

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANDRE A. WILLIAMS,

Defendant.

REPORT AND
RECOMMENDATION

12-cr-54-wmc

REPORT

The grand jury has returned a one-count indictment charging defendant Andre Williams with being a felon in possession of a handgun on March 21, 2012. The handgun was discovered as a result of what started as a parking lot weapons patdown by Fitchburg police officers that escalated into a multi-officer melée before the police wrested a handgun from the waistband of Williams's pants. Williams has moved to suppress this handgun on the ground that the officers did not have reasonable suspicion to justify the pat-down. *See* dkt. 17. The government takes a contrary view of the evidence and opposes the motion.

The circumstances of the weapons frisk put this case in the gray area of this circuit's Fourth Amendment jurisprudence. The material facts are not genuinely disputed, but how one characterizes them could change the decision whether the patdown was constitutionally reasonable. This wobbliness would seem to suggest that even if the patdown was unreasonable, suppression is not an appropriate remedy. Having piled these myriad qualifiers onto the front end, I am recommending that the court find that the patdown, while an understandable act of self-protection, was constitutionally unreasonable, but that the court further find that suppression of evidence is not the appropriate remedy in this situation. Accordingly, I am recommending that this court deny Williams's motion to suppress.

On July 24, 2012, this court held an evidentiary hearing at which I heard and saw the testimony of two Fitchburg police officers. The parties also have submitted a recording of the 911 telephone call that led the police to the parking lot at which they encountered Williams (Gov. Exh. 1). Having heard and seen the witnesses, having judged their credibility and having listened to the 911 call [which literally speaks for itself], I find the following facts:

FACTS

Schneid's Bar is a small tavern in Fitchburg, Wisconsin, located in a strip mall on the west side of Fish Hatchery Road, a North-South traffic artery in the Madison metropolitan area. Immediately south of the strip mall and its parking lot is a Mobil gas station, which sits on the corner of Fish Hatchery and Post Road. The Fitchburg Police Department (FPD) views this as a high crime area.¹ Known gang members hang out at Schneid's. FPD gets a lot of calls from Schneid's and the nearby gas stations, including drug calls and weapon calls. Fitchburg police have responded to Schneid's more frequently than other nearby businesses, particularly during third shift, which spans bar time. FPD actually had been working with Schneid's to curb the violence.

At about 11:25 p.m. on March 21, 2012, Fitchburg 911 dispatch received a call from a woman on her cell phone who reported a large group of people hollering and waving around guns. The woman refused to give her name: "I don't want to give my name, I need to just be here, there's too much of a crowd!" The caller stated that she had just been past the gas station at Fish Hatchery and Post Road and "there's people who's right behind the gas station, it's a lot

¹ This is a relative and situational characterization: my 79 year old mother still gets her hair done at the salon in the same strip mall as Schneid's, but to my knowledge she has never been there at bar time.

of them, they have guns out, all of that, can you just send somebody!?” She reported that it was a group of over 25 people outside standing around behind the gas station who were “hollerin’ at each other, doing whatever and I seen guns, so I’m calling the police to check out . . .” The caller had seen three or four of these people waving around handguns. “that’s what made me call!” The caller was “walking away from it as fast as I [*unint.*].” The dispatcher asked if the caller had seen or heard any fights or taunting; she no. The caller did not describe any of the people by gender, race, clothing, size, or any other descriptor. Six times during this less-than-four minute call the caller told the dispatcher that the police needed to come, once stating that “I stay in Fitchburg, I know Fitchburg, the, you know, around, somebody needs to pull up before anything happens!” The conduct described by the caller would be deemed by police to be disorderly conduct with an armed enhancer.²

Dispatch sounded the distinctive weapons alert tone followed by verbal information about the call. FPD’s third shift officers were receiving their pre-shift briefing in the station squad room. FPD and its officers deem a weapons alert involving three or four handguns to be an emergency situation. The briefing was cut short and all officers—a total of six or seven—ran to their squad cars to speed north on Fish Hatchery Road to Schneid’s, a three-to-five minute drive from the station.

Among the first to arrive was Officer Lucas Hale, who at that time had about two years’ experience as an officer. Officer Hale was very familiar with Schneid’s and its interaction with FPD. Officer Hale pulled into the parking lot of the bank across Post Road south of the gas station and strip mall. He did this in order to obtain a tactically advantageous position given

² Whether this is entirely accurate is debatable. More on this in the analysis, below.

the type of call. From this location Officer Hale could see one group of about ten African American men between the gas station and Schneid's. Since this was the only group of people in the area, Officer Hale assumed this must be the group about which the weapons call had been received. As other officers arrived, Officer Hale armed himself with his in-squad rifle and approached the group with the rifle down but ready to engage if Officer Hale encountered an immediate threat. Asked why he felt the need to approach the scene with rifle, Officer Hale explained:

I guess plain and simple reason, I want to go home at the end of my shift. I want to have more firepower than somewhere that I may be going to, and there was an indication of firearms, so that immediately ups the ante, if you will and that's why I took out the rifle.

Transcript, dkt. 20, at 30.

The scene was well lit by police car headlights and spotlights. Officers began contacting members of the group and attempting to make the scene safe. The men, who had been fairly tightly grouped near three or four parked cars when the officers arrived, started to expand out, avoiding eye contact—apparently trying to avoid *any* contact—with the approaching officers. Some officers began directing men the group to lie on the ground. Fitchburg Police Officer Ryan Jesberger, who had been an officer for about 1½ years at that time, called out to a man who appeared to be walking away from the area between two of the parked cars, head down, hands in his pockets. This man was defendant Andre Williams.

Officer Jesberger singled out Williams because the call involved firearms and Williams had his hands in his pockets and appeared to be avoiding eye contact, as were the others in the group:

When I got there, . . . the thing that drew me to Mr. Williams was that his hands were in his pockets and he was kind of avoiding – everyone was avoiding eye contact with us and that’s usually, based on my training and experience when people are avoiding eye contact and kind of trying to walk away from us, that’s a pretty good sign that something is up.

Dkt. 20 at 36.

All this being so, no one in the group had done anything to heighten any officer’s suspicion of criminal activity in the group. Other officers asked members of the group to come over and talk to them; apparently the officers patted down these men in the course of talking to them.³

Officer Jesberger asked Williams to come speak to him. Williams asked “why?” Officer Jesberger then *directed* Williams to come over and speak with him, near the middle of the parking lot. Williams complied. Up to that point, Williams had done nothing to increase Officer Jesberger’s suspicions; yet Officer Jesberger remained concerned that Williams might be armed: in his (brief) experience as an officer, with a weapons call, if a person had a gun, typically it would not be in a place where Officer Jesberger would be able to see it; the firearm either would be in the person’s pockets or waistband, and Williams’s hands were in his pockets. For all these same reasons, Officer Jesberger intended to pat down Williams for weapons before attempting to interview him. Officer Jesberger asked Williams to take his hands out of his pockets in the interests of officer safety. Williams took his hands out of his pockets.

³ Williams suggests otherwise in his reply brief, dkt. 24 at 8, n.3, but Officer Jesberger’s affirmative answer to the question actually posed suggests that his colleagues were patting down other men in the group during their initial interactions with them.

Officer Jesberger directed Williams to place both hands on top of his head. Williams complied. Officer Jesberger placed his own left hand on top of Williams's hands and began patting Williams down with his right hand. Williams immediately pulled his hands out from under Officer Jesberger's left hand, lowering his hands to his waist. Officer Jesberger grabbed one of Williams's hands and told him not to make any more movements like that or Officer Jesberger would handcuff him to ensure his own safety. Officer Jesberger directed Williams to put his hands back on top of his head. Williams started to raise his hands, then attempted to pull away. As Officer Jesberger pulled out his handcuffs, Williams attempted to run away. Officer Jesberger grabbed hold of Williams and yelled at him to stop resisting and stop pulling away. Hearing the yells, three other officers came to assist. With those officers now focused on Williams and Jesberger, at least two people in the crowd ran from the scene.

The officers wrestled Williams to the ground on his stomach, but he kept his hands underneath him near his waist, defying the officers' forceful attempts—including knee strikes—to pry his hands into view. As Williams struggled, Officer Hale approached with his taser, shot the prongs into Williams and delivered at least one shock. This was enough for the other officers to pull Williams's hands out from beneath him so that Officer Jesberger could handcuff him. At this point, one of the other officers saw a handgun in Williams's pants, so he seized it. This is the firearm that is charged against Williams in this federal prosecution.

ANALYSIS

Deciding whether to grant or deny Williams' motion to suppress is a close call because the facts present competing valid interests that pull in different directions. As a starting point, logic and common sense suggest that police officers responding to an anonymous call reporting three or four handguns in a group of 25 men hollering at each other in a known trouble spot would want to ensure at the outset of any interviews that the men they were talking to were not armed. That's the rationale behind allowing weapons frisks in the first place:

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

Terry v. Ohio, 392 U.S. 1, 30 (1968).

In *Cady v. Sheahan*, 467 F.3d 1057 (7th Cir. 2006), the court repeated the Court's observation in *Terry* that American criminals have a long history of armed violence, with dozens of officers feloniously killed in the line of duty every year; thus,

the protective search for weapons is a vital tool that serves the immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.

Cady, 467 F.3d at 1061, quoting *Terry* at 23.

Under appropriate circumstances, police are given great leeway in protecting themselves: “When a suspect is considered dangerous, requiring him to lie face down on the ground is the safest way for police officers to approach him, handcuff him and finally determine whether he carries any weapons.” *United States v. Tilmon*, 19 F.3d 1221, 1228 (7th Cir. 1994). Such a display of force and restraint does not necessarily convert the investigative detention into a full arrest. *See Jewett v. Anders*, 521 F.3d, 818–826-27 (7th Cir. 2008).

But *Terry* does not give the police *carte blanche* to frisk every suspect in every investigative encounter. In *Florida v. J.L.*, 529 U.S. 266, 272 (2000), the Court held that an uncorroborated phone tip does not suffice to justify a weapons frisk because such a policy could lead to overly intrusive police interference with citizens going about their business. With that as the baseline, subsequent cases have given police more leeway in situations deemed to be emergencies. In *United States v. Whitaker*, 546 F.3d 902 (7th Cir. 2008), the court distinguished *J.L.* on the ground that the stop of an individual *solely* on the anonymous tip of an individual usually falls beyond the bounds of reasonableness. Even so,

the reporting of an *ongoing* emergency presents special problems and obligations on the police. Accordingly, . . . when police respond to an emergency as a result of a 911 call, the exigencies of the situation do not require further pre-response verification of the caller’s identity before action is taken.

Whitaker, 546 F.3d at 909.

The holding of *J.L.* does not apply when the tip was not one of general criminality, but of an ongoing emergency, or very recent criminal activity. *Id.*

A rule requiring a lower level of corroboration before conducting a stop on the basis of an emergency report . . . is better understood as rooted in the special reliability inherent in reports of ongoing emergencies. Based on that special reliability, the Supreme Court has held that reports of ongoing emergencies made in 911 calls are

subject to less testing in court than other out-of-court statements. Similarly, when an officer relies on an emergency report in making a stop, a lower level of corroboration is required.

Whitaker at 910, quoting *United States v. Hicks*, 531 F.3d 555 (7th Cir. 2008).

So far, so good. But did this situation qualify as an actual emergency so as to justify a weapons search of the men found on the scene? Williams argues that it did not, distinguishing the facts of this case from those in which the Court of Appeals for the Seventh Circuit has applied what might be characterized as the emergency enhancement to reasonable suspicion. In this regard, Judge Hamilton has sounded a cautionary note relevant to the instant analysis:

The erosion of Fourth Amendment liberties comes not in dramatic leaps but in small steps, in decisions that seem “fact-bound,” case specific, and almost routine at first blush. Taken together, though, these steps can have broader implications for the constitutional rights of law-abiding citizens.

United States v. Tinnie, 629 F.3d 749, 754 (7th Cir. 2011)
(Hamilton, J., dissenting).

We know from *J.L.* that not every anonymous phone call reporting possession of a firearm is an emergency justifying a weapons patdown; so, how much more information do the police need to make the patdown constitutionally reasonable?

In this case, the anonymous caller complained that there was group of over 25 people standing around behind the gas station who were “hollerin’ at each other, doing whatever and I seen guns, so I’m calling the police to check out.” At the evidentiary hearing, Officer Jesberger characterized this as disorderly conduct with an armed enhancer. Here is Wisconsin’s disorder conduct statute:

947.01. Disorderly conduct

(1) Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor.

(2) Unless other facts and circumstances that indicate a criminal or malicious intent on the part of the person apply, a person is not in violation of, and may not be charged with a violation of, this section for loading, carrying or going armed with a firearm, without regard to whether the firearm is loaded or is concealed or openly carried.

As a rule of thumb, conduct is disorderly if it is of the type that would be disruptive to peace and good order in the community. *State v. Schwebke*, 253 Wis.2d 1, 24 (2002).

To the extent that a Fitchburg resident at the Mobil station at 11:30 p.m. on March 22, 2012 was disturbed enough to call 911 about a group of people shouting and waving firearms in the adjacent parking lot, there would be reasonable suspicion that the people *shouting* might be violating § 947.01(1). But in light of subsection (2) of the statute, a citizen report that people were displaying and waving around handguns, without any additional suggestion of criminal or malicious intent, would not transform this situation into an actual emergency. The 911 dispatcher asked the caller “so basically, they’re just sort of loitering, being loud, you saw the guns and you’re concerned about that?” The caller agreed with this characterization, although she clearly was disturbed by what was occurring. Certainly the police were allowed to take into account that this conduct was occurring near Schneid’s, a notorious trouble spot for FPD, see *United States v. Oglesby*, 597 F.3d 891, 894 (7th Cir. 2010), but displaying a firearm near Schneid’s doesn’t make the act more criminal than if it had occurred somewhere else.

Further, by the time the police arrived, the group was down to 10, no one was being loud or boisterous, and no firearms were in sight. Nobody actually fled and nobody did anything that would create reasonable suspicion of criminal activity, other than avoid eye contact and avoid physical contact with the police. Even if this were to qualify as “nervous or evasive behavior,” which is a dubious proposition, it was not specific to Williams so as to differentiate him from the crowd. According to Officer Jesberger, this was true of “everyone,” so these factors do not adequately explain or justify why he picked out Williams as the person he wanted to talk to. More likely it was a random selection of one of the men closest to him. When Officer Jesberger asked Williams to approach, Williams didn’t want to, but he approached anyway, so this could not have raised any suspicion regarding Williams individually.

Which segues to the question how a court should apply the requirement of individualized suspicion to a group situation like that confronting the officers at Schneid’s. When slapping down the overly-aggressive execution of a search warrant in *Ybarra v. Illinois*, 444 U.S. 85 ((1979), the Court observed that “the narrow scope of the *Terry* exception does not permit a frisk for weapons on less than a reasonable belief or suspicion directed at the person to be frisked even though that person happens to be on the premises where an authorized narcotics search is taking place.” *Id.* at 85. “Nothing in subsequent decisions of the Supreme Court has repudiated the requirement for individualized suspicion for either a *Terry* stop or a full-blown search in the circumstances presented here.” *United States v. Johnson*, 170 F.3d 708, 716 (7th Cir. 1999). As a corollary, the logic of the court’s holding in *United States v. Bohman*, 683 F.3d 861 (7th Cir. 2012) would seem to apply to this situation: if a police stop resting on the mere emergence of a car from a suspected drug site is unreasonable, *id.* at 866 n.1, then a *Terry* frisk resting on the mere presence of a person in a group in which some members were suspected of having

committed disorderly conduct would seem to be unreasonable as well. As the court held, an investigative detention is unreasonable where circumstances support general suspicion of the stopped car but do not provide the necessary “quantum of individualized, articulable suspicion.” *Id.* at 867.

Here, the anonymous caller reported seeing a group of more than 25 people, three or four of whom were waving around handguns. When the police arrived at this location just minutes later, only ten men were present. What were the police to make of this? Williams’s argument that the police couldn’t be sure this was the same group is unpersuasive,⁴ but this was at best a measurably smaller subgroup, and its behavior did not match that reported by the anonymous caller: no one was acting disorderly and no weapons were in sight.

Given that the police caravan surging up Fish Hatchery Road would have been visible from Schneid’s long before it arrived, the most logical assumption would be that anyone carrying a firearm (or other contraband) would have fled before the police even arrived. On the other hand, the most cautious assumption for the police to make would be that of the ten men still there, four could be armed. But even the cautious assumption meant that six of the ten men were not armed. Does a 0% to 40% chance that any given person in the group might have a handgun in his pocket constitute individualized suspicion to search all ten men? Does the upper percentage drop when there is paltry corroboration of the anonymous caller’s report?⁵

⁴ “Police observation of an individual, fitting a police dispatch description of a person involved in a disturbance, near in time and geographic location to the disturbance establishes a reasonable suspicion that the individual is the subject of the dispatch.” *United States v. Lenoir*, 318 F.3d 725, 729 (7th Cir. 2003), quoting *United States v. Hicks*, 531 F.3d 555, 559 (7th Cir. 2008).

⁵ This circuit presumes the reliability of an eyewitness 911 call reporting an emergency situation for purposes of establishing reasonable suspicion, particularly when the caller identifies herself, but this presumption can evanesce if the officers are confronted with reasons to doubt the caller’s report. *United*

From a patrol officer's perspective, even posing such questions may be esoteric to the point of preciousness. As Officer Hale explained, the officers are going to do what they deem necessary to ensure that they go home at the end of their shift. That's the commonsensical notion that started the court's analysis, above, and it's hard to quarrel with it from the safety of a desk job. But on the facts presented here, deeming the decision to frisk Williams for weapons to be constitutionally reasonable would seem to be one of those small steps toward the erosion of the Fourth Amendment that concerned Judge Hamilton in his dissent in *United States v. Tinnie*, quoted above. As I noted at the outset, this seems to be a close call and there is support for reaching the opposite conclusion, but I conclude that the totality of circumstances did not provide Officer Jesberger with reasonable suspicion to frisk Williams for weapons. This search was unconstitutional.

If the district judge accepts this conclusion, this does not mean that suppression of the handgun is automatic. As the Court noted in *Herring v. United States*, 555 U.S. 135 (2009),

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the judicial system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

Herring, 555 U.S. at 144.

Here, as in *Herring*, the police were operating with a bona fide concern for their own safety and for public safety. Although it seems that the police overstepped the constitutional bound of reasonableness, then they were so close to what was allowable that suppression is a

States v. Drake, 456 F.3d 771, 775 (7th Cir. 2006).

disproportionate response to their mistake. Further, the fact pattern presented here does not lend itself to deterrence because as far as I can tell, there is no clear law that would have allowed Officer Jesberger to realize that frisking Williams for weapons was constitutionally unreasonable. To the contrary, as Judge Hamilton note in *Tinnie*, the cases addressing this subject are so fact-bound, case-specific and nuanced that there is no clear guidance to police about how to keep their conduct constitutional when responding to a 911 dispatch that may or may not be deemed a genuine emergency after the fact, based on an anonymous caller who may or may not be deemed reliable after the fact based on what the police see and hear at the scene, how they process this input against their training and experience, and how they characterize it in their subsequent reports and testimony.

This is not to say that the law of *Terry* frisks is so muddled that officers are immune from suppression when they frisk a suspect for weapons when responding to a 911 call. But absent clearer overarching guidance from the courts as to where the line is, it seems that each decision will remain case specific and fact-bound. In this case, on these facts, I conclude that, to the extent that it was constitutionally unreasonable for Officer Jesberger to initiate a weapons frisk of Williams under the circumstances known to him, Officer Jesberger's decision cannot be viewed as a deliberate, reckless, or grossly negligent violation of Williams's Fourth Amendment rights. Given the fact-specific nature of each constitutional challenge to a weapons frisk, it is difficult to hypothesize some systemic flaw in FPD's training or practices regarding weapons frisks that could be flagged or cured by suppressing the evidence in this case. As a result, no meaningful deterrence would result from invoking the exclusionary rule in this case.

RECOMMENDATION

Pursuant to 42 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Andre Williams's motion to suppress evidence.

Entered this 17th day of August, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

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August 17, 2012

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Re: United States v. Andre A. Williams
Case No. 12-cr-54-wmc

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before August 27, 2012, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by August 27, 2012, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,
/s/
Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures

MEMORANDUM REGARDING REPORTS AND RECOMMENDATIONS

Pursuant to 28 U.S.C. § 636(b), the district judges of this court have designated the full-time magistrate judge to submit to them proposed findings of fact and recommendations for disposition by the district judges of motions seeking:

- (1) injunctive relief;
- (2) judgment on the pleadings;
- (3) summary judgment;
- (4) to dismiss or quash an indictment or information;
- (5) to suppress evidence in a criminal case;
- (6) to dismiss or to permit maintenance of a class action;
- (7) to dismiss for failure to state a claim upon which relief can be granted;
- (8) to dismiss actions involuntarily; and
- (9) applications for post-trial relief made by individuals convicted of criminal offenses.

Pursuant to § 636(b)(1)(B) and ©, the magistrate judge will conduct any necessary hearings and will file and serve a report and recommendation setting forth his proposed findings of fact and recommended disposition of each motion.

Any party may object to the magistrate judge's findings of fact and recommended disposition by filing and serving written objections not later than the date specified by the court in the report and recommendation. Any written objection must identify specifically all proposed findings of fact and all proposed conclusions of law to which the party objects and must set forth

with particularity the bases for these objections. An objecting party shall serve and file a copy of the transcript of those portions of any evidentiary hearing relevant to the proposed findings or conclusions to which that party is objection. Upon a party's showing of good cause, the district judge or magistrate judge may extend the deadline for filing and serving objections.

After the time to object has passed, the clerk of court shall transmit to the district judge the magistrate judge's report and recommendation along with any objections to it.

The district judge shall review de novo those portions of the report and recommendation to which a party objects. The district judge, in his or her discretion, may review portions of the report and recommendation to which there is no objection. The district judge may accept, reject or modify, in whole or in part, the magistrate judge's proposed findings and conclusions. The district judge, in his or her discretion, may conduct a hearing, receive additional evidence, recall witnesses, recommit the matter to the magistrate judge, or make a determination based on the record developed before the magistrate judge.

NOTE WELL: A party's failure to file timely, specific objections to the magistrate's proposed findings of fact and conclusions of law constitutes waiver of that party's right to appeal to the United States Court of Appeals. *See United States v. Hall*, 462 F.3d 684, 688 (7th Cir. 2006).