APPENDIX TO THE PETITION

893 F.3d 232
United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Edward Joseph KEHOE, Defendant–Appellant.

No. 17-4536
|
Argued: May 10, 2018
|
Decided: June 20, 2018

Synopsis

Background: Defendant entered a conditional plea to being a felon in possession of a firearm. The United States District Court for the Eastern District of Louisiana, Robert G. Doumar, Senior District Judge, denied defendant's motion to suppress. Defendant appealed.

Holdings: The Court of Appeals, Diana Gribbon Motz, Circuit Judge, held that:

[1] law enforcement officers were entitled to rely on information provided by caller in determining whether they had reasonable suspicion;

[2] officers had reasonable suspicion when they seized defendant; and

[3] district court's references to defendant's race at suppression hearing did not prejudice him so as to require reversal.

Affirmed.

***234** Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Robert G. Doumar, Senior District Judge. (4:16-cr-00073-RGD-LRL-1)

Attorneys and Law Firms

ARGUED: Caroline Swift Platt, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Alexandria, Virginia, for Appellant. Richard Daniel Cooke, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee. ON BRIEF: Geremy C. Kamens, Federal Public Defender, Wilfredo Bonilla, Jr., Assistant Federal Public Defender, Alexandria, Virginia, for Appellant. Dana J. Boente, United States Attorney, Alexandria, Virginia, Megan M. Cowles, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Newport News, Virginia, for Appellee.

Before WILKINSON, MOTZ and KING, Circuit Judges.

Opinion

Affirmed by published opinion. Judge Motz wrote the opinion, in which Judge Wilkinson and Judge King joined.

DIANA GRIBBON MOTZ, Circuit Judge:

Edward Joseph Kehoe entered a conditional plea to being a felon in possession of a firearm, reserving the right to appeal the district court's order denying his motion to suppress. Kehoe now appeals that order. For the reasons that follow, we affirm.

I.

A.

On August 2, 2016, the Newport News Police Department received two phone calls reporting a potential issue at RJ's Sports Bar involving a man drinking while carrying a concealed firearm. Police officers went to RJ's and, after investigating, seized a gun from Kehoe's person and arrested Kehoe.

A grand jury indicted Kehoe for possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). Kehoe moved to suppress the gun seized from his person and his statements to officers. He argued that the officers lacked reasonable suspicion for the seizure. At the suppression hearing, the district court admitted recordings of the two phone calls, a "call for service report," body camera footage, and a photo of the firearm recovered from ***235** Kehoe's person. The court also heard testimony from two Newport News police officers, Gary Lipscomb and E.D. Barnes. Although Kehoe called Officer Lipscomb as a witness, Kehoe did not testify or offer any other witnesses on his behalf.

According to recordings of the two phone calls, the first caller reported that he was at RJ's, and that a white male wearing "a blue-and-white striped shirt" had a gun "on his side" "under his shirt" and had "been drinking." The caller stated that he wished to be anonymous, but at the 911 operator's request, provided his first name and phone number. Almost simultaneously, a second caller, an off-duty police officer, informed the police that a "bartender at RJ's" had called to inform him that a white male at RJ's was "intoxicated" and "carrying a firearm."

Based on these two phone calls, the Police Department dispatched multiple officers to RJ's, including Officers Lipscomb and Barnes. Both officers testified that RJ's was in a "known problem area." Newport News officers had previously responded to a "myriad of calls" at RJ's and in the surrounding area for incidents involving "gunshots," "intoxicated individuals refusing to leave after being kicked out of the bar," and "fights in the parking lot."

The officers did not listen to the 911 calls before entering RJ's. Instead, they reviewed a written police "call for service report." That report includes some, but not all, of the information supplied by the two callers. Specifically, it notes that the first caller, who provided his first name and telephone number, described seeing at RJ's a white male in a blue-and-white striped shirt who had a "gun on his side covered by his shirt" and was "drinking." The call for service report states that a second caller said that the RJ's bartender was concerned about a white male in unknown clothing who was carrying a firearm. The report does not indicate that the second caller was a police officer or otherwise identify him, nor does it indicate that the second caller stated that the suspect was intoxicated.

Upon arriving at RJ's, but before entering the bar, the police officers "went over some of the different code sections." Officer Lipscomb testified that, based on this review, the officers determined that under state law, persons "could be inside of a bar possessing a firearm concealed if they had a concealed permit, as long as they were not drinking." *See* Va. Code § 18.2-308.012(B).

The officers then entered RJ's. Inside, Officer Lipscomb conferred with the bartender for approximately one minute. According to Officer Lipscomb, the bartender confirmed that several patrons had reported that a white male in a blue-and-white striped shirt had a gun, and that the bartender had seen a "bulge" but not the gun itself. The bartender also told Officer Lipscomb that the white man was located in the adjacent pool hall area. The officers immediately proceeded to that area where they identified the one patron—Kehoe—who matched the description of the suspect.

Officer Lipscomb approached Kehoe, who was seated at a small table near a pool table. Body camera footage shows that while speaking to Officer Lipscomb, Kehoe remained seated, leaning slightly to his left—the same side on which Officer Lipscomb was standing. Officer Lipscomb testified that Kehoe's speech was "slightly slurred." Because the confined space, loud music, and pool tables made it difficult to have a conversation, Officer Lipscomb asked Kehoe to "step outside with" the officers. When Kehoe did not comply, Officer Lipscomb asked Kehoe to "stand up" and produce identification. Kehoe did so, ***236** and two officers placed their hands on Kehoe to steer him toward the exit.

Officer Lipscomb described Kehoe's demeanor as "calm," "polite," but a bit "passive-aggressive." Officer Lipscomb also testified that he believed Kehoe's initial refusal to stand up, talk to the officers, or leave the bar indicated nervousness.

Once outside, the police officers testified that, among other things, Kehoe's speech was slurred and his eyes were glassy, suggesting that he had consumed alcohol. At this point, the officers handcuffed Kehoe and began a pat-down search, which revealed a handgun concealed underneath Kehoe's shirt. The police then arrested Kehoe.

B.

At the suppression hearing, the district court orally denied Kehoe's motion to suppress the challenged evidence.[1] Nine days later, the court issued a twenty-five page written opinion detailing its reasons for denying the motion. In that opinion, the court found that three categories of evidence provided the officers with reasonable suspicion sufficient to detain Kehoe briefly for investigative purposes.

1 During the hearing, the district judge made a number of remarks (not repeated in its written opinion) suggesting that he found Kehoe's conduct more

suspicious because of Kehoe's race. We address these remarks in Part III.

First, the court found that the police dispatch was not based on a single, anonymous tip, but instead "on two 911 calls that, in combination with each other and the other factors present that night, supported reasonable suspicion." The court concluded that neither caller was anonymous, because the first caller "provided both his first name and a phone number," and "[t]he second call was from another police officer, who was reporting the concerns of the bartender and other patrons." In addition, the court found that the bartender "offered a physical description of the Defendant that matched the information in the dispatch."

Second, the court noted that "[t]he officers' experience also contributed to the development of reasonable suspicion. Both Officer Lipscomb and Officer Barnes had previously responded to calls for service concerning guns, and [RJ's] was known to the Newport News Police Department for the very sort of activity the officers had received a dispatch for."

Third, the district court concluded that Kehoe's behavior "contributed to the officers' reasonable suspicion." The court explained, "When the officers approached [Kehoe], they observed him leaning to his right side (where the gun was previously reported to have been), detected the consumption of alcohol by" Kehoe, and noted Kehoe's "refusal to answer their questions." Thus, the court found that, "together with the information provided in the dispatch and the officers' previous experience with the bar, the totality of the circumstances supported reasonable suspicion of criminal activity." On these bases, the court denied Kehoe's motion to suppress.

C.

Kehoe pled guilty to one count of being a felon in possession of a firearm, but reserved "the right to appeal the court's ruling on all grounds in his previously filed motion to suppress." The district court sentenced Kehoe to 24 months' imprisonment and two years of supervised release.

[1] Kehoe now appeals the denial of his motion to suppress. He maintains that the police officers seized him "without a warrant and without reasonable suspicion that ***237** he had or was about to engage in criminal activity." Appellant Br. at 11. Kehoe recognizes that in assessing "a district court's decision on a motion to suppress," although we review the court's "factual findings for clear error," we review its "legal conclusions de novo." *Id.*; *see United States v. McGee*, 736 F.3d 263, 269 (4th Cir. 2013).

II.

[2] **[3]** The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. Amend. IV. This includes brief investigatory stops, also known as *Terry* stops. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In assessing the constitutionality of such a stop, we ask whether, at the time of the seizure, the police officer had a "reasonable suspicion" that the person seized was "involved in criminal activity." *Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177, 185, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004).

[4] **[5]** Reasonable suspicion requires "more than an inchoate and unparticularized suspicion or hunch"; rather, the government agent must articulate a particularized, objective basis for his or her actions. *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) (internal citation and quotation marks omitted). To determine whether an officer had such a basis for "suspecting legal wrongdoing," "reviewing courts ... must look at the 'totality of the circumstances' of each case." *United States v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 417–18, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)).

Kehoe argues that the district court erred in holding that reasonable suspicion existed at the time the police officers seized him. At the latest, as the Government acknowledges, the police seized Kehoe when two officers physically placed their hands on him. Oral Argument at 39:22–58, *United States v. Kehoe*, 893 F.3d 232 (4th Cir. 2018) (No. 17-4536), http://coop.ca4.uscourts.gov/OAarchive/mp3/17-4536-20180510.mp3 (counsel for Government admitting that the seizure occurred when the officers "grabbed" Kehoe). By that time, the officers had told Kehoe that they suspected him of illegal activity, and Officer Lipscomb had acquired Kehoe's identification.

While we disagree with some of the district court's findings and conclusions, based on our independent review of the record, we must agree with the court's ultimate holding: the officers had reasonable suspicion of ongoing criminal activity when they seized Kehoe. *See United States v. Smith*, 395 F.3d 516, 519 (4th Cir. 2005) (affirming denial of motion to suppress on different grounds); *see also Scott v. Harris*, 550 U.S. 372, 378–81, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (noting in § 1983 case that where a "videotape quite clearly contradicts the version of the story" adopted by a lower court, that court erred in not viewing "the facts in the light depicted by the videotape").

[6] To seize Kehoe, the officers needed reasonable suspicion that, while in RJ's, Kehoe was carrying a concealed handgun *and* drinking alcohol. Va. Code § 18.2-308.012(B) ("No person who carries a concealed handgun onto the premises of any restaurant or club ... may consume an alcoholic beverage while on the premises."). The Government bears the burden of proving that reasonable suspicion justified a warrantless seizure. ***238** *McGee*, 736 F.3d at 269. [2]

2 As the Government acknowledges, the district court erroneously stated that Kehoe bore "the burden of proving that the evidence should be suppressed." *See* Appellee Br. at 11. But this error provides no basis for reversal because, as Kehoe recognizes, we evaluate de novo the correctness of legal conclusions. *See* Appellant Br. at 11.

We assess the totality of the circumstances to determine if "an objectively reasonable police officer" would have had reasonable articulable suspicion that Kehoe was committing a crime at the time the officers seized him. *Ornelas v. United States*, 517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). The Government both before the trial court and on appeal principally, but not exclusively, relies on the two telephone tips. [3]

3 Two factors given some weight by the district court *cannot* support a finding of reasonable suspicion here: Kehoe's posture and his alleged nervousness. Officer Lipscomb testified that he found suspicious Kehoe's leaning towards the *right*, the side on which Kehoe purportedly had a gun, but the body camera footage clearly shows that Kehoe was leaning to the *left.* Nor could Officer Lipscomb's general assertion that Kehoe seemed "nervous" establish reasonable suspicion. *See United States v. Massenburg*, 654 F.3d 480, 491 (4th Cir. 2011) (explaining that if "the ordinary response of the innocent upon being asked to consent to a search—some mild nervousness—sufficed to create reasonable suspicion, then *Terry*'s reasonable suspicion requirement would become meaningless").

[7] **[8]** **[9]** The degree to which the police may rely on a tip to establish reasonable suspicion depends on the tipster's veracity, reliability, and basis of knowledge. *Alabama v. White*, 496 U.S. 325, 328, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). A tip from an anonymous caller "seldom demonstrates the informant's basis of knowledge" or contains "sufficient indicia of reliability" necessary to provide the reasonable suspicion necessary to justify a *Terry* stop and frisk. *Florida v. J.L.*, 529 U.S. 266, 270, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000) (quoting *White*, 496 U.S. at 327, 329, 110 S.Ct. 2412) (internal quotation marks omitted). In contrast, courts generally presume that a citizen-informant or a victim who discloses his or her identity and basis of knowledge to the police is both reliable and credible. *See e.g.*, *United States v. Gomez*, 623 F.3d 265, 269–71 (5th Cir. 2010); *United States v. Elmore*, 482 F.3d 172, 180–83 (2d Cir. 2007); *United States v. Brown*, 496 F.3d 1070, 1075–77 (10th Cir. 2007); *United States v. Pasquarille*, 20 F.3d 682, 689 (6th Cir. 1994).

[10] Kehoe argues that both calls were "effectively" anonymous tips because the police did not know the identity of either caller. Kehoe is correct that the second call was anonymous. This is so because when the officers entered RJ's, their sole source of information about the two phone calls was the call for service report, which contains no information about the second caller's identity or basis of knowledge. Thus, we agree with Kehoe that the *second* caller was an anonymous source; the district court's contrary finding was clearly erroneous.

In contrast, however, the call for service report establishes that the *first* caller was *not* an anonymous source. An anonymous caller is "an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information." *J.L.*, 529 U.S. at 271, 120 S.Ct. 1375. *Cf. United States v. Reaves*, 512 F.3d 123, 127 (4th Cir. 2008) (anonymous where caller did not provide name or number); *United States v. Saddler*, 275 F. App'x 549, 550–51 (7th Cir. 2008) (not anonymous where caller provided "his name and the address of his store," even though he

asked to remain anonymous, ***239** refused to identify his store by name, and did not provide his phone number). Unlike the second caller and the anonymous caller in *J.L.*, the first caller does not fall into that category. *See J.L,* 529 U.S. at 270–71, 120 S.Ct. 1375.

Although the first caller did not provide his full name, he provided his first name and phone number. This crucial information allowed the police to ascertain his identity. The first caller also provided the basis of his knowledge: his presence at RJ's, the location of the alleged ongoing criminal activity. *See White*, 496 U.S. at 332, 110 S.Ct. 2412 (indicating that reasonable suspicion requires "reason to believe not only that the caller was honest but also that he was well informed").

[11] Thus, in determining whether the officers had reasonable suspicion that Kehoe was engaging in criminal activity, the officers were entitled to rely on the information provided by the first caller as noted in the call for service report: that a white male wearing a blue-and-white striped shirt was at RJ's, carrying a concealed weapon, and drinking. Even if that would not, standing alone, provide reasonable suspicion, the officers corroborated several key facts from the first caller's tip *before* they seized Kehoe. Officer Lipscomb learned from the bartender at RJ's that several patrons had reported that a white man in a blue-and-white striped shirt was carrying a concealed weapon. The officers then identified only one man in the bar who matched this description: Kehoe. And Officer Lipscomb observed that Kehoe's speech was "slightly slurred."

[12] The officers also knew that RJ's was located in a "known problem area." Although "an area's disposition toward criminal activity" "carries no weight standing alone," it is "an articulable fact that may be considered along with more particularized factors to support a reasonable suspicion." *United States v. Sprinkle*, 106 F.3d 613, 617 (4th Cir. 1997) (internal quotation marks and citation omitted). That the officers were responding to a situation involving an intoxicated individual and a gun—a situation not dissimilar from previous calls for service at RJ's—added to their reasonable suspicion that Kehoe was, in fact, intoxicated and in possession of weapon.

Given all these facts, it is clear that when the officers seized Kehoe they had a reasonable articulable suspicion that he was violating the law. [4]

4 On appeal, the parties submitted in their Joint Appendix one officer's body camera footage. After oral argument, the Government moved to file a supplemental appendix containing another body camera video because, according to the Government, the video in the Joint Appendix is not the video entered into evidence before the district court. The Government also admitted, however, that "no one disputes that the video in the joint appendix is a video of the events, and ... this Court could affirm with the record as it is now." Because Kehoe opposed the Government's motion to supplement and, because, as the Government conceded, the video in the Joint Appendix is also a video of the events in question and provides adequate evidence to affirm, we deny the Government's motion to supplement the appendix.

III.

Finally, Kehoe contends that the district court committed reversible error in relying on Kehoe's race during the suppression hearing.

The Government maintains that the district court did not suggest "that it was suspicious that the defendant was the only white male in the pool room, but merely noted that the defendant was the only individual matching the description of the suspect." Appellee Br. at 25. We cannot ***240** agree. The court's statements during the suppression hearing seem to us to indicate that it believed Kehoe's conduct was *more* suspicious because he was of a different race than the other RJ's patrons. For example, the court told counsel to address whether "there was a reasonable suspicion of whomever that white person was *in this particular bar with the clientele that was in that bar*." And the district court repeatedly expressed concerns about why Kehoe (a white man) would go to RJ's (a bar with mostly black patrons) after midnight with a gun. The court also compared Kehoe's conduct to recent racially motivated murders of African–American churchgoers by a white man and suggested that if the officers had not arrested Kehoe, he too might have engaged in racially motivated violence.

[13] **[14]** **[15]** We do not condemn the court's outrage over racially motivated violence; indeed, we share it. The desire to ensure that police can investigate and detain suspects to prevent such incidents is admirable. But the mere fact that a person of one race is present among

a group that is predominantly of another race does not provide a basis of suspicion of criminal activity. [5] The district court's repeated reference to Kehoe's race during the suppression hearing was clearly improper.

5 Of course, race, like sex and national origin, commonly provides an unobjectionable basis for identity. *See, e.g.*, *Nassar v. Sissel*, 792 F.2d 119, 122 (8th Cir. 1986). And courts must also necessarily consider a party's race to evaluate claims, like those under Title VII or the Equal Protection Clause, that require assessing whether an individual is treated differently from those outside the protected class. *See, e.g.*, *Goode v. Central Va. Legal Aid Soc'y, Inc.*, 807 F.3d 619 (4th Cir. 2015). But it is axiomatic that race alone cannot furnish reasonable suspicion of criminal activity. *See, e.g.*, *United States v. Brignoni–Ponce*, 422 U.S. 873, 884–87, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). The suggestion that someone is more likely to engage in a crime because of his or her race is equally impermissible.

Whether the court's comments during the suppression hearing provide a basis for reversal is, however, a different question. Kehoe does not offer *any* legal authority suggesting that such comments, when made during a suppression hearing, in and of themselves constitute reversible error. For several reasons, we cannot conclude that they do.

[16] **[17]** First, a motion to suppress inherently rests on the *police officers'* reasons for deciding to conduct a search or seizure. No evidence in the record indicates that the *police officers* impermissibly considered Kehoe's race in their reasonable suspicion analysis. *Cf. United States v. Brignoni–Ponce*, 422 U.S. 873, 884–87, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975) (finding that Border Patrol officers lacked reasonable suspicion for a stop where they relied on only "the apparent Mexican ancestry" of the persons stopped). Indeed, Kehoe makes no argument that the *officers* improperly considered his race.

Furthermore, in this case, we can view detailed video and telephone recordings of the events in question. Such recordings always provide important advantages to reviewing courts. *See Scott*, 550 U.S. at 378, 127 S.Ct. 1769 (reversing because a "videotape quite clearly contradict[ed]" the lower court's findings). They are particularly important here, as our review of the recordings, call for service report, and body camera footage enables us to independently assess the facts in question and to affirm on the basis of our assessment, not that of the district court. [6]

6 The only determinations by the district court on which we need rely are those regarding witness credibility. Two witnesses testified at the suppression hearing: Officers Lipscomb and Barnes. Kehoe did not present any witnesses or evidence that undermined their credibility, nor does he does contend on appeal that race in any way affected the district court's credibility determinations.

***241** Nor does the record suggest that the court's remarks interfered with Kehoe's ability to obtain a fair hearing. Such remarks before a *jury* could well have interfered with the jury's ability to be impartial. But the district court made its comments during a suppression hearing with no jury present. *See United States v. Lefsih*, 867 F.3d 459, 467 (4th Cir. 2017) (noting that the concern in cases alleging judicial bias or interference "is not necessarily with the content of the court's questions or comments, but rather that the jury may infer from the very fact of repeated interventions or interruptions that the court is sympathetic to one side of the case"). Kehoe does not maintain that the court's conduct "impermissibly interfered with the manner in which [he] sought to present his evidence," *United States v. Martinovich*, 810 F.3d 232, 240 (4th Cir. 2016), and his trial counsel did not object to these statements at any point during the suppression hearing.

In sum, racial remarks like those at issue here have no place in our judicial system, and we do not in any way condone them. But our independent review of the record —particularly the video and telephone recordings— establishes that in this case, the district court's references to Kehoe's race at the suppression hearing did not prejudice him, and so do not require reversal.

IV.

For the reasons set forth within, the judgment of the district court is

AFFIRMED.

All Citations

893 F.3d 232

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

UNITED STATES OF AMERICA

v. **CRIMINAL NO. 4:16cr73**

EDWARD JOSEPH KEHOE,

Defendant.

ORDER

This matter comes before the Court upon Edward Joseph Kehoe's ("Defendant") Motion to Suppress. ECF No. 11. For the reasons set forth herein and explained at the January 17, 2017 hearing on this Motion, the Motion to Suppress is **DENIED**.

I. PROCEDURAL HISTORY

On October 11, 2016, Edward Joseph Kehoe ("Defendant") was named in a one-count indictment charging him with Felon in Possession of a Firearm and Ammunition in violation of 18 U.S.C. § 922(g)(1). ECF No. 1. On November 30, 2016, Defendant filed a Motion to Suppress, ECF No. 11, to which Government filed a response on December 14, 2016, ECF No. 12. On January 17, 2017, this Court held a hearing, at which all parties were present, including the Defendant, on the instant Motion to Suppress. ECF No. 19.

II. FACTUAL BACKGROUND

The following summary is provided by way of background. The basic details of the investigation are not in dispute. Most of the information summarized here has been drawn from the evidence presented at the January 17, 2017 hearing on the instant Motion, including the testimony of Newport News Police Officer Gary David Lipscomb and Newport News Master Police Officer E.D. Barnes (both of whom have experience with gun investigations), Officer

Lipscomb's bodycam video, a recording of the 911 calls, the call for service reports, and a photograph of the firearm and ammunition. See ECF No. 19. Additional details undisputed by the parties in their briefing are included to fill out the narrative.

At approximately 12:18am on the morning of August 2, 2016, at least four officers with the Newport News Police Department arrived at RJ's Sports Bar ("the bar") after receiving a call for service to the bar. See ECF No. 11, at 1–2. According to the testimony of Officer Lipscomb and Officer Barnes, although the neighborhood surrounding the bar was a relatively quiet business district, the bar was known to the Police Department because the Department had previously received calls for service to the bar in order to deal with intoxicated individuals, drugs, guns, gunshots in the area around the bar, and fights that had occurred in the parking lot of the bar. Officer Lipscomb testified that he had previously responded to calls for service to the bar for such activity. He also noted it was the subject of a Virginia Department of Alcoholic Beverage control investigation. In addition, "[the bar] prohibited firearms on the premises" pursuant to Va. Code Ann. § 18.2–308.012,[1] and "notice of this prohibition was posted in the entryway of the bar." ECF No. 12, at 3.

The dispatch was precipitated by two separate calls to 911. The first was from a patron at

[1] This section states:

> A. Any person permitted to carry a concealed handgun who is under the influence of alcohol or illegal drugs while carrying such handgun in a public place is guilty of a Class 1 misdemeanor. Conviction of any of the following offenses shall be prima facie evidence, subject to rebuttal, that the person is "under the influence" for purposes of this section: manslaughter in violation of § 18.2-36.1, maiming in violation of § 18.2-51.4, driving while intoxicated in violation of § 18.2-266, public intoxication in violation of § 18.2-388, or driving while intoxicated in violation of § 46.2-341.24. . . .
>
> B. (Effective until July 1, 2018) No person who carries a concealed handgun onto the premises of any restaurant or club as defined in § 4.1-100 for which a license to sell and serve alcoholic beverages for on-premises consumption has been granted by the Virginia Alcoholic Beverage Control Board under Title 4.1 may consume an alcoholic beverage while on the premises. A person who carries a concealed handgun onto the premises of such a restaurant or club and consumes alcoholic beverages is guilty of a Class 2 misdemeanor. . . .

the bar reporting that there was an individual with a gun inside the bar. The caller described the individual as a white male wearing a blue-and-white striped shirt with what appeared to be a gun inside his waistband on his side, under his shirt; the caller further reported that some of other patrons had seen the gun. The caller noted that the individual with the gun was not "acting up" but that that fellow patrons were worried because the individual with the gun had been drinking. The caller identified his first name and gave his phone number. See ECF No. 12, at 2. He also noted he did not want to speak with anyone from the Police Department when they arrived.

The second 911 call was from Newport News Police Officer Ryder, who was not at the bar but had received a call from a bartender reporting that patrons had observed an individual who was intoxicated and was carrying a firearm inside the bar. The bartender described the individual to Officer Ryder as a white male. Id.

Based on the two 911 calls, officers received a dispatch call for service to the bar; the call for service also contained annotations noting that patrons had observed another patron with a firearm and that this patron was intoxicated. Officer Lipscomb, who was across the street from the bar at another location, responded within approximately one minute. Once there, he conferred with the other officers who had gathered as to the Virginia Code sections that would potentially be applicable to Defendant's activity, including possession of a firearm in a bar, concealed carry of a firearm without a permit, and drinking while carrying a firearm. Four officers, including Officers Barnes and Lipscomb, then proceeded into the bar.

After the officers entered the bar, Officer Lipscomb conferred with the bartender for approximately one minute; the bartender confirmed the description of the individual and noted he had not seen the gun but that he had seen the bulge. The bartender also noted that the patron who reportedly had the gun was not acting out of control. See ECF No. 12, at 3. The officers did

not confer with anyone else and proceeded to the pool area of the bar. Once there, Officer Lipscomb took note of the only white male with a blue-and-white striped shirt—that is, the Defendant—and approached him. From Officer Lipscomb's bodycam video, it would appear that the Defendant may have been the only white male patron in the bar. ECF No. 19, Def. Ex. 1. As Officer Lipscomb approached the Defendant, Officer Lipscomb noticed the Defendant lean forward towards his right side. Officer Lipscomb did not observe a drink in the Defendant's hand or on the table next to him. He did note that Defendant's speech was slightly slurred, that Defendant did not want to stand up to speak to him, and that Defendant swayed while standing. Officer Lipscomb then asked Defendant whether Defendant was carrying a gun or anything Officer Lipscomb "need[ed] to be concerned about," to which Defendant responded in the negative. Id. See also ECF No. 12, at 3–4. Officer Lipscomb testified that because of the volume of the music in the pool hall, he asked and then directed Defendant outside. Upon Officer Lipscomb's direction, Defendant made his way outside the bar, but paused before exiting and had to be directed to leave, which Officer Barnes also observed. See also ECF No. 12, at 3–4. Once outside the bar, where another officer was waiting, Officer Lipscomb detected the scent of alcohol on Defendant and noted that Defendant's eyes were glassy.

Officer Barnes further noted that he questioned the Defendant as to how the Defendant would be returning home that night, to which Defendant responded that he would be driving. Officer Barnes then observed that Defendant was intoxicated, to which Defendant then replied that he would ride home with a friend. Officer Barnes further testified that he stated to Defendant that he noticed Defendant was in an intoxicated state, which Defendant did not deny.

After the officers and Defendant were outside, Officer Lipscomb explained to Defendant that he was being detained and that he was going to pat Defendant down to see if Defendant had

any weapons; he also handcuffed Defendant. ECF No. 12, at 4. Officer Lipscomb then began patting Defendant down on the waistband, but Defendant began turning his hips away. In response, Officer Lipscomb directed him not to move. Id. He immediately felt the butt of the handgun on the front to right side of Defendant's waistline. He removed the gun from Defendant's belt; Officer Barnes then assisted in securing the weapon while Officer Lipscomb continued searching Defendant. Id. The officers ultimately recovered the Taurus 0.4 caliber handgun, a magazine, eleven 0.4 caliber cartridges, and a knife. Id. Officer Lipscomb then requested that Dispatch run a felony check on Defendant; after the check confirmed Defendant was a convicted felon, Defendant was taken into custody.

Officer Barnes also noted that the officers did not speak with the 911 caller prior to approaching Defendant, but did so afterwards.

III. LEGAL STANDARD

Defendant challenges both the admission of the evidence obtained as the result of the stop-and-frisk and the admission of his statements to the officers on the night of his arrest. ECF No. 11, at 6–10. As to Defendant's challenges to the admission of evidence obtained as the result of the stop-and-frisk, the Fourth 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. The "touchstone" of any Fourth Amendment analysis is "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's private security." Terry v. Ohio, 392 U.S. 1, 19 (1968). Reasonableness "depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers. Pennsylvania v. Mimms, 434 U.S. 106, 108–09 (1977). "The public interest . . . includes the substantial public concern for the safety of police officers lawfully carrying out the law enforcement effort." United States v. Sakyi, 160 F.3d 164, 167 (4th Cir. 1998).

Evidence obtained by unlawful searches and seizures in violation of a defendant's constitutional rights are inadmissible against him. Florida v. J.L., 529 U.S. 266 (2000). As the moving party, Defendant bears the burden of proving that the evidence should be suppressed. United States v. Dickerson, 655 F.2d 559, 561 (4th Cir. 1981) ("Unquestionably the district court was correct in placing the burden of proof upon the defendant, since the proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." (internal quotation omitted)).

As to Defendant's challenges to the admission of his statements, the Fifth Amendment provides that "[n]o person shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This protection applies not only to courtroom proceedings, but to out-of-court, custodial interrogations. Miranda v. Arizona, 384 U.S. 436, 467–68 (1966). In the case of either formal arrest or restraint of an individual's freedom of movement tantamount to formal arrest, Miranda warnings are required. Id.

As above, the moving party bears the burden of production and persuasion. However, once the movant has established by a showing of initial facts that a confession was obtained while he was under custodial interrogation, the government then has the ultimate burden of proving that the defendant was given a Miranda warning and/or voluntarily waived his privilege against self-incrimination. United States v. de la Fuente, 548 F.2d 528, 533 (5th Cir. 1977).

IV. ANALYSIS

Defendant argues that the firearm, magazine, and ammunition seized from him should be excluded because the items were illegally obtained as the result of an unlawful search and seizure. Defendant also argues all of the statements he made after he was allegedly in custody must be suppressed. ECF No. 11, at 6. In support of this, Defendant makes three specific arguments: (1) because his alleged initial detention was "based upon the report of an unnamed,

anonymous party who, without more, allegedly informed the bartender [of the bar the Defendant was at] that [the Defendant] possessed a firearm," id. at 7, the detention amounted to an unlawful seizure; (2) because the police officers who approached Defendant did not have a reasonable, articulable suspicion that he was armed and presently dangerous, the search of Defendant was unlawful, id. at 8; and (3) because Defendant was in a custodial interrogation when he was approached by the police officers but was not given a Miranda warning, the statements made by Defendant while in police custody must be suppressed, id. at 10. Each of these arguments are considered in turn.

A. UNLAWFUL SEIZURE/INVESTIGATIVE STOP

1. Legal Standard

An officer may stop and briefly detain a person for investigative purposes when there is reasonable suspicion, based on articulable facts, that criminal activity is afoot. Terry v. Ohio, 392 U.S. 1, 30 (1968). Whether there is a reasonable suspicion depends on the totality of the circumstances, including the information known to the officer and any reasonable inferences to be drawn at the time of the stop. United States v. Arvizu, 534 U.S. 266 (2002).

The Fourth Circuit has described reasonable suspicion as a "common-sensical proposition" that "credit[s] the practical experience of officers who observe on a daily basis what transpires on the street." United States v. Lender, 985 F.2d 151, 154 (4th Cir. 1993). As the intrusion created by an investigative stop is minimal, the reasonable suspicion standard "does not need to rise to the level of probable cause to survive scrutiny under the Fourth Amendment," and thus may be based on information "less reliable than that required to show probable cause." United States v. Perrin, 45 F.3d 869, 872 (4th Cir. 1995). See also United States v. Glover, 662 F.3d 694, 698–700 (4th Cir. 2011) (observation by police of man watching and then approaching

gas station attendant at 4:40am in high crime area sufficient to justify stop-and-frisk).[2]

However, an officer cannot rely on a "mere hunch," Arvizu, 534 U.S. at 274, or an uncorroborated anonymous tip, J.L., 529 U.S. at 270–74, to establish reasonable suspicion. For example, J.L. held that an anonymous telephone tip that a young black male at a bus stop wearing a plaid shirt was carrying a gun was not sufficient on its own to establish reasonable suspicion. Nonetheless, information from an anonymous source can establish reasonable suspicion when it includes "sufficient indicia of reliability," United States v. Elston, 479 F.3d 314, 318 (4th Cir. 2007).

By way of background, the Court will discuss anonymous tips even though the initial 911 caller—despite noting that he did not wish to speak with anyone from the Police Department—nonetheless disclosed his personal information, including his first name and contact number. Whether an anonymous tip contains a sufficient indicia of reliability depends on the totality of the circumstances. The Supreme Court has distinguished between "details [given by a tipster] relating . . . to easily obtained facts [such as a physical description of the suspect] and conditions existing at the time of the tip" as opposed to "future actions of third parties ordinarily not easily predicted." United States v. Bryant, 654 Fed. App'x 622, 626 (4th Cir. 2016) (internal quotations and citations omitted). Easily obtained facts are "of little value because anyone can observe and

[2] A number of factors have been noted as properly contributing to reasonable suspicion, including: (1) presence in a high crime area, United States v. Johnson, 599 F.3d 339, 345 (4th Cir. 2010); (2) informant tips and information, including anonymous tips if there has been some independent corroboration of the information, Alabama v. White, 496 U.S. 325, 329–30 (1990); (3) lateness of the hour, United States v. Lender, 985 F.2d 151, 154 (4th Cir. 1993); (4) observation by law enforcement of what appears to be criminal conduct based on their experience, Terry, 392 U.S. at 22–23; (5) evasive conduct, United States v. Smith, 396 F.3d 579, 585–87 (4th Cir. 2005); (6) furtive behavior, United States v. Sims, 296 F.3d 284, 285–87 (4th Cir. 2002) (when taken together with observation of individual fitting description); and (7) "observing a bulge . . . in a suspect's clothing . . . even if the suspect was stopped only for a minor [traffic] violation," United States v. Baker, 78 F.3d 135, 137 (4th Cir. 1996). However, neither being in a high crime area by itself nor unprovoked flight by itself is enough to constitute reasonable suspicion, Illinois v. Wardlow, 528 U.S. 119, 124 (2000), but each is a relevant factor; thus, when they occur together, there is reasonable suspicion to support a Terry stop. United States v. Mayo, 361 F.3d 802, 804–07 (4th Cir. 2004). Similarly, a refusal to cooperate, "without more, does not furnish the minimal level of objective justification needed for a detention or seizure." Florida v. Bostick, 501 U.S. 429, 437 (1991).

report unremarkable conditions existing at the time of a call, such as the color and location of [a] car" whereas predictive information "increases the reliability of a tip by demonstrating inside information—a special familiarity with [the suspect's] affairs." Id.

The tip, if corroborated by other information not obtained from the anonymous caller, may exhibit a "sufficient indicia of reliability to provide suspicion to make the investigatory stop." Perrin, 45 F.3d at 872 (internal quotations and citations omitted). For example, in Perrin, police officers—upon receiving an anonymous call that cocaine was being sold at an apartment complex—corroborated the tip based on information outside of the scope of the call, including through the officer's previous experience with the defendant, that the defendant had been the subject of a similar anonymous tip three days earlier, that the area in which the cocaine was being sold was the scene of frequent drug activity, that the calls offered detailed information about the defendant but contained sufficiently different details to suggest the calls "were made either by two different people or by one individual who knew a substantial amount about [the defendant]," and that the police officers "knew for a fact" that it was the defendant they were approaching when they went to the apartment complex. 45 F.3d at 871–73.

However, corroboration of "predictive information is [not] the only way to assess the reliability of an anonymous tip." United States v. Perkins, 363 F.3d 317, 324–25 (4th Cir. 2004). Rather, where an officer has objective reasons to believe such a tip has an indicia of reliability, the officer may act on the tip to investigate further "even without the presence of predictive information." Id. For example, in Perkins, 363 F.3d at 321–29, the Fourth Circuit found an anonymous tip reliable where the officer knew the area of the home in front of which the reported criminal activity was taking place to be a "high-crime, drug ridden neighborhood"; the officer had taken part in or four or five drug investigations in the area and the house in question

was a known drug house under investigation; the unnamed caller had described "two white males pointing rifles in various directions" in the front yard of the home and described the car in which they sat; the caller was reasonably assumed to be a resident who lived across the street who had previously provided reliable tips; and police observed males meeting the caller's description.[3] The Fourth Circuit has also afforded credibility to face-to-face tips. United States v. Lawing, 703 F.3d 229, 237 (4th Cir. 2012).

The use of the 911 system is also a factor to be considered in assessing the reliability of a tip. As the 911 system has features "that allow for identifying and tracing callers," it "thus provide[s] some safeguards against making false reports with immunity." Navarette v. California, 134 S. Ct. 1683, 1689–90 (2014) (holding that the use of the 911 system is a relevant circumstance to justify an officer's reliance on the information reported in the 911 call)

Finally, the Fourth Circuit does not appear to have directly addressed a Terry stop based on a violation of a law like Va. Code Ann. § 18.2–308.012, in which individuals who carry a concealed weapon into a restaurant or bar licensed to serve alcohol may not themselves consume alcohol. However, in cases in which officers suspect an individual has been driving while intoxicated, the Fourth Circuit has upheld the officer's detection of the odor of alcohol on the defendant as a fact supporting "the investigatory detention of [the suspect] for a reasonable period of time to ascertain whether he was operating a vehicle under the influence of alcohol." United States v. Perry, 20 Fed. App'x 97, 103 (4th Cir. 2001).

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[3] Similarly, in United States v. Quarles, 330 F.3d 650, 650–55, a 911 operator received a call reporting that the defendant had a gun in the bag he was carrying. The caller, who used a cell phone and was observing the defendant as he spoke, described the defendant's appearance, clothing, companions, and exact location. The defendant argued, citing J.L., that the 911 call was no more than an anonymous tip that could not establish the reasonable suspicion required. The Fourth Circuit explained, however, that the 911 call in that case did not qualify as an anonymous tip as the caller identified himself to the dispatcher; arranged for the police to meet with him after the call to verify the information; stayed on the phone for fourteen minutes observing the defendant and providing the dispatcher with information; and gave the defendant's name to the police, as well as other information establishing his connection to the defendant. Id.

2. Parties' Arguments

Defendant argues that the evidence should be excluded because the initial detention of Defendant was based on an anonymous report that was not corroborated by the officers prior to their approach of Defendant, thus amounting to an unlawful detention. ECF No. 11, at 7. Although the caller in the first 911 call gave his name and phone number, Defendant argues that because the caller expressed a desire not to speak with the police officers, the call amounted to an anonymous tip. Furthermore, Defendant argues, "[n]o predictive information was ever provided to the Newport News police officers." Id.

In addition, Defendant argues that "[e]ven the bartender advised Newport News police officers that he actually never personally observed a gun on [Defendant's] person" and that "[i]t is also clear that the Newport News police officers never personally observed a firearm on [Defendant] prior to the search of his person." Id. Furthermore, Defendant argues, Defendant "remained non-threatening, polite, cooperative, and compliant with the police officers, and never engaged in any unusual conduct or behavior." Id. at 8. The officers also did not observe the Defendant holding a drink or a drink on the table next to Defendant. Thus, altogether, Defendant argues the officers did not verify the information in the call to service and Defendant did not behave in any fashion that would have provided the officers with a reasonable suspicion that Defendant was violating state and local law.

Government argues that the Terry stop was justified because Officer Lipscomb reasonably suspected that Defendant was violating state and local law (including consuming alcohol while carrying a concealed weapon at a bar licensed to serve alcohol, in violation of Va. Code. Ann. § 18.2–308.012, and possessing a weapon without a concealed carry permit, in violation of Va. Code Ann. § 18.2–308(A)). Government notes that the officers received a call for service from dispatch because of two 911 calls about a white male with a gun drinking at the

bar; in the first call, the caller gave his first name, a contact number, and identified the bar, while in the second call, an officer relayed information provided to him by the bartender at the bar. ECF No. 12, at 8. Furthermore, Government notes, the use of the 911 emergency system is another indicator of veracity, as discussed above. Navarette, 134 S. Ct. at 1690 (2014).

In addition, Government notes that the officers confirmed the information from the calls with the bartender before approaching the Defendant: the bartender said he had seen a bulge on the man but not the actual gun; said that the patrons had told him they had seen a gun; said that the man was a tall, white male with short hair wearing a striped shirt; and said that the man was drinking. This physical description matched the description in the police dispatch. Furthermore, Government argues, Defendant's subsequent behavior with the officers "established a reasonable suspicion that he was engaged in criminal activity." ECF No. 12, at 9.

3. Analysis

Upon review of parties' arguments, the Court finds that the totality of the circumstances gave the officers reasonable suspicion of criminal activity sufficient to briefly detain Defendant for investigative purposes. First, the dispatch was not based on a single, anonymous tip. Rather, it was based on two 911 calls that, in combination with each other and the other factors present that night, supported reasonable suspicion. In the first call, the caller identified himself and provided a phone number, and also described how he knew the alleged crime was occurring (i.e., he was at the bar and was observing the activity and the reactions of other patrons). Even though the caller may have wished to remain anonymous, he was not as he provided both his first name and a phone number. The second call was from another police officer, who was reporting the concerns of the bartender and other patrons. The annotations in the dispatch itself indicated that patrons had observed a gun and that the individual with the gun appeared to be intoxicated.

When the officers arrived at the bar, they corroborated some the information with a

bartender there, who offered a physical description of the Defendant that matched the information in the dispatch. As the information in contained in each of the 911 calls was corroborated by sources independent of each call, the 911 calls together possessed a sufficient indicia of reliability to contribute to the officers' reasonable suspicion.

The officers' experience also contributed to the development of reasonable suspicion. Both Officer Lipscomb and Officer Barnes had previously responded to calls for service concerning guns, and the bar itself was known to the Newport New Police Department for the very sort of activity the officers had received a dispatch for.

Finally, Defendant's behavior also contributed to the officers' reasonable suspicion. When the officers approached the Defendant, they observed him leaning to his right side (where the gun was previously reported to have been), detected the consumption of alcohol by the Defendant, and noted Defendant's refusal to answer their questions. Each of these observations alone would not have been sufficient to establish reasonable suspicion, but taken together with the information provided in the dispatch and the officers' previous experience with the bar, the totality of the circumstances supported reasonable suspicion of criminal activity. Mayo, 361 F.3d at 804–06. Accordingly, the Court finds that the officers' investigative stop of Defendant was not unlawful.

B. UNLAWFUL SEARCH

Defendant argues because the police officers who approached Defendant did not have a reasonable, articulable suspicion that he was armed and presently dangerous, the search of Defendant was unlawful.

1. Legal Standard

If reasonable suspicion to stop a suspect exists, "in connection with such a seizure or stop, if presented with a reasonable belief that the person may be armed and presently dangerous

[to the officer], an officer may conduct a protective frisk" to search for concealed weapons. United States v. Black, 525 F.3d 359, 364 (4th Cir. 2008). In contrast to the Terry stop's purpose of determining whether a crime is afoot, a protective frisk is permitted to ensure officer safety. Mimms, 434 U.S. at 112. A reasonable belief that the suspect is armed and dangerous must also be based on a totality of the circumstances assessment by the police officer. Black, 525 F.3d at 366.

The Fourth Circuit recently articulated two requirements for conducting a lawful frisk in connection with an investigative stop: first, that the officer has conducted a lawful stop, such as a traditional Terry stop; and second, that during the valid but forced encounter, "the officer reasonably suspect[ed] that the person is armed and therefore dangerous"—thereby linking "armed" and "dangerous." United States v. Robinson, Case No. 14-4902, at 15–16 (4th Cir. Jan. 23, 2017). In setting forth these requirements, the Fourth Circuit rejected the argument that, when an officer possesses a reasonable suspicion that a suspect is carrying a weapon and is about to pat down the suspect during a traffic stop, the officer must also possess a reasonable suspicion that the suspect is independently dangerous to the officer. Id. at 10. In rejecting this argument, the Fourth Circuit recognized that "whenever police officers use their authority to effect a stop"—whether a traditional Terry stop or a traffic stop—"they subject themselves to a risk of harm." Id. at 11. The Fourth Circuit then emphasized that the presence of a weapon during a forced police encounter inherently presents a danger to the police officer. Id. at 14 ("It was thus [the suspect's] status of being armed [only indicated through a bulge observed by the police officer] during a forced police encounter . . . that posed the danger justifying the frisk[.]" (citing Mimms, 434 U.S. at 112)). See also United States v. Baker, 78 F.3d 135, 147 (4th Cir. 1996).

2. Parties' Arguments

Parties' briefing and oral arguments occurred prior to the release of Robinson on January

23, 2017. Defendant argues that because the police officers did not possess a reasonable, articulable suspicion that he was both armed and presently dangerous, the evidence seized upon the officers' frisk must be suppressed. ECF No. 11, at 8. Defendant analogizes his case to J.L. (in which the Supreme Court held that a firearm seized from a defendant must be suppressed after police officers stopped and frisked him—following an anonymous tip without any predictive information—while he was not engaged in any unusual conduct). Similarly, Defendant argues, he was "simply sitting down in the pool hall area" and "watching a pool game"—"not engag[ing] in any unusual conduct or behavior." Id. Furthermore, Defendant argues, in so-called "shall issue" states like Virginia, which broadly permit public possession of firearms "even in places that serve alcohol, reasonable suspicion that a person is armed does not by itself give rise to reasonable suspicion that a person is dangerous for Terry purposes." Id. at 9. Robinson, however, rejected these very propositions. Case No. 14-4902, at 16–17 (noting that the purpose of a frisk is not to discover evidence of crime but to permit a police officer to investigate without fear of violence; accordingly, a frisk may be necessary and reasonable regardless of whether a concealed weapon violates a particular state law).

Finally, Defendant argues that "any frisk conducted by an officer must be justified only on the basis of what [the] law enforcement officer knew before they conducted the search." Id. at 10. Defendant argues that because the police officers had "no lawful basis in which to conclude that [Defendant] was armed and presently dangerous," the stop-and-frisk was unlawful, and any evidence acquired from the pat-down must be suppressed. Id. at 10.

Government argues that the officers' frisk was justified based on the reasonable suspicion, established by the facts known to the officers, that Defendant's possession of a firearm on the premises of the bar was illegal (both because the owner of the bar had banned firearms on

the premises and because Virginia state law prohibits concealed carry of a firearm while consuming alcohol at a bar). Government argues that because "[t]here is always the risk that the Terry stop will escalate into a violent confrontation between the officer and the suspect, and as long as the officer reasonably believes the suspect is armed, the Fourth Amendment permits him to minimize the risk to his safety and the safety of others with a pat down for weapons" while determining whether the possession of the firearm was illegal. ECF No. 12, at 14. Furthermore, Government argues, even if there is a separate dangerousness requirement beyond establishing that the Defendant may have been committing a crime and was armed, "a crime that involves illegal gun possession satisfies any conceivably appropriate dangerousness requirement," and "illegal firearm possession by someone who is drinking alcohol in a bar" also meets such a requirement. Id. at 14–15

3. Analysis

The Court finds that the officers' frisk of Defendant meets the two requirements articulated by Robinson: first, as previously determined, the officers engaged in a valid, forced stop of Defendant. Second, the officers reasonably suspected that the suspect was armed—and therefore reasonably suspected the Defendant was dangerous enough to warrant a protective pat-down.

Furthermore, other information known to the officers at the time of the stop-and-frisk supported the officers' reasonable suspicion that the Defendant was armed and dangerous. Both 911 calls contained reports of patrons expressing concern about Defendant, who was described "as a white male who was intoxicated and carrying a firearm." ECF No. 12, at 3. This description—in combination with Defendant's reluctance in cooperating, the lateness of the hour, and the officers' knowledge of the bar as the subject of numerous calls to service—gave the officers a reasonable, articulable suspicion that Defendant presented a danger. In this vein,

this Court notes this situation is arguably akin to Black, 525 F.3d at 364, in which the officers were justified in patting down the suspect where the officers encountered him in a high-crime area; the suspect appeared to be grasping an item in his right pocket and was reluctant to remove his hand from that pocket; the suspect appeared to be continually lying about what was in the pocket; and the officer observed a bulge in that pocket that he suspected was a firearm. Similarly, here, the bar was the subject of numerous dispatches; the Defendant leaned in to his right side—which the officers knew was where the gun was reportedly located—as the officers approached him; Defendant refused to answer the officers' questions about whether he was carrying a weapon; and the officers detected that the Defendant had consumed alcohol. Accordingly, the Court finds that the officers possessed reasonable suspicion that Defendant was armed and dangerous and that the frisk was not unlawful.

C. CUSTODIAL INTERROGATION

Defendant argues because Defendant was in a custodial interrogation when he was approached by the police officers but was not given a Miranda warning, the statements made by Defendant while in police custody must be suppressed.

1. Legal Standard

At least since Berkemer v. McCarty, 468 U.S. 420, 434 (1984), "Miranda warnings have not been required when a person is questioned during a [Terry] stop . . . ." United States v. Leshuk, 65 F.3d 1105, 1108–09 (4th Cir. 1995). As the Fourth Circuit has noted, "instead of being distinguished by the absence of any restriction of liberty, Terry stops differ from custodial interrogation in that they must last no longer than necessary to verify or dispel the officer's suspicion. . . . From these standards, we have concluded that drawing weapons, handcuffing a suspect, placing a suspect in a patrol car for questioning, or using or threatening to use force does not necessarily elevate a lawful stop into a custodial arrest for Miranda purposes." Leshuk, 65

F.3d at 1109–1110. Thus, where the officers did not draw weapons, identified themselves as police officers, informed defendants they were investigating a nearby drug site, did not engage in coercive or intimidating questioning, and engaged in questioning reasonably related to the purpose of the stop, the Terry stop did not become a custodial interrogation. Rather, officers' actions "amounted to a limited Terry stop necessary to protect their safety, maintain the status quo, and confirm or dispel their suspicions." Id. at 1110.

However, a Terry stop may progress into a custodial interrogation. The test for determining whether an individual is under a warrantless arrest is whether, under the totality of the circumstances, the individual's freedom of action is curtailed to a degree associated with formal arrest. Park v. Shiflett, 250 F.3d 843 (4th Cir. 2001). See also Miranda, 384 U.S. at 444 (noting a custodial interrogation occurs when there is "questioning initiated by law enforcement officers after a person has been taken into custody or deprived of his freedom of action in a significant way").[4]

2. Parties' Arguments

Defendant argues that because there is no doubt that when he "was not free to leave" throughout his encounter with the officers, he was in a custodial interrogation and that, because he was given no Miranda warning, "all statements made by [him] while in police custody must be suppressed." ECF No. 11, at 10. In support of this, Defendant notes he was approached and escorted outside by four police officers, and that he was encircled by five officers outside the bar while they questioned him. He was also handcuffed, after which officers continued to question him and pat him down. Id.

[4] The determination of when a defendant is in custody is "objective" and focuses on "how a reasonable man in the suspect's position would have understood his situation." Davis v. Allsbrooks, 778 F.2d 168, 171 (4th Cir. 1985) (internal citations and quotations omitted). See also Berkemer v. McCarthy, 468 U.S. 420, 442 (1984) ("In the absence of formal arrest, the trial court must determine whether a suspect's freedom of movement was sufficiently curtailed by considering how a reasonable man in the suspect's position would have understood his situation." (internal quotation omitted)).

Government argues that Defendant was not in custody at any time during the stop-and-frisk. Government points to United States v. Elston, 479 F.3d 314, 320 (4th Cir. 2007), which held that where officers reasonably believed that the defendant was armed and dangerous, they did not exceed the limits of a Terry stop by drawing their weapons and placing the defendant in handcuffs, nor did this initial detention by the officers rise to the level of a custodial arrest. As the stop lasted no longer than necessary to verify or dispel the officer's suspicion—distinguishing it from custodial interrogation—the Defendant was not under arrest. Leshuk, 65 F.3d at 1109. Furthermore, here, as in United States v. Pope, the officers "properly removed the gun from defendant's possession pending his presentation of a concealed weapons permit. And when defendant failed to produce such a permit, the deputies took him into custody." 212 Fed. App'x 214, 218 (4th Cir. 2007). Finally, Government argues that although Defendant's arms were restrained in handcuffs, his brief conversation with the officers did not amount to custodial interrogation.

3. Analysis

Based upon parties' arguments, the Court finds that the officers' encounter with Defendant did not progress from a Terry stop into a custodial interrogation. The questioning was directly related to the purpose of the stop; the encounter only lasted as long as necessary to confirm the officers' suspicions; and even the handcuffing of Defendant did not amount to a custodial situation as handcuffing does not necessarily transform a stop into a custodial arrest when the handcuffing is related to the purposes of the stop-and-frisk, including maintaining officer safety. Leshuk, 65 F.3d at 1109–10. Furthermore, it does not appear the officers engaged in unduly coercive behavior; although encircling the Defendant with officers would, in other situations, most likely create a situation in which an individual would not feel free to leave—thus amounting to a custodial interrogation—here, it does not appear that such behavior, in

combination with the other factors present, elevated the situation to a custodial interrogation. Accordingly, the Court finds that the failure to give Defendant a Miranda warning was not unlawful and therefore does not warrant suppression of Defendant's statements.

V. CONCLUSION

For the reasons stated herein, Defendant's Motion to Suppress is **DENIED**. ECF No. 11.

The Clerk is **DIRECTED** to forward a copy of this Order to all Counsel of Record.

IT IS SO ORDERED.

/s/
Robert G. Doumar
Senior United States District Judge
UNITED STATES DISTRICT JUDGE

Norfolk, VA
January 26, 2017