing a "substantial chance of criminal activity, rather than an actual showing of criminal activity[.]" *Winarske*, 715 F.3d at 1067.

We conclude that the box's suspicious appearance and Zina's alert, together with Green picking up the box, placing it inside the apartment, and demonstrating his familiarity with that specific box supported probable cause to arrest him.

C. The Protective Sweep

Green last argues that the lengthy protective sweep of his entire apartment was unconstitutional because the anticipatory warrant only authorized the officers to seize one item (the box), which they found just inside the front door. He claims that the tactical team "saw the only item they could seize pursuant to the anticipatory warrant, chose not to seize it and exit the premises, and proceeded to walk through the entire apartment for ten to fifteen minutes looking under a mattress, in the kitchen trash can, in kitchen cabinets, and at or in a shoe box." On this point, we agree with Green.

As usual in the Fourth Amendment context, reasonableness controls the analysis when it comes to "the method of execution of [a] warrant." *United States v. Ramirez*, 523 U.S. 65, 71, 118 S.Ct. 992, 140 L.Ed.2d 191 (1998). "[T]he search of a residence is generally unreasonable 'without a warrant issued on probable cause.' " *United States v. Waters*, 883 F.3d 1022, 1026 (8th Cir. 2018) (quoting *Maryland v. Buie*, 494 U.S. 325, 331, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990)). But "[a]n exception to the general warrant requirement of the Fourth Amendment is the protective sweep." *Id.* A protective sweep "is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Id.* "During a properly limited protective sweep, the police may seize an item that is in plain view if its incriminating character is 'immediately apparent.' " *United States v. Green*, 560 F.3d 853, 856 (8th Cir. 2009) (quoting *Horton v. California*, 496 U.S. 128, 136, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990)).

In *Buie*, the Supreme Court addressed when and how officers may conduct a protective sweep in the context of one conducted incident to an arrest. 494 U.S. at 334, 110 S.Ct. 1093. First, the Court held that, *as a matter of course*, officers may look in spaces "immediately adjoining the place of arrest from which an attack could be immediately launched." *Id.* Second, the Court held that to sweep beyond those "immediately adjoining" spaces, officers must have *reasonable suspicion* to believe dangerous individuals are hiding in the area to be swept. *Id.* at 334, n.2, 110 S.Ct. 1093.

In the executing-a-search-warrant context, we have held that officers may conduct a protective sweep. *See United States v. Jones*, 471 F.3d 868, 874–75 (8th Cir. 2006). But what type of sweep can officers conduct while executing a search warrant?

Here, the district court concluded that the officers justifiably swept Green's apartment based on language in *Bailey v. United States*, 568 U.S. 186, 194, 133 S.Ct. 1031, 185 L.Ed.2d 19 (2013). *Bailey* said that a "search for narcotics is the kind of transaction that may give rise to sudden violence[.]" 568 U.S. at 194, 133 S.Ct. 1031 (quoting *Michigan v. Summers*, 452 U.S. 692, 702, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981)). In such situations, the Court said that law enforcement can "secure the premises" to "exercise unquestioned command ***692** of the situation." *Id.* at 194–95, 133 S.Ct. 1031. But *Bailey* dealt with questions about law enforcement's authority to detain people both on and off the premises while executing a warrant. It did not decide when officers may execute a protective sweep incident to the execution of a search warrant.

While *Bailey* did not address that question, we did in *United States v. Waldner*, 425 F.3d 514 (8th Cir. 2005), and again in *United States v. Rodriguez*, 834 F.3d 937 (8th Cir. 2016). In *Waldner*, we stated that "*Buie* authorizes protective sweeps for unknown individuals in a house who may pose a threat to officers as they effectuate an arrest; *Buie* does not allow a protective sweep for weapons or contraband." 425 F.3d at 517. And, in *Waldner*, we held that in the context of a non-arrest situation, conducting a protective sweep "requires a showing of a reasonable suspicion of dangerous individuals in the house." *Id.* We reaffirmed the rule from *Waldner* in *Rodriguez*. *Rodriguez*, 834 F.3d at 942 ("[A] protective sweep in the absence of an arrest or

reasonable suspicion of dangerous individuals was clearly illegal under *Waldner*."). Here, just like in *Waldner* and *Rodriguez*, we are dealing with a protective sweep in the context of a non-arrest situation (i.e., executing a search warrant).[2]

The government tries to distinguish *Waldner* and *Rodriguez* because the former involved serving a protective order and the latter involved entering a house with consent. But *Waldner* and *Rodriguez* are clear: In a non-arrest context, a protective sweep requires reasonable suspicion of dangerous individuals inside from the outset. *See Waldner*, 425 F.3d at 517; *Rodriguez*, 834 F.3d at 942. Because the government does not argue that the officers had reasonable suspicion to believe that dangerous individuals were present in Green's apartment *before* they began the protective sweep, we conclude that the protective sweep of Green's apartment violated the Fourth Amendment.

Even assuming a protective sweep of Green's apartment was valid, the scope of the sweep here also violated the Constitution. The Supreme Court has held that a protective sweep "may extend only to a cursory inspection of those spaces where a person may be found." *Buie*, 494 U.S. at 335, 110 S.Ct. 1093. A protective sweep must be "quick and limited" and "initially confined to places large enough to conceal a person." *United States v. Boyd*, 180 F.3d 967, 976 (8th Cir. 1999) (quoting *Buie*, 494 U.S. at 327, 110 S.Ct. 1093); *see Alatorre*, 863 F.3d at 815 (holding a task force conducted a constitutional protective sweep "because it lasted only two minutes and was confined to places large enough to hide a person"). Here, a team of officers performed a "sweep" of Green's apartment that lasted around ten minutes and included looking inside kitchen cupboards, trash cans, and even inside a shoebox. This exhaustive search far exceeded the permissible bounds of a protective sweep both in the time it took for a team of officers to "sweep" the apartment and the places that were searched. *Cf.* ***693** *United States v. Thompson,* 6 F.4th 789, 791-92, 793-94 (8th Cir. 2021) (holding the sweep of a house was justified where the suspicious conduct of people inside and the defendant's criminal history involving concealed weapons supported the officers' reasonable suspicion that dangerous individuals were present in the home). We therefore conclude that, even if a protective sweep of Green's apartment was valid, the scope of the sweep violated the Fourth Amendment.

D. Independent Source Doctrine

Considering our conclusion that the protective sweep of Green's apartment violated the Constitution, we next ask whether an exception to the exclusionary rule applies. *See Utah v. Strieff*, —— U.S. ——, 136 S. Ct. 2056, 2061, 195 L.Ed.2d 400 (2016) (laying out multiple exceptions to the exclusionary rule); *see also Hudson v. Michigan*, 547 U.S. 586, 591, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006) ("Suppression of evidence ... has always been [a] last resort, not [the] first impulse."). The government argues that the independent source doctrine works to prevent exclusion here.[3]

"The independent source doctrine allows admission of 'evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality.' " *United States v. Anguiano*, 934 F.3d 871, 874 (8th Cir. 2019) (quoting *Murray v. United States*, 487 U.S. 533, 537, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988)); *see Strieff*, 136 S. Ct. at 2061. To invoke the doctrine, the government must show "(1) that the decision to seek the warrant was *independent* of the unlawful entry—i.e., that police would have sought the warrant even if the initial entry had not occurred—and (2) that the information obtained through the unlawful entry *did not affect* the magistrate's decision to issue the warrant." *United States v. Khabeer*, 410 F.3d 477, 483 (8th Cir. 2005) (emphasis added); *accord United States v. Swope*, 542 F.3d 609, 613–14 (8th Cir. 2008).

Here, there is an argument that the independent source doctrine applies. Apart from the protective sweep, the officers would still have discovered that, as suspected, the box contained drugs. And the officers saw Green place the box inside the apartment after indicating that he recognized ***694** it. So, there was clear evidence associating a box containing drugs with the apartment. Even without the protective sweep, then, the officers may have obtained a warrant to search Green's apartment. *See Swope*, 542 F.3d at 615 (holding a search warrant obtained after an unlawful search was an independent source for physical evidence because the officers' decision to seek the warrant did not depend on the unlawful search and the redacted warrant application still supported probable cause); *United States v. Craig*, 630 F.3d 717, 722 (8th Cir. 2011) (same).

But just like in *Khabeer*, we must remand so that the district court has an opportunity to "explicitly find" whether "the agents would have sought a warrant if they had not earlier" conducted a lengthy protective sweep of Green's apartment. 410 F.3d at 484 (quoting *Murray*, 487 U.S. at 543, 108 S.Ct. 2529 ("[I]t is the function of the [d]istrict [c]ourt rather than the [c]ourt of [a]ppeals to determine the facts" and concluding that the possible inferences to be drawn from the record are not "clear enough to justify the conclusion that the [d]istrict [c]ourt's findings amounted to a determination of independent source.")).

III. Conclusion

For these reasons, we retain jurisdiction over this appeal, but remand to the district court for the limited purpose of making findings of fact as to whether the officers' decision to seek a search warrant for Green's apartment was prompted by what the officers observed when they conducted their protective sweep.

All Citations

9 F.4th 682

Footnotes

1 Based on our conclusion that Detective Garcia did not seize the box when he initially removed it from the conveyor belt and carried it to the back of the facility for the K9 sniff, we need not reach the district court's alternative holding that reasonable suspicion also supported seizing the box from the outset.

2 The government does not argue that Green's arrest outside the apartment justified a protective sweep of his apartment. Even so, we note that the government would need to point to "*articulable facts and rational inferences* supporting the officers' *reasonable beliefs* that someone else could be inside posing a danger to them during or following the arrest." *United States v. Alatorre*, 863 F.3d 810, 814–15 (8th Cir. 2017) (holding a protective sweep of a residence was justified after officers removed the arrestee to the porch where there were specific facts indicating the clear possibility that dangerous individuals and weapons were inside). The government did not point us to any such facts, beyond the general drug context, here.

3 While the district court did not rely on the independent source doctrine below, "[w]e may affirm the district court's denial of a motion to suppress on any ground the record supports." *United States v. Murillo-Salgado*, 854 F.3d 407, 414 (8th Cir. 2017) (quotation omitted); *see, e.g.*, *United States v. Perez-Trevino*, 891 F.3d 359, 367 (8th Cir. 2018) (affirming the denial of a motion to suppress on a different ground than the district court); *United States v. Brandwein*, 796 F.3d 980, 984 (8th Cir. 2015) (same).

The government also argues that the good-faith exception to the exclusionary rule applies. *See United States v. Leon*, 468 U.S. 897, 920–21, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) ("[W]hen an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope ... there is no police illegality and thus nothing to deter."); *see also United States v. Cannon*, 703 F.3d 407, 413 (8th Cir. 2013) ("For the *Leon* exception to apply when the warrant is based on evidence obtained through a Fourth Amendment violation, the detectives' prewarrant conduct must have been 'close enough to the line of validity to make the officers' belief in the validity of the warrant objectively reasonable.' " (quoting *United States v. Conner*, 127 F.3d 663, 667 (8th Cir. 1997))). But the good-faith exception does not apply here because the scope of the protective sweep—a ten-minute long exhaustive search of every nook and cranny of Green's apartment—was clearly illegal under our precedent. *See, e.g.*, *Boyd*, 180 F.3d at 976 (holding a protective sweep must be "quick and limited" and "initially confined to places large enough to conceal a person").

809 F.3d 834
United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff–Appellee

v.

Ivan GARCIA–LOPEZ, Defendant–Appellant.

No. 14–41392.
|
Jan. 11, 2016.

Synopsis

Background: Following denial of his suppression motion, defendant entered conditional guilty plea in the United States District Court for the Southern District of Texas, John D. Rainey, J., to being felon in possession of firearm. Defendant appealed.

The Court of Appeals, James E. Graves, Jr., Circuit Judge, held that police officer had reasonable suspicion to justify protective sweep of defendant's bedroom.

Affirmed.

Attorneys and Law Firms

***835** John Richard Berry, Asst. U.S. Atty., Renata Ann Gowie, Asst. U.S. Atty., U.S. Attorney's Office, Houston, TX, for Plaintiff–Appellee.

Mark Glendon Parenti, Parenti Law, P.L.L.C. El Campo, TX, for Defendant–Appellant.

Ivan Garcia–Lopez, El Campo, TX, pro se.

Appeal from the United States District Court for the Southern District of Texas.

Before OWEN, GRAVES, and HIGGINSON, Circuit Judges.

Opinion

JAMES E. GRAVES, JR., Circuit Judge.

This is an appeal by Defendant Ivan Garcia–Lopez ("Garcia–Lopez"). Garcia–Lopez entered a conditional plea to a single firearm violation, and now appeals the denial of his motion to suppress the firearms from which that violation and his resulting conviction flowed. For the reasons set forth below, we **AFFIRM.**

I.

On the evening of February 5, 2014, Wharton County Deputy Sheriff Raul Adam Gomez ("Deputy Gomez") arrived at the trailer home of Jaime Garcia ("Mr. Garcia") to serve a felony arrest warrant for his younger son, Yonari Garcia ("Yonari").

While Deputy Gomez approached the front door, Wharton County Deputy Sheriff Lionel Garcia ("Deputy Garcia") stood at the back door to prevent a potential escape. Asked by Deputy Gomez whether Yonari was home, Mr. Garcia responded that he was not. Mr. Garcia then consented to Deputy Gomez's request to search the residence for Yonari. Prompted by his observation of a light in a distant room, Deputy Gomez asked Mr. Garcia ***836** whether anyone else was home. Mr. Garcia replied that his older son, Garcia–Lopez, was. At the time, Garcia–Lopez sat alone in his bedroom eating dinner.

Around the time Deputy Gomez entered the residence, Garcia–Lopez closed and locked his bedroom door. Finding Garcia Lopez's bedroom door locked, Deputy Gomez ordered the door opened immediately. After Garcia–Lopez unlocked the door, Deputy Gomez entered the bedroom, moved Garcia–Lopez aside, and began his search for Yonari.

Garcia–Lopez's bedroom, an add-on to the single-wide trailer home, had the following characteristics: ten feet by eleven feet in size, no closets, an unmade bed (comprised of only a mattress and box spring sitting flush to the floor), a dresser, and an entertainment center.

As Deputy Gomez walked around Garcia–Lopez's bedroom in search of Yonari, he noticed two bulletproof vests on Garcia–Lopez's bed. Garcia–Lopez asked to sit back on his bed to finish his meal. Deputy Gomez allowed him to do so. When asked, Garcia–Lopez told Deputy Gomez that the vests belonged to Yonari. Deputy Gomez, aware that Garcia–Lopez was in violation of 18 U.S.C. § 922(g)(1) (*i.e.,* convicted felon in possession of body armor), asked Garcia–Lopez to stand, cuffed his hands behind his back, and moved him over by the door of his bedroom. Deputy Gomez then radioed Deputy Garcia for assistance and held Garcia–Lopez until Deputy Garcia entered the bedroom. Two to three minutes had elapsed since Deputy Gomez first entered the home.

Deputy Gomez resumed his search of Garcia–Lopez' bedroom as Deputy Garcia held Garcia–Lopez's arm and kept an eye on Mr. Garcia. Deputy Gomez lifted Garcia–Lopez's mattress, finding a short barrel shotgun and two rifles. His search then progressed to a camouflaged, zipped backpack that sat on the floor next to the bed. Feeling the backpack's weight, Deputy Gomez unzipped it and found that it contained ammunition and three handguns, among other items.[1] Deputy Gomez continued his search for Yonari in Garcia–Lopez's bedroom, searching behind the dresser and entertainment center, but to no avail.

Upon completing their search of Garcia–Lopez's bedroom, neither deputy searched the remainder of the trailer home for Yonari. Instead, with Garcia–Lopez having been arrested, they left the residence with him in tow. Six to seven minutes had elapsed from the time of their arrival to their departure.

II.

On March 6, 2014, Magistrate Judge Jason B. Libby signed a criminal complaint charging Garcia–Lopez with possession of six firearms in violation of 18 U.S.C. § 922(g)(1). On March 26, 2014, Garcia–Lopez was charged by indictment with six counts of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The indictment contained a notice of forfeiture pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c) as to the firearms and two sets of body armor.

***837** On June 6, 2014, Garcia–Lopez filed a motion to suppress the items seized from his bedroom. The United States filed a motion to strike Garcia–Lopez's original motion claiming that it failed to specify a basis for suppression. Garcia–Lopez then filed an amended motion to suppress, alleging that the deputies searched his backpack and under his mattress without permission and probable cause. The district court granted the United States' motion to strike Garcia–Lopez's original motion to suppress, but did not strike his amended motion to suppress. The United States then filed a response to Garcia–Lopez's amended motion to suppress.

The district court held a hearing on Garcia–Lopez's amended motion to suppress on August 6, 2014. At the conclusion of the hearing, the district court orally denied Garcia–Lopez's motion to suppress, ruling:

> Very well. I have considered the motion to suppress, the response; and I've heard the evidence; and I will apply the facts as presented by the evidence to the law that I believe applies in this case.
>
> First of all, it appears from the evidence presented that the law enforcement officers were in the home for a legitimate purpose. There's been no contradictory evidence that they did not have a warrant or that they were not given permission to come in. So, they were in the home legally for purposes of this motion. And the purpose—and maybe we got—the evidence sort of got off track.
>
> The motion—the purpose of them being there was to find Yonari. That was why they were there. It was an arrest warrant. It was not to find the Defendant in this case but Yonari. So, they had a right to search the home in an attempt to find the fugitive, Yonari. As far as the bedroom goes, as soon as the officer entered the bedroom, he saw contraband on the bed and, as a result of that, effectuated arrest of the Defendant in this case.
>
> Now, the issue then—as we all know, when you arrest someone or you're in that situation, officers have a right to make a protective sweep. It is obvious from the law it may last no longer than necessary to dispel the reasonable suspicion of danger or it's no longer justified to remain on the premises. So, the issue in this case boils down to why we're here, and that's the lifting of the mattress. And I've heard evidence from Deputy Gomez that in his experience people hide in between mattresses and, specifically, in mattresses that have been hollowed out. The defense has pointed out, well, there was no—that mattress had not been hollowed out. Well, fine. But Deputy Gomez did not know that.
>
> Deputy Marshal Hernandez has supported that, I guess, reasonable suspicion by Gomez with the fact that in his training and experience people have often hidden in hollowed-out mattresses, between box springs and mattresses. So, it certainly was reasonable since, even though the Defendant had been arrested, they were still there to look for Yonari. And he lifted the mattress in an attempt to see if anyone was hiding in there. That's, I think, a very reasonable—that's reasonable conduct in connection with trying to execute an arrest warrant.
>
> So, I find no unconstitutional conduct in this case, no constitutional violations that would support a finding that the evidence should be suppressed. So, the motion to suppress is denied.

On September 10, 2014, Garcia–Lopez made a conditional guilty plea to count one of his indictment, reserving his right to appeal the district court's denial of his motion to suppress. On December 1, 2014, ***838** the district court sentenced Garcia–Lopez to 46 months imprisonment, to be followed by two years of supervised release. The district court also dismissed the remaining five counts in the indictment and ordered all six firearms forfeited to the United States.

III.

When reviewing the denial of a motion to suppress, we review the district court's factual findings for clear error and its legal conclusions *de novo*. *United States v. Allen,* 625 F.3d 830, 834 (5th Cir.2010). Where the defendant was arrested or subject to search without a warrant, the Government bears the ultimate burden of proof to justify the warrantless search. *United States v. De La Fuente,* 548 F.2d 528, 533 (5th Cir.1977). The district court's ruling should be upheld "if there is any reasonable view of the evidence to support it." *United States v. Scroggins,* 599 F.3d 433, 440 (5th Cir.2010). We may affirm a ruling on a motion to suppress "on any basis established by the record." *United States v. Mata,* 517 F.3d 279, 284 (5th Cir.2008).

Warrantless searches are per se unreasonable under the Fourth Amendment, subject to a few specific exceptions. *Coolidge v. New Hampshire,* 403 U.S. 443, 474–75, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The government advances two such exceptions: first, that the initial search of Garcia–Lopez's mattress was valid pursuant to the protective sweep exception and, second, that the subsequent backpack search was valid because it was incident to arrest.

IV.

We consider Deputy Gomez's warrantless search where he discovered three firearms lodged between Garcia–Lopez's mattress and box spring. Garcia–Lopez, arguing that Deputy Gomez's belief that Yonari might lay hidden between his mattress and box spring was unreasonable, urges us to hold that the warrantless search violated his Fourth Amendment rights. The district court, in denying Garcia–Lopez's suppression motion, held that the protective sweep exception supported the warrantless mattress search. We agree.

The scope of a valid "protective sweep" exception to the warrant requirement was the subject of the oft-quoted Supreme Court case, *Maryland v. Buie,* 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). In *Buie,* the Supreme Court held that officers who are lawfully inside a residence to serve an arrest warrant may conduct a protective sweep with only reasonable suspicion. 494 U.S. at 327, 110 S.Ct. 1093. It is not necessary that the officer have probable cause to believe that there might be an assailant hiding on the premises. *Id.* at 334, 110 S.Ct. 1093. The Court noted, "[T]here must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.*

The Supreme Court, though, before discussing the facts in the case, outlined the restrictive scope of the protective sweep that governed its analysis. The Court stated:

> "[A] 'protective sweep' is a quick and limited search of the premises, incident to an arrest and conducted to protect the safety of police officers and others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger ***839** and in any event no longer than it takes to complete the arrest and depart the premises." *Id.* at 327, 110 S.Ct. 1093.

Thus, evidence or contraband seen in plain view during a lawful sweep can be seized and used in evidence at trial. *United States v. Jackson,* 596 F.3d 236, 242 (5th Cir.2010).

This circuit has often re-emphasized *Buie* in its inquiries as to whether evidence discovered during a protective sweep should be suppressed. *See United States v. Gould,* 364 F.3d 578 (5th Cir.2004), *abrogated in other part by Kentucky v. King,* 563 U.S. 452, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011); *United States v. Mata,* 517 F.3d 279 (5th Cir.2008); *United States v. Roberts,* 612 F.3d 306 (5th Cir.2010).

Relying on *Buie,* Garcia–Lopez emphasizes that (1) it is not reasonable that an attack could have been immediately launched from under his mattress; and (2) that the facts do not support a reasonably prudent officer's belief that anyone lay hidden under his mattress. The government, in contrast, relies on *Buie* to support its contention that Deputy Gomez had requisite reasonable suspicion to search under the mattress for Yonari and that neither deputy spent more time than necessary to conduct the sweep. We agree.

There is ample evidence to support the district court's finding of reasonable suspicion. Under the facts, Deputy Gomez first noticed a light on before hearing a door shut. Prior to these events, Deputy Gomez had been given no concrete proof as to who might *actually* lie on the other side of the closed door. Upon entry, Deputy Gomez became suspicious that Garcia–Lopez's first order of business after their "standoff" over the locked door was to calmly request to sit back on his bed. In that moment, Garcia–Lopez's seemingly innocent request triggered something else entirely for Deputy Gomez. To Deputy Gomez, the request led to his belief that Yonari might lay hidden beneath the mattress in a hollowed box spring. Indeed, Deputy Gomez testified as much before the district court, stating ".... when I was looking for Yonari because he could possibly be hiding between the mattresses."

Garcia–Lopez attempts to cut at Deputy Gomez's suspicion by arguing the sheer improbability that an adult male could hide in the hollowed-out mattress without so much as a rise or bulge in the mattress. In support of his proposition, Garcia–Lopez

directs the court's attention to cases like *United States v. Blue,* 78 F.3d 56 (2d Cir.1996), and *United States v. Ford,* 56 F.3d 265 (D.C.Cir.1995).

It is true that these cases held protective sweeps overbroad where officers searched under mattresses without justification. *See Ford,* 56 F.3d at 270; *see also Blue,* 78 F.3d at 61. But, unfortunately, in citing *Blue* and *Ford* (and similar decisions), Garcia–Lopez fails to take into account that it was logical under the specific facts of this case to suspect that a person might be hiding in a hollowed box spring.

Accordingly, we hold that the district court did not err in denying Garcia–Lopez's motion to suppress the evidence seized from under his mattress.[2]

AFFIRMED.

All Citations

809 F.3d 834

Footnotes

1 The complaint alleges that three guns were found in the backpack. At the suppression hearing, Deputy Gomez testified that he found in the backpack "a Hi–Point, 9mm; another revolver; and ammunition." Deputy Gomez did not mention a third firearm. The most logical reading of the record appears to be that Gomez simply failed to mention a third firearm at the hearing. We assume that three guns were found in the backpack, but none of our conclusions would change if only two guns were found.

2 Having addressed the mattress search, in which three firearms—including the firearm particularized in Garcia–Lopez's count of conviction—were discovered, we decline to consider the constitutionality of the backpack search. Even if the guns found in the backpack were suppressed, the three admissible guns stemming from the justified mattress search are sufficient to support Garcia–Lopez's conviction and sentence. U.S.S.G. § 2K2.1(b)(1)(A). Hence, the denial of the motion to suppress the evidence seized from the backpack is inconsequential.

2022 WL 627749

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.
Court of Appeals of Ohio, First District, Hamilton County.

STATE of Ohio, Plaintiff-Appellant,

v.

Andre CURRY, Defendant-Appellee.

NO. C-210274
|
Date of Judgment Entry on Appeal: March 4, 2022

Hamilton County Court of Common Pleas, TRIAL NO. B-2005513.

Attorneys and Law Firms

Joseph T. Deters, Hamilton County Prosecuting Attorney, and Philip R. Cummings, Assistant Prosecuting Attorney, for Plaintiff-Appellant,

Bryan R. Perkins, for Defendant-Appellee.

OPINION.

Winkler, Judge.

***1** {¶1} Andre Curry was indicted on one count of having weapons while under a disability after the police located a firearm in the trunk of his vehicle during a traffic stop. Curry moved to suppress the firearm obtained during the warrantless search of the trunk, and the trial court granted that motion after a suppression hearing. The state of Ohio now appeals, claiming in one assignment of error that the trial court erred in granting the motion to suppress.

{¶2} The state maintains the search of the trunk was justified under the automobile exception to the warrant requirement. The investigating officer testified to several key facts that demonstrate probable cause, including detecting the odor of raw marijuana emanating from the trunk before the search, and the trial court expressly found the officer credible. Curry characterizes the credibility finding as "obscure" and unsupported by the record. We accept the credibility finding by the trial court and conclude the trial court misapplied the law governing the automobile exception because the facts demonstrate the officer had probable cause to search the trunk. Consequently, we reverse.

I. Background Facts and Procedure

{¶3} Curry moved to suppress the firearm on the ground that the search of his trunk was performed without a warrant. At the suppression hearing, Cincinnati Police Officer Aubrey Pitts acknowledged the absence of a warrant, but indicated he believed based on certain facts he observed and his training that the trunk contained raw marijuana and therefore an immediate search was justified.

{¶4} Officer Pitts testified that he was patrolling the area of Gilbert Avenue and Beecher Street as a member of the police department's gun task force in the early evening of October 19, 2020. On that date, he had been a police officer for over five

years, patrolling on shifts for most of his tenure. He specified his training from which he learned to distinguish the odor of burnt marijuana from raw marijuana and to detect marijuana in vehicles.

{¶5} According to Officer Pitts, he stopped the 2019 Honda Civic driven by Curry due to illegal "heavy window tint" that prevented him from seeing the occupants inside the vehicle. Officer Pitts approached the "slow-to-stop" vehicle and ordered Curry and the occupants out of the vehicle due to furtive movements observed by another officer at the scene. The occupants were handcuffed and placed in the back of his cruiser. The officer testified that at the same time he smelled the odor of raw marijuana emanating from the passenger compartment along with the scent of burnt marijuana. Additionally, the officer stated he detected the odor of raw marijuana emanating from the unopened trunk of Curry's vehicle.

{¶6} Inside the passenger compartment, Officer Pitts found a small amount of raw marijuana, more on the passenger's side than on the driver's side. He then searched the trunk of the vehicle. There, he found no marijuana, but located the firearm that led to Curry's indictment for having weapons while under a disability.

***2** {¶7} Curry testified at the suppression hearing, and that testimony provided a perspective that differed from the officer's perceptions. Curry said he could not smell any marijuana that day in the passenger compartment or emanating from the trunk, the quantity of drugs was too insignificant to be detected, based on his experience with the substance, and no raw marijuana had ever been placed in the trunk of his vehicle.

{¶8} During closing arguments at the hearing, defense counsel argued the exclusionary rule required suppression of the firearm. Characterizing as incredible the officer's testimony about smelling marijuana from a closed trunk that contained no marijuana, defense counsel asserted the state failed to present any credible facts to justify the warrantless search of the trunk based on the automobile exception. Although the state relied solely on the automobile exception to justify the warrantless search, defense counsel refuted the application of the other exceptions to the warrant requirement, concluding that police could not search the trunk, an area where Curry could not "reach."

{¶9} To refute defense counsel's impossibility argument, the assistant prosecutor directed the trial court to a decision from this court recognizing probable cause based on police officers' credible testimony that they perceived the odor of raw marijuana emanating from a trunk. *See State v. Howard*, 1st Dist. Hamilton Nos. C-070174 and C-070175, 2008-Ohio-2706, ¶ 11.

{¶10} After entertaining argument on Curry's motion, the trial court took the matter under advisement for a few weeks and then granted the motion to suppress. In its oral comments explaining the basis of its decision, the court made the following findings:

> The defendant was stopped for tinted windows. After entering the defendant's vehicle, the passenger was found to have a nominal amount of marijuana. The officer testified that his intent was to cite only the defendant for the tinted windows, a minor misdemeanor, and give a warning to the passenger. The search of the defendant's trunk was then done without consent and extensively due to a small amount of marijuana. A firearm was discovered in the trunk. The Court finds that all of the testimony was credible.

{¶11} The trial court additionally indicated that "the issue is the search of the trunk and the fact that it was beyond the scope of the stop." The court referred to three cases. First, a federal case involving what "scope" means in the context of consent to search. *United States v. Elliott*, 107 F.3d 810 (10th Cir. 1997). Second, an Ohio Supreme Court decision holding that the scent of burnt marijuana coming from the passenger compartment of a defendant's vehicle did not, standing alone, establish probable cause for a warrantless search of a trunk. *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985. Finally, a recent decision from this court concluding that the scent of burning marijuana, standing alone, did not support a warrantless search of a trunk. *State v. Ulmer*, 1st Dist. Hamilton Nos. C-190304, C-190305 and C-190306, 2020-Ohio-4689.

II. Analysis

A. Decision on Motion to Suppress and Appellate Review

{¶12} An appellate court's review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. "When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses." *Id.* Where a motion to suppress involves factual issues, the trial court "shall" state its essential findings on the record. Crim.R. 12(F).

***3** {¶13} We must accept the trial court's findings of fact if they are supported by competent and credible evidence. *Burnside* at ¶ 8. "Accepting these facts as true, [we] must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Id.*

B. Scope of Motion to Suppress

{¶14} "To suppress evidence obtained pursuant to a warrantless search or seizure, the defendant must (1) demonstrate the lack of a warrant, and (2) raise the grounds upon which the validity of the search or seizure is challenged in such a manner as to give the prosecutor notice of the basis for the challenge." *City of Xenia v. Wallace*, 37 Ohio St.3d 216, 524 N.E.2d 889 (1988), paragraph one of the syllabus. The notice requirement involves "the specific legal and factual grounds upon which the validity of the search and seizure is challenged." *Id.* at 219.

{¶15} Generally, a defendant waives for purposes of appeal grounds for suppression that are not articulated in the motion to suppress and memorandum of support, unless they are articulated later without objection by the state and with permission of the court. *See generally id.* at 221; *State v. Lattimore*, 1st Dist. Hamilton No. C-100675, 2011-Ohio-2863, ¶ 7-9; Moreover, where a defendant concedes an issue in the lower court, the invited-error doctrine precludes revival of the abandoned argument on appeal. *Ulmer*, 1st Dist. Hamilton Nos. C-190304, C-190305 and C-190306, 2020-Ohio-4689, at ¶ 15.

{¶16} We mention these procedural rules because on appeal Curry presents legal and factual grounds to support suppression of the firearm, including the lawfulness of the stop, that he did not present in his written motion or memorandum in support. In that motion, Curry sought suppression of the evidence seized from his trunk because the "search of the trunk" was performed under circumstances that did not fall under any of the recognized exceptions for a "warrantless search": "[t]here was no consent given to search the trunk of the vehicle, the contents of the trunk were not in plain view * * *, there were no exigent circumstances that would allow a search for the safety of the officers to extend to a trunk of the vehicle that is not accessible from inside the vehicle * * * nor was there a crime in progress, that would justify the warrantless search of the trunk of the vehicle," "regardless of any suspicion the officers may have had at the time."

{¶17} Further, at the suppression hearing, the assistant prosecutor objected to defense counsel's attempt to extend the specified legal and factual grounds asserted in Curry's written motion. The trial court sustained the objection. Finally, Curry effectively conceded the lawfulness of the stop, telling the court at the conclusion of the hearing that "since the [window tinting] law has been changed * * * it's basically [the officer's] opinion whether they can see into the vehicle or not." On this record, we conclude Curry waived these new arguments, including the lawfulness of the stop, for purposes of appeal.

{¶18} Accordingly, we limit our discussion to the legal and factual grounds presented in the motion to suppress—whether the search of Curry's vehicle during a lawful detention fit into a recognized exception to the warrant requirement and was thus reasonable under the Fourth Amendment to the United States Constitution and Article 1, Section 14, of the Ohio Constitution.

C. Automobile Exception

***4** {¶19} Warrantless searches are per se unreasonable without prior approval of a judge or magistrate, subject to a few well-established exceptions. *See Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Ulmer*, 1st Dist. Hamilton Nos. C-190304, C-190305 and C-190306, 2020-Ohio-4689, at ¶ 13. The state maintains the search was constitutionally reasonable based on the "automobile exception" to the warrant requirement. *See United States v. Ross*, 456 U.S. 798, 809, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982); *State v. Moore*, 90 Ohio St.3d 47, 51, 734 N.E.2d 804 (2000).

{¶20} The "automobile exception" applies to searches of "validly stopped motor vehicles" that are supported by an officer's "probable cause to believe that [the] vehicle contains contraband." *Moore* at 51. Probable cause must be based upon objective facts that would justify the issuance of a warrant by a magistrate. *Ross* at 809; *Moore* at 49. "[T]he scope of the search is limited by the object of the search and the places that may conceal the contraband." *Ulmer*, 1st Dist. Hamilton Nos. C-190304, C-190305 and C-190306, at ¶ 13, citing *Howard*, 1st Dist. Hamilton Nos. C-070174 and C-070175, 2008-Ohio-2706, ¶ 11.

{¶21} Probable cause to search a vehicle may be based on odors. *See Moore* at syllabus ("The smell of marijuana, alone, by a person qualified to recognize the odor is sufficient to establish probable cause to search a motor vehicle pursuant to the automobile exception to the warrant requirement."), quoted in *State v. Vega*, 154 Ohio St.3d 569, 2018-Ohio-4002, 116 N.E.3d 1262, ¶ 15. The scope of the search based on that odor is circumscribed, as "[a] trunk and a passenger compartment of an automobile are subject to different standards of probable cause to conduct searches." *Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985, at ¶ 51. To search a trunk, an officer must observe more than just an odor of burnt marijuana in the passenger compartment. *See Farris* at ¶ 52, cited in *Ulmer* at ¶ 17.

{¶22} Curry agrees that under the case law governing the search of trunks based on the scent of raw marijuana, the objective facts presented through Officer Pitts's testimony, if believed, are sufficient to support a finding that raw marijuana would be found in the trunk. *See State v. Gartrell*, 3d Dist. Marion No. 9-14-02, 2014-Ohio-5203, ¶ 58; *Howard,* 1st Dist. Hamilton Nos. C-070174 and C-070175, 2008-Ohio-2706, at ¶ 11. Officer Pitts detected the odor of raw marijuana emanating specifically from the trunk, he smelled marijuana in the passenger compartment but recovered just a small quantity of marijuana, and he had training and experience in identifying the scent of raw marijuana.

{¶23} The parties disagree as to whether the trial court accepted the officer's testimony. The state takes the position that the trial court expressly found the officer credible, but committed error when the court failed to properly distinguish the facts of this case from *Farris* and *Ulmer*. Curry argues the state's argument is based on a faulty premise that trial court accepted Officer Pitts's testimony about detecting the scent of raw marijuana emanating from trunk.

{¶24} In support of his position, Curry notes the lower court found "all the testimony was credible" and two witnesses presented conflicting perspectives. Curry further points out the trial court ultimately ruled that suppression was appropriate after weighing the evidence. Curry contends the trial court simply disbelieved the officer and concluded the officer lacked a lawful basis to extend the scope of the stop without the detection of the scent of marijuana from the trunk.

***5** {¶25} We are not persuaded by Curry's position. The state sought to justify the warrantless search based on the exception for probable-cause-based searches of automobiles. The state relied on objective facts presented through Officer Pitts's testimony, including the key fact concerning the odor of marijuana emanating from the trunk. As previously mentioned, Crim.R. 12(F) requires the court when adjudicating a motion to suppress to "state its essential findings on the record." Here, the trial court granted the motion to suppress but never stated it found the officer's testimony incredible, an "essential finding" for suppression based on the governing law and facts at issue in this case. Instead, the trial court made an express finding of *credibility.*

{¶26} Relatedly, we are unable say the finding of credibility is not supported by competent and credible evidence. A trained officer's testimony concerning the detection of the odor of marijuana from a closed trunk is not inherently incredible. *See, e.g., Howard*, 1st Dist. Hamilton Nos. C-070174 and C-070175, 2008-Ohio-2706.

{¶27} We are troubled by the absence of marijuana in the trunk, but realize there could have been a lingering scent of marijuana. The trial court was in the best position to judge the officer's credibility. Thus, we defer to the trial court's acceptance of Officer Pitts's testimony, which adequately conveyed his experience and training with the substance.

{¶28} Finally, we conclude Curry's concerns about the conflicting testimony—his versus the officer's—are unwarranted. In our view, the trial court directed the credibility comment to the officer's testimony, but then misapplied the law concerning the automobile exception to the warrant requirement. That exception allows a probable-caused based search of a trunk during the lawful detention of a motorist, even when that probable cause is based primarily on the odor of raw marijuana emanating from the trunk and is unrelated to the basis for the traffic stop.

{¶29} Given the circumstances of this case, we hold the trial court erred by suppressing the firearm recovered from the trunk of Curry's vehicle. Accordingly, we sustain the state's single assignment of error.

III. Conclusion

{¶30} The judgment of the trial court is reversed, and this cause is remanded for further proceedings consistent with this decision and the law.

Judgment reversed and cause remanded.

Myers, P.J., concurs.

Bergeron, J., dissents.

Bergeron, J., dissenting.

{¶31} I agree with the majority that, if the officer actually smelled raw marijuana wafting from the trunk, that would provide probable cause to search pursuant to the automobile exception. Our disagreement stems from how we read the trial court's decision. The majority indicates that "the trial court expressly found the officer credible," which provides its rationale for concluding that the trial court committed legal error. Majority opinion at ¶ 2. That, however, is not the case. The trial court, summarizing the testimony, noted only: "The Court finds that all of the testimony was credible." It is significant that the officer and Mr. Curry both testified (painting diametrically opposed pictures of what happened), so the trial judge could not believe both sets of testimony. A more complete examination of what unfolded below convinces me that the trial court did not find the officer's testimony credible, and therefore I respectfully dissent.

{¶32} It is well-established that appellate courts must accept the factual findings of a trial court in evaluating a suppression motion when they are supported by competent, credible evidence. *State v. Banks-Harvey*, 152 Ohio St.3d 368, 2018-Ohio-201, 96 N.E.3d 262, ¶ 14 ("Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact * * * [a]n appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence."); *see State ex rel. Portage Lakes Edn. Assn. v. State Emp. Relations Bd.*, 95 Ohio St.3d 533, 2002-Ohio-2839, 769 N.E.2d 853, ¶ 39 ("The issue of probable cause in criminal proceedings is essentially one of fact."). And if we harbor doubt as to how to understand the trial court's conclusion, we must interpret it in a manner consistent with the judgment. *See State v. Bennett*, 1st Dist. Hamilton No. C-190181, 2020-Ohio-652, ¶ 12 ("[W]hen evidence is susceptible to more than one construction, a reviewing court must give it

the interpretation that is consistent with the judgment."); *Karches v. City of Cincinnati*, 38 Ohio St.3d 12, 19, 526 N.E.2d 1350 (1988) ("[I]f the evidence is susceptible of more than one construction, we must give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the trial court's verdict and judgment.").

***6** {¶33} With the benefit of that perspective, I see several reasons why the trial court might not have found the officer's testimony about a smell of raw marijuana in the empty trunk plausible. The officer testified that he smelled raw marijuana emanating from the cab and the trunk of the car before observing anything. He then saw raw marijuana "shakes" on the passenger side, but in such a trivial amount that it could not legally provide a basis for arrest. At some point, the officer claims to have seen marijuana shakes on Mr. Curry's side of the car as well, though again, in such a meager amount that it could not be collected as evidence. On redirect, the officer testified that he also smelled burnt marijuana (albeit not "burning marijuana"). The nasal detection of raw marijuana allegedly sealed in the trunk seems to be a pretty remarkable observation since no marijuana (raw, burnt, or otherwise) turned up. The majority appropriately admits some concern about the smell of nonexistent raw marijuana, but posits that "there could have been a lingering scent of marijuana" in the trunk. Majority opinion at ¶ 27. Of course, the officer never testified to that, and I don't think we should be bolstering testimony on appeal—particularly going out of our way like this to reject the trial court's conclusions.

{¶34} Second, the officer insinuated that Mr. Curry attempted to flee by testifying that another unit "deployed Stop Sticks to stop the car because it continued to roll * * * [i]f any vehicle attempts to flee us, Stop Sticks are deployed so we don't have a high-speed pursuit." When pressed by defense counsel (and reminded that body-camera video captured the incident), the officer acknowledged that stop sticks were not placed directly in front of the car until after the vehicle had stopped and Mr. Curry was handcuffed. The testimony about the stop sticks is punctuated by inconsistencies, yet the officer relied on Mr. Curry's alleged "slow[ness] to stop" as the originating reason to suspect the vehicle contained contraband. Although the officer witnessed no furtive movements from any of the occupants of the vehicle, he claimed that another officer on scene did. Conveniently, that officer did not testify at the hearing and the testifying officer provided no details on the nature of this "movement" that apparently justified removing the occupants from the vehicle and handcuffing them.

{¶35} Third, the officer insisted that no legal standard governed window-tint violations, which stands at odds with existing law. R.C. 4513.241(A) provides that the director of public safety "shall adopt rules governing the use of tinted glass * * * that prevent a person of normal vision looking into the motor vehicle from seeing or identifying persons or objects inside the motor vehicle." And we find those governing rules in the Ohio Administrative Code. Ohio Adm.Code 4501-41-03(A)(2) (tinting on windshield must have a "light transmittance of not less than seventy per cent plus or minus three per cent"); Ohio Adm.Code 4501-41-03(A)(3) (tinting on side windows must have a "light transmittance of not less than fifty per cent plus or minus three per cent"). In fact, if no standard existed, it would allow any officer to pull over any car based on window tint, thus throwing open a wide door to pretextual stops.

{¶36} The trial court thus confronted (a) smells of burnt and raw marijuana without any physical evidence of such; (b) a potential exaggeration about the car seeking to flee (or at least inconsistencies on that score); (c) vagueness on the nature of any movement in the vehicle, and no first-hand account of it; and (d) a stop for a window-tint violation when the officer never actually substantiated the grounds for the stop because he did not believe any legal standard applied. In light of that, it's not difficult to see why the smell testimony might raise concerns. Regardless, our job is to "neither weigh the evidence nor judge the credibility of witnesses." *State v. Woods*, 2018-Ohio-3379, 117 N.E.3d 1017, ¶ 19 (5th Dist.). We defer to the trial court because "the trial court has had the opportunity to observe the witness' demeanor, gestures, and voice inflections that cannot be conveyed to us through the written record." *State v. Whitfield*, 1st Dist. Hamilton No. C-190591, 2020-Ohio-2929, ¶ 12. Inferences to be drawn from the evidence present factual questions within the province of the trial court, and "[a] reviewing court can not usurp the function of the triers of fact by substituting its judgment for theirs." *Simon v. Lake Geauga Printing Co.*, 69 Ohio St.2d 41, 45, 430 N.E.2d 468 (1982); *Seasons Coal Co. v. City of Cleveland*, 10 Ohio St.3d 77, 81, 461 N.E. 2d 1273 (1984) ("A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court.").

***7** {¶37} To support its opinion, the majority determines that the trial court really meant to find the officer's testimony fully credible. I'm afraid I just can't divine that from the transcript. After all, the trial court explained that the search resulted "extensively due to a small amount of marijuana"—not from the smell of raw marijuana in the trunk. Given the state's focus on the smell throughout the hearing, that comment alone suggests the trial court, with the benefit of observing the testimony described above, discounted the smell of raw marijuana in the trunk as the basis for probable cause. From that springboard, the trial court proceeded to cite three cases supporting its decision to suppress the evidence. *United States v. Elliot*, 107 F.3d 810 (10th Cir. 1997) (granting motion to suppress where officer exceeded scope of consent); *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985 (holding that light odor of burnt marijuana does not establish probable cause for warrantless search of the trunk); *State v. Ulmer*, 1st Dist. Hamilton Nos. C-190304, C-190305 and C-190306, 2020-Ohio-4689 (reversing conviction where the officer did not have probable cause to search the trunk). The citation of these cases further supports the trial court's rejection of the state's theory for probable cause.

{¶38} In *Ulmer*, for instance, officers stopped the defendant in a parking lot on suspicion of trespassing. At the hearing on the motion to suppress, one officer testified that he searched the trunk because he could smell a very strong odor of marijuana coming from Mr. Ulmer, the immediate vicinity, and the vehicle. We disagreed with the state's theory of probable cause, explaining that the odor of burning marijuana could not support the search of the vehicle's trunk (because burning marijuana would be unlikely to be found in the trunk). We specifically contrasted that situation with a scenario in which an officer testified "that he smelled raw marijuana or that he was trained to detect the odor of raw marijuana." *Ulmer* at ¶ 19. This case provides the exact scenario contemplated by *Ulmer*, so if the trial court believed the officer's testimony about the smell of raw marijuana (as the majority concludes), the court would have used that as a fairly obvious reason to distinguish *Ulmer*. But that's not what the trial court did.

{¶39} Similarly, in *Farris*, the smell of burning marijuana could not be wielded to justify a search of the trunk. "The odor of burnt marijuana in the passenger compartment of a vehicle does not, standing alone, establish probable cause for a warrantless search of the trunk of the vehicle. No other factors justifying a search beyond the passenger compartment were present in this case. The officer detected only a light odor of marijuana, and the troopers found no other contraband within the passenger compartment." *Farris* at ¶ 52. Again, if the trial court reached the conclusion that the majority envisions, it would have readily distinguished this result rather than follow it.

{¶40} Admittedly, the trial court could have been clearer in setting forth its credibility findings. But the majority's conclusions simply can't be squared with my reading of the trial court's decision. And the record amply supports trial court's decision to disbelieve the testimony about the odor of raw marijuana in the trunk. I accordingly respectfully dissent and would affirm the trial court's judgment.

All Citations

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