Appendix

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-12979
Non-Argument Calendar

D.C. Docket No. 1:15-cr-20674-MGC-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BENJIE EARL WRIGHT,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(October 18, 2017)

Before JORDAN, ROSENBAUM and BLACK, Circuit Judges.

PER CURIAM:

Benjie Earl Wright appeals the denial of his motion to suppress and his 180-month sentence for being a felon in possession of a firearm or ammunition, 18 U.S.C. §§ 922(g)(1) and 924(e). Wright asserts the district court erred by denying his motion to suppress evidence when it determined police officers had not exceeded their authority during an investigatory stop and pat-down. He also contends the district court erred by determining Florida strong armed robbery qualified as a violent felony under the Armed Career Criminal Act (ACCA). After review,[1] we affirm Wright's conviction and sentence.

I. MOTION TO SUPPRESS

"The Fourth Amendment prohibits 'unreasonable searches and seizures' by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest." *United States v. Arvizu*, 534 U.S. 266, 273 (2002). "[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself

[1] We review the district court's denial of a motion to suppress under a mixed standard, reviewing the district court's findings of fact under the clearly erroneous standard and the district court's application of law to those facts *de novo*. *United States v. Gil*, 204 F.3d 1347, 1350 (11th Cir. 2000). Questions of probable cause and reasonable suspicion are reviewed *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). We review *de novo* the district court's conclusion that a particular offense constitutes a "violent felony" under 18 U.S.C. § 924(e). *United States v. Wilkerson*, 286 F.3d 1324, 1325 (11th Cir. 2002).

as a policeman and makes reasonable inquiries, . . . 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). "If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass make its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons." *United States v. Griffin*, 696 F.3d 1354, 1363 (11th Cir. 2012) (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993)).

"In determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry*, 392 U.S. at 26. We must look at the "totality of the circumstances" to see whether the detaining officer has a "particularized and objective basis" for suspecting legal wrongdoing. *Arvizu*, 534 U.S. at 273.

The police officers had reasonable suspicion to detain Wright based on articulable facts. The police officers were permitted to rely on the description, given from the victim, that the armed robber suspect was black, heavyset, in his 30s, located in the Yellow Meat Market, wearing a white shirt and black cargo

shorts, with a lowboy haircut and tattoos. *See United States v. Hensley*, 469 U.S. 221, 232 (1985) (holding "if a flyer or bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion the wanted person has committed an offense, then reliance on that flyer or bulletin justifies a stop to check identification, to pose questions to the person, or to detain the person briefly while attempting to obtain further information" (internal citations omitted)). The police officers saw Wright, who was black, appeared to be in his 30s, had on dark colored cargo shorts, had tattoos, had a lowboy haircut, and was in the Yellow Meat Market.[2] Officer Yunieski Arriola testified he believed Wright matched the description of the suspect. Officer Arriola testified that, based on his experience, he knew descriptions of suspects can be incorrect because suspects change or discard clothing.

When Officer Arriola asked for his identification, Wright stated that he worked at the Yellow Meat Market and did not provide any identification. Officer Arriola stated the police respond to crime incidents at the Yellow Meat Market once or twice per week. He stated he did not recognize Wright as an employee or regular at the store. He believed Wright lied to the officers when he told them he worked there, based on their frequent visits to the Yellow Meat Market.

[2] Other facts, such as the fact Wright was wearing a black shirt and not a white shirt, was "medium-set" and not heavyset, had on dark cargo shorts and not black cargo shorts, and was sitting calmly in the location of the robbery indicated he might not be the suspect.

Based on the totality of the circumstances, including the suspect's description and the officers' familiarity with the Yellow Meat Market, the officers had enough articulable facts amounting to reasonable suspicion and were justified in conducting a brief, investigatory stop. *See Arvizu*, 534 U.S. at 273; *Hensley*, 469 U.S. at 232.

Furthermore, because the officers had reasonable suspicion to believe Wright matched the description of the armed robber, the officers had reasonable suspicion to believe he was armed and dangerous. Based on this reasonable suspicion, the officers were entitled, for their protection, to conduct a carefully limited search of the outer clothing of Wright in an attempt to discover weapons. *See Terry*, 392 U.S. at 30. While *Terry* pat-downs are generally limited to the outer clothing, the Supreme Court also stated in *Terry* that a search for weapons must be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer. *Id.* at 29. The officers raised the back of Wright's long, baggy shirt no higher than necessary to view his waistband and pat down his back pockets. Therefore, the lifting of Wright's shirt is within the boundary of *Terry* because the intrusion was designed to discover a gun when the officers reasonably believed Wright had a gun and the intrusion was balanced against the necessity of the search.

Accordingly, the district court did not err by denying Wright's motion to suppress when the officers did not exceed their authority to detain and pat-down Wright because they had reasonable articulable suspicion that he matched the description of an armed robber and their search was limited to slightly lifting Wright's shirt to expose his waistband and patting down the outside of Wright's cargo shorts. We affirm the district court's denial of Wright's motion to suppress.

II. ACCA

Under the ACCA, any person who violates 18 U.S.C. § 922(g), and has 3 previous convictions for a violent felony or a serious drug offense, is subject to a mandatory minimum sentence of 15 years' imprisonment. 18 U.S.C. § 924(e)(1). The ACCA defines the term "violent felony" as any crime punishable by a term of imprisonment exceeding one year that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). The first prong of this definition is referred to as the "elements clause," while the second prong contains the "enumerated crimes" and,

finally, what is commonly called the "residual clause."[3] *United States v. Owens*, 672 F.3d 966, 968 (11th Cir. 2012).

Prior to 1997, Florida's intermediate appellate courts were divided as to whether a sudden snatching amounted to robbery under Fla. Stat. § 812.13. *See United States v. Welch*, 683 F.3d 1304, 1311 & n.29 (11th Cir. 2012) (citing cases). In 1997, the Florida Supreme Court held mere snatching of property did not amount to robbery under § 812.13 unless the perpetrator employed force greater than that necessary to simply remove the property from the person. *Robinson v. State*, 692 So. 2d 883, 886 (Fla. 1997). It stated "in order for the snatching of property from another to amount to robbery, the perpetrator must employ more than the force necessary to remove the property from the person." *Id*. It explained the Florida robbery statute required "resistance by the victim that is overcome by the physical force of the offender." *Id.*

In *United States v. Lockley*, we addressed whether a 2001 Florida attempted-robbery conviction qualified as a crime of violence under the elements clause of the career-offender provision of the Sentencing Guidelines. 632 F.3d 1238, 1244 (11th Cir. 2011). We determined Lockley's 2001 Florida

[3] In *Johnson*, the Supreme Court held the residual clause of the ACCA is unconstitutionally vague because it creates uncertainty about how to evaluate the risks posed by a crime and how much risk it takes to qualify as a violent felony. *Johnson v. United States*, 135 S. Ct. 2551, 2557-58, 2563 (2015). The Supreme Court clarified that, in holding the residual clause is void, it did not call into question the application of the elements clause and the enumerated crimes of the ACCA's definition of a violent felony. *Id.* at 2563.

attempted-robbery conviction categorically constituted a crime of violence under the elements clause of the career-offender guideline. *Lockley*, 632 F.3d at 1244-45.

In *Seabrooks*, we relied on *Lockley* to determine a 1997 Florida armed robbery conviction constituted a violent felony under the ACCA. *See United States v. Seabrooks*, 839 F.3d 1326, 1338-41 (11th Cir. 2016); *id.* at 1346 (Baldock, J. concurring); *id.* at 1346, 1350-51 (Martin, J. concurring). The narrowest ground on which we agreed in *Seabrooks* was that, under *Lockley*, post-*Robinson* Florida armed robbery convictions categorically qualify as violent felonies under the ACCA's elements clause. *See id.* at 1340; *id.* at 1346 (Baldock, J., concurring); *id.* at 1350 (Martin, J., concurring).

Given this Court's holding in *Seabrooks*, Wright's 2000 Florida robbery conviction qualifies as a violent felony under the elements clause of the ACCA.[4] This Court has specifically held a post-1997/post-*Robinson*, Florida armed robbery conviction categorically qualifies as a violent felony under the ACCA's elements clause. *See Seabrooks*, 839 F.3d at 1338-41.

[4] Wright does not dispute he has two previous convictions for a serious drug offense that qualify as predicate offenses under the ACCA. Therefore, he only needs a third predicate offense to qualify as an armed career criminal.

Wright's three qualifying convictions[5] subject him to a mandatory minimum sentence of 15 years' imprisonment. 18 U.S.C. § 924(e)(1). Accordingly, we affirm his sentence.

AFFIRMED.

[5] Because Wright's Florida robbery conviction qualifies as a violent felony, he has three previous convictions for a violent felony or serious drug offense and this Court need not review whether Wright's Florida conviction for battery qualifies as a violent felony.

Appendix

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UNITED STATES DISTRICT COURT

Southern District of Florida
Miami Division

UNITED STATES OF AMERICA
v.
BENJIE EARL WRIGHT

JUDGMENT IN A CRIMINAL CASE

Case Number: **15-20674-CR-COOKE**
USM Number: **08643-104**

Counsel For Defendant: **Gregory Samms, Esq.**
Counsel For The United States: **Kevin Quencer, AUSA**
Court Reporter: **Glenda Powers**

The defendant pleaded guilty to count one of the Indictment.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18, U.S.C. 922(g)(1) and 924(e)(1)	Possession of a firearm and ammunition by a convicted felon.	06/20/2015	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence:
5/18/2016

Marcia G. Cooke
MARCIA G. COOKE
United States District Judge

May 18, 2016

DEFENDANT: **BENJIE EARL WRIGHT**
CASE NUMBER: **15-20674-CR-COOKE**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **180 months**.

The court makes the following recommendations to the Bureau of Prisons: For the defendant to participate in the Bureau of Prison's Residential Drug and Alcohol Treatment Program, and for the defendant to be designated to a facility in the Southern District of Florida.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **BENJIE EARL WRIGHT**
CASE NUMBER: **15-20674-CR-COOKE**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **BENJIE EARL WRIGHT**
CASE NUMBER: **15-20674-CR-COOKE**

SPECIAL CONDITIONS OF SUPERVISION

Anger Control / Domestic Violence - The defendant shall participate in an approved treatment program for anger control/domestic violence. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Mental Health Treatment - The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

No New Debt Restriction - The defendant shall not apply for, solicit or incur any further debt, included but not limited to loans, lines of credit or credit card charges, either as a principal or cosigner, as an individual or through any corporate entity, without first obtaining permission from the United States Probation Officer.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

DEFENDANT: **BENJIE EARL WRIGHT**
CASE NUMBER: **15-20674-CR-COOKE**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00	$0.00	$0.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **BENJIE EARL WRIGHT**
CASE NUMBER: **15-20674-CR-COOKE**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of $100.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

The Government shall file a preliminary order of forfeiture within 3 days.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Appendix

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-20674-CR-COOKE

UNITED STATES OF AMERICA,

Plaintiff,

Vs.

BENJIE EARL WRIGHT,

Defendant.
_____/

ORDER ON MOTION TO SUPPRESS

THIS CAUSE came before the Court on February 19, 2016 for a hearing on the Defendants *Motion to Suppress Physical Evidence, and Supplemental Motion to Suppress (ECF No. 20 and 26)*. With a hearing being held and for reasons stated in open court, it is hereby,

ORDERED AND ADJUDGED that the motions are **DENIED**.

DONE AND ORDERED in open court at the United States District Courthouse in Miami- Dade County, Florida this 19th day of February 2016.

Marcia G. Cooke

MARCIA G. COOKE
United States District Judge