

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 17-3508

Leonard Dwayne Hill

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the District of Minnesota - Minneapolis
(0:17-cv-02282-ADM)

ORDER

The petition for rehearing by the panel is denied.

April 11, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 17-3508

Leonard Dwayne Hill

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the District of Minnesota - Minneapolis
(0:17-cv-02282-ADM)

JUDGMENT

Before WOLLMAN, KELLY and ERICKSON, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

March 08, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States of America, Plaintiff, v. Leonard Dwayne Hill, Defendant.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA
2017 U.S. Dist. LEXIS 174092
Criminal No. 14-276 ADM/SER, Civil No. 17-2282 ADM
October 20, 2017, Decided
October 20, 2017, Filed

Editorial Information: Subsequent History

Petition denied by Hill v. United States, 2018 U.S. App. LEXIS 9079 (8th Cir. Minn., Apr. 11, 2018)

Editorial Information: Prior History

United States v. Hill, 835 F.3d 796, 2016 U.S. App. LEXIS 15910 (8th Cir. Minn., Aug. 29, 2016)

Counsel Benjamin Bejar, Assistant United States Attorney, United States
Attorney's Office, Minneapolis, MN, on behalf of Plaintiff.
Leonard Dwayne Hill, Pro se.

Judges: ANN D. MONTGOMERY, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: ANN D. MONTGOMERY

Opinion

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This matter is before the undersigned United States District Judge for a ruling on Defendant Leonard Dwayne Hill's ("Hill") 28 U.S.C. § 2255 Motion [Criminal Docket No. 131] ("§ 2255 Motion"), and Application to Proceed In Forma Pauperis [Docket No. 132] ("IFP Application").¹ For the reasons set forth below, Hill's § 2255 Motion is granted in part and denied in part, and his IFP Application is denied as moot.

II. BACKGROUND

On August 6, 2015, a jury returned a verdict finding Hill guilty of being a felon in possession of ammunition in violation of 18 U.S.C. §§ 921(a)(17)(A), 922(g)(1) and 924(e)(1). Jury Verdict [Docket No. 88]. The Presentence Investigation Report ("PSR") determined that Hill's conviction under 18 U.S.C. § 922(g) qualified him as an armed career criminal under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(2), and he was therefore subject to a mandatory minimum sentence of 180 months imprisonment. PSR ¶¶ 22, 87. The ACCA designation was premised upon three prior convictions for Second Degree Burglary, two prior convictions for Domestic Assault, and one prior conviction for Theft from Person. PSR ¶ 22.2 The PSR concluded that Hill's sentencing guideline range was 262 months to 327 months imprisonment. *Id.* ¶ 88.

On September 10, 2015, the Court held a sentencing hearing and adopted the PSR sentencing

determinations without change. Min. Entry [Docket No. 102]; Statement Reasons [Docket No. 104] at 1. As a result, Hill was adjudicated to be an armed career criminal under the ACCA. The Court imposed a 192-month sentence, a downward variance from the Guidelines range of 262 months to 327 months imprisonment. Sentencing J. [Docket No. 103] at 2; Statement Reasons at 1, 3.

Hill appealed his conviction, arguing that 1) the Government constructively amended the Indictment; 2) the Government failed to establish that the ammunition was in or affecting interstate commerce; and 3) the de minimis connection to interstate commerce was insufficient to satisfy the Commerce Clause. United States v. Hill, 835 F.3d 796, 797-98 (8th Cir. 2016). On August 29, 2016, the Eighth Circuit affirmed Hill's conviction. Id. at 800. The Mandate [Docket No. 127] was issued on October 6, 2016, and Hill's writ of certiorari to the Supreme Court was denied on January 17, 2017. See Hill v. United States, 137 S. Ct. 820, 196 L. Ed. 2d 605 (2017).

On June 26, 2017, Hill filed the § 2255 Motion and the IFP Application. In the § 2255 Motion, Hill argues that 1) the Court lacked territorial jurisdiction over the offense of conviction, and that the ammunition was not manufactured outside of Minnesota; 2) his prior felony convictions no longer qualify as violent felony convictions under the ACCA; 3) he received ineffective assistance of counsel when his attorney failed to file a motion to dismiss the Indictment; and 4) the de minimis nexus of his offense to interstate commerce is unconstitutional.

On August 18, 2017, the Government filed a Response [Docket No. 137], arguing that Hill's first claim fails because the offense conduct occurred in St. Paul, Minnesota, and the ammunition's propellant powder was manufactured outside of Minnesota. The Government further argues that Hill's ineffective assistance of counsel claim fails because the validity of the Indictment was upheld at trial and on appeal. Therefore, trial counsel's failure to file a motion to dismiss the Indictment was not ineffective because any such motion would have been futile. Finally, the Government argues that Hill's interstate commerce arguments are not cognizable under § 2255 because they were fully litigated at trial and on appeal.

With regard to Hill's sentencing argument, the Government concedes that Hill must be resentenced. Eighth Circuit decisions subsequent to Hill's sentencing and appeal establish that Hill no longer has three qualifying prior felony convictions that qualify him as an armed career criminal.

III. DISCUSSION

A. Section 2255

28 U.S.C. § 2255 provides a prisoner in federal custody a limited opportunity to collaterally attack the constitutionality or legality of his sentence, as well as to argue that "the court was without jurisdiction to impose such a sentence." Relief under § 2255 is reserved for correcting "a fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure." United States v. Timmreck, 441 U.S. 780, 783, 99 S. Ct. 2085, 60 L. Ed. 2d 634 (1979).

B. Jurisdiction

Hill argues that the Court lacked "territorial" and "legislative" jurisdiction over the offense conduct. Hill does not articulate specifically how jurisdiction was lacking over a crime that was committed in St. Paul, Minnesota. The cases cited by Hill are inapposite, involving circumstances wholly unrelated to this case. See, e.g., United States v. Prentiss, 206 F.3d 960, 964-974 (10th Cir. 2000) (holding that Indictment was deficient for failing to allege the Indian or non-Indian status of the defendant and victim, which were essential elements of the crime charged). This claim does not entitle Hill to relief.

C. Ineffective Assistance of Counsel

Hill argues that his trial counsel was ineffective because counsel did not move to dismiss the Indictment for failure to state an offense. According to Hill, since the Indictment charged that he illegally possessed rounds of Federal brand ammunition that were manufactured in Minnesota, he could not have possessed ammunition that affected interstate commerce, as the Indictment charged.

In Strickland v. Washington, the Supreme Court set forth the standard for claims of ineffective assistance of counsel. 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To properly demonstrate a claim, a defendant must show that his attorney's representation fell below an objective standard of reasonableness. Id. at 687-88. The defendant must also demonstrate that a reasonable probability exists that but for the attorney's errors, the result of the proceeding would have been different. Id. at 694. "[W]hen reviewing an ineffective-assistance-of-counsel claim, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Woods v. Donald, 135 S. Ct. 1372, 1375, 191 L. Ed. 2d 464 (2015) (quotations omitted).

Hill's ineffective assistance of counsel claim fails because he cannot demonstrate that but for his counsel's errors, the result of his proceeding would have been different. Hill's attorney unsuccessfully challenged the sufficiency of the Indictment both before and after the jury returned its Verdict. See Trial Tr. Vol II [Docket No. 118] at 221:25-227:17 (arguing that the Indictment was deficient); Second Mot. Acquittal [Docket No. 90] at 5 (arguing that the Government's evidence created a fatal constructive amendment of the Indictment); Hill, 835 F.3d at 799. Any further motion by Hill's trial attorney attacking the sufficiency of the Indictment would have been unsuccessful. Therefore, this claim also does not entitle Hill to any relief because the outcome of the proceeding would not have been different.

D. Interstate Commerce

Hill again argues that the Government failed to prove the interstate commerce requirement of § 922(g). Hill contends that the ammunition's nexus to interstate commerce is de minimis because only one component of the live rounds of ammunition Hill possessed was manufactured outside of Minnesota. The Government responds that the Eighth Circuit has held that ammunition assembled from components which had traveled in interstate commerce satisfies the interstate commerce requirement of § 922(g) purposes even though the ammunition itself had been assembled intrastate. The Government also argues that because this claim was litigated on appeal it is not cognizable under § 2255.

Section 2255 generally may not "be used to relitigate matters decided on direct appeal." Sun Bear v. United States, 644 F.3d 700, 702 (8th Cir. 2011) (citing Davis v. United States, 417 U.S. 333, 346-47, 94 S. Ct. 2298, 41 L. Ed. 2d 109 (1974)). "Claims which were raised and decided on direct appeal cannot be relitigated on a motion to vacate pursuant to 28 U.S.C. § 2255." United States v. Shabazz, 657 F.2d 189, 190 (8th Cir. 1981) (per curiam).

The Eighth Circuit has previously addressed and rejected Hill's argument that the ammunition charged in the Indictment did not travel in interstate commerce. See Hill, 835 F.3d at 800 (holding that Hill's argument that "the de minimis connection to interstate commerce is insufficient to satisfy the Commerce Clause" "is foreclosed by binding precedent"). Because this issue was squarely raised and decided on direct appeal, it cannot be relitigated in this § 2255 Motion.

E. Prior Felony Convictions

Hill and the Government agree that Hill no longer has sufficient qualifying felony convictions to support his designation as an armed career criminal under the ACCA. Hill is thus entitled to

resentencing at a date to be determined.³

F. IFP Application

The Court "may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such [person] possesses that the person is unable to pay such fees or give security therefor." 28 U.S.C. § 1915(a). No fee is required, however, to file a § 2255 petition. See, e.g., United States v. Schultz, No. 13-214, 2015 U.S. Dist. LEXIS 137217, 2015 WL 5853117, at *3 (D. Minn. Oct. 7, 2015). Thus, Hill's IFP Application is denied as moot.

IV. CERTIFICATE OF APPEALABILITY

The Court may grant a certificate of appealability only where a defendant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); Tiedeman v. Benson, 122 F.3d 518, 523 (8th Cir. 1997). To make such a showing, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). The Court finds it unlikely that another court would decide the issues raised in this 2255 Motion differently, or that any of the issues raised in Hill's petition would be debatable among reasonable jurists. Thus, the Court declines to grant a certificate of appealability.

V. CONCLUSION

Based upon the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Defendant Leonard Dwayne Hill's 28 U.S.C. § 2255 Motion [Docket No. 131] is **GRANTED in part and DENIED in part**;
2. Hill's Application to Proceed In Forma Pauperis [Docket No. 132] is **DENIED** as moot; and
3. A certificate of appealability shall not issue.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

/s/ Ann D. Montgomery

ANN D. MONTGOMERY

U.S. DISTRICT JUDGE

Dated: October 20, 2017.

Footnotes

1

All docket citations are to the Criminal Docket.

2

The Government notes that Hill also has a prior conviction for Third-Degree Riot / Crime Committed for Benefit of a Gang. PSR ¶ 45. This prior conviction was not identified in the PSR as a predicate

conviction for ACCA purposes. Since the Government agrees that this conviction does not qualify as a predicate violent felony for ACCA purposes, its exclusion from the PSR's list of qualifying prior felonies is immaterial.

3

Hill challenges the Government's contention that his non-ACCA designation, offense level, and criminal history result in a sentencing guideline range of 110 to 137 months imprisonment. Hill's arguments, and the Government's position on his new guideline range, are premature. The Court will order a revised Presentence Investigation Report and will provide Hill and the Government an opportunity to object to the Report's conclusions.

United States of America, Plaintiff, v. Leonard Dwayne Hill, Defendant.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA
2015 U.S. Dist. LEXIS 88436
Criminal No. 14-276 ADM/SER
July 8, 2015, Decided
July 8, 2015, Filed

Editorial Information: Subsequent History

Decision reached on appeal by United States v. Hill, 835 F.3d 796, 2016 U.S. App. LEXIS 15910 (8th Cir. Minn., Aug. 29, 2016)

Editorial Information: Prior History

United States v. Hill, 2015 U.S. Dist. LEXIS 89114 (D. Minn., June 26, 2015)

Counsel For Plaintiff: Benjamin Bejar, Esq., Assistant United States Attorney,
United States Attorney's Office, Minneapolis, MN.

For Defendant: Robert D. Richman, Esq., St. Louis Park, MN.

Judges: ANN D. MONTGOMERY, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: ANN D. MONTGOMERY

Opinion

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This matter is before the undersigned United States District Judge for a ruling on Leonard Dwayne Hill's ("Hill") Objection [Docket No. 63] to Magistrate Judge Steven E. Rau's June 26, 2015 Report and Recommendation [Docket No. 62] ("R&R"). In the R&R, Judge Rau recommends denying Hill's Motion to Suppress Statements, Admissions, and Answers [Docket No. 46] and Motion to Suppress Evidence Obtained as a Result of Search and Seizure [Docket No. 47]. After a thorough de novo review of the record and for the reasons stated below, Hill's Objection is overruled and Judge Rau's R&R is adopted.

II. BACKGROUND¹

Near midnight on July 9, 2014, St. Paul Police Officers Michael Soucheray ("Officer Soucheray") and Chris Rhoades ("Officer Rhoades") responded to an emergency call of shots fired at Willard's Bar, located near North Grotto Street and Edmund Avenue West in St. Paul, Minnesota. The Officers arrived at the scene within minutes of the 911 call. Officer Soucheray entered Willard's Bar and Officer Rhoades walked south on North Grotto Street. Officer Rhoades located several 9-millimeter shell casings on the sidewalk near the bar, as well as additional casings further south.

Witnesses at the scene informed Officer Rhoades that two groups of people had been shooting at each other and had fled. One witness requested a private conversation with Officer Rhoades. This

person informed Officer Rhoades that he had witnessed the "entire event" and that an individual Officer Rhoades had just spoken with had been with the shooter. Tr. Mots. Hr'g [Docket No. 61] ("Tr.") 16:15-16. The witness described the individual with the shooter as wearing a red shirt and shorts. The witness described the shooter as a heavyset black male with a red shirt. Finally, the witness informed Officer Rhoades that the shooter had opened the doors of a nearby parked van and said that "he was going to get more ammunition, and then closed the door." Id. 44:25-45:1.

While Officer Rhoades was talking with witnesses outside, Officer Soucheray was viewing surveillance footage inside Willard's Bar and was providing radio updates as he watched. The black and white video showed the area outside of the bar and filmed someone shooting a firearm. Officer Soucheray radioed that the shooter was a black male, probably with a heavy build, wearing a light-colored t-shirt, long shorts, sneakers, and no hat.

Officer Rhoades walked to the van identified by the witness and peered inside. While inspecting the van, Officer Rhoades noticed a man, later identified as Hill, walking nearby who fit the description of the shooter provided by the witness and corroborated by the video surveillance. Hill's walking pace and gait indicated to Officer Rhoades that he was likely intoxicated. As Hill walked past, Officer Rhoades asked him how he was doing. Hill offered a slurred and unintelligible response. When asked where he was coming from, Hill responded that he was coming from a Wendy's restaurant. Officer Rhoades determined this response was suspicious because the nearest Wendy's restaurant was over a half-mile away and the individual was not carrying a food bag. Officer Rhoades then asked Hill why he was walking if the van was his, to which Hill responded that the van was in fact his.

At this point, Officer Rhoades believed Hill was the shooter. As Officer Rhoades was placing Hill in handcuffs, he noticed a bulge in Hill's front pocket. Officer Rhoades next conducted a open hand pat-down over Hill's outer clothing, starting with the bulging pocket. From the feel of the pat-down, Officer Rhoades surmised the pocket was full of loose rounds of ammunition. Officer Rhoades testified that he was able to make this determination based on his experience at the shooting range, and that he was "pretty familiar with what a pocket full of ammo feels like." Id. 26:15-17. Officer Rhoades eventually removed twenty-three rounds of 9-millimeter ammunition from Hill's pocket.² Officer Soucheray conferred again with Officer Rhoades and "confirmed that the male . . . was the one he had seen on the surveillance footage." Id. 29:6-8.

III. DISCUSSION

A. Standard of Review

"A district judge may refer to a magistrate judge for recommendation a defendant's motion to dismiss or quash an indictment or information, a motion to suppress evidence, or any matter that may dispose of a charge or defense." Fed. R. Crim. P. 59(b)(1). In reviewing a magistrate judge's report and recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C); see also D. Minn. L.R. 72.2(b). A district judge "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." Id.

B. Motion to Suppress Statements, Admissions, and Answers

Judge Rau informed the parties at the suppression hearing that he would only address the issues identified and supported by the parties in their briefing. Tr. 70:20-71:2. Since Hill did not identify or advance argument that any statements should be suppressed, Judge Rau correctly recommended that Hill's Motion to Suppress Statements be denied.

C. Motion to Suppress Evidence

In his Objection, Hill maintains that Judge Rau erred in concluding that Officer Rhoades had a reasonable, particularized suspicion that Hill was armed and that Officer Rhoades did not exceed the scope of a Terry frisk under Minnesota v. Dickerson, 508 U.S. 366, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993).

1. Officer Rhoades had a reasonable, particularized suspicion that Hill was armed

Hill does not contend that Officer Rhoades lacked constitutional authority to conduct a Terry stop. Hill does argue, however, that Officer Rhoades' pat-down violated the Fourth Amendment. Hill contends that Officer Rhoades' pat-down was unlawful because he received information from a witness of unknown reliability. Specifically, Hill argues that although the witness identified the shooter as wearing a red shirt, this fact was not reliable because there was a second man in a red t-shirt at the scene. Hill also contends that Officer Soucheray's description from the surveillance footage that the shooter was wearing a light-colored t-shirt undermines Officer Rhoades' suspicion of Hill because Hill's t-shirt was bright red. As Judge Rau correctly noted, Hill's arguments are without merit.

While the Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," U.S. Const. amend. IV, "law enforcement officers may make an investigatory stop if they have a reasonable and articulable suspicion of criminal activity." United States v. Bustos-Torres, 396 F.3d 935, 942 (8th Cir. 2005) (citing Terry v. Ohio, 392 U.S. 1, 25-31, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). Once an investigatory stop has been made, officers "may take steps reasonably necessary to protect their personal safety." United States v. Stachowiak, 521 F.3d 852, 855 (8th Cir. 2008) (quoting United States v. Shranklen, 315 F.3d 959, 961 (8th Cir. 2003)). A pat-down or "protective frisk" for officer safety is lawful when "specific articulable facts taken together with rational inferences support the reasonable suspicion that a party was potentially armed and dangerous." United States v. Binion, 570 F.3d 1034, 1039 (8th Cir. 2009) (quoting United States v. Ellis, 501 F.3d 958, 961 (8th Cir. 2007)).

Officer Rhoades' suspicion of Hill was not exclusively based on the color of his t-shirt. In speaking with witnesses outside of Willard's Bar, Officer Rhoades spoke to a black male in a red shirt. Officer Rhoades described this individual's stature as "smaller" and noted that he was wearing a hat. Tr. 18:2-9. Both the witness who requested the private conversation and Officer Soucheray described the shooter as having a "heavy build," and did not identify the shooter as wearing a hat. Id. 51:23-24. Hill matched this description; the other individual with the red t-shirt did not. With respect to the shade of the t-shirt, Officer Soucheray's description of a light-colored t-shirt is not inconsistent with the witness' statement that the shooter was wearing a red t-shirt considering the fact that the surveillance footage Officer Soucheray based his description on was in black and white.

Judge Rau addressed Hill's concerns about the witness' reliability, concluding that the witness' tip contained sufficient indicia of reliability. As Judge Rau correctly observed, the witness provided an eyewitness account of the events, provided a description of the shooter, and identified which direction the shooter had fled shortly after the events unfolded. See Navarette v. California, 134 S. Ct. 1683, 1689, 188 L. Ed. 2d 680 (2014) (noting that statements made soon after perceiving the event are "especially trustworthy"). Officer Rhoades spoke directly with the witness and was able to ask questions to assess the witness' credibility and reliability. Finally, the witness' identification was consistent with Officer Soucheray's description gleaned from the video. See United States v. Buchanan, 574 F.3d 554, 562 (8th Cir. 2009) (noting that independent corroboration increases reliability). These factors dispel the suggestion that the witness was unreliable and tainted Officer Rhoades' Terry stop and protective pat-down. Officer Rhoades thus had constitutionally permissive suspicion that Hill was armed to support his legal search of Hill.

2. Officer Rhoades' pat-down did not violate Terry

Hill next argues that Officer Rhoades' pat-down exceeded the scope of a frisk contemplated under Terry. Hill contends Officer Rhoades' assertion that he could tell from his open-handed pat-down that Hill's pocket contained ammunition should be rejected. Hill argues that Officer Rhoades was able to conclude he had ammunition in his pocket only by "manipulating" the pocket to get a sense of the size and shape of its contents. According to Hill, since there was no way Officer Rhoades could identify the ammunition from the pat-down permitted under Terry, the seizure necessarily was unlawful and the ammunition should thus be suppressed.

Terry permits a police officer to perform a limited search absent probable cause "for the discovery of weapons which might be used to harm the officer or others nearby." Terry, 392 U.S. at 26. The search may not be used as "a general exploratory search for whatever evidence of criminal activity [the officer] might find." Id. at 30. This concept was reiterated in Minnesota v. Dickerson, which noted that a Terry frisk "is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence." 508 U.S. at 373 (quoting Adams v. Williams, 407 U.S. 143, 146, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972)).

In Dickerson, an officer exceeded the scope of Terry by squeezing, sliding, and manipulating an object in a suspect's pocket, which the officer knew was not a weapon, and was then identified as a lump of crack cocaine. Id. at 378. The Supreme Court determined that "the officer's continued exploration of [Dickerson's] pocket after having concluded that it contained no weapon . . . amounted to the sort of evidentiary search that Terry expressly refused to authorize." Id. (citations omitted).

Here, Officer Rhoades' search stands in stark contrast to the search at issue in Dickerson. Officer Rhoades stated that from his pat-search, he "could immediately tell" Hill's pocket "was full of loose rounds of ammunition." Tr. 26:3-5. Hill points to no record evidence to rebut this. Officer Rhoades supported his assertion with personal experience from his firearm training. Officer Rhoades testified it was "standard practice" to carry loose ammunition in his pocket. Tr. 26:8-14. The experience with ammunition ascribes believability to Officer Rhoades' assertion that he could identify an ammunition-filled pocket without the manipulation or probing proscribed by Dickerson.

Hill also attempts to use Officer Rhoades' police report as evidence that Officer Rhoades' discovery of ammunition was not the product of the pat-down. This argument is also without merit. In his police report, Officer Rhoades stated:

As I conducted a pat search of the males [sic] pockets I could feel what felt like a large amount of ammunition in his front left pocket. I then put my hand into the pocket and confirmed the item I felt was in fact a handful of 9mm ammunition. Mem. Supp. Mot. Suppress [Docket No. 58] 5. As Judge Rau noted, this statement is not inconsistent with Officer Rhoades' claim that he could immediately identify ammunition in Hill's pocket. Judge Rau correctly concluded that Officer Rhoades was credible and his patdown did not exceed Terry.³

IV. CONCLUSION

Based upon the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Defendant Leonard Dwayne Hill's Objection [Docket No. 63] to Magistrate Judge Steven E. Rau's June 26, 2015 Report and Recommendation [Docket No. 62] is **OVERRULED**;
2. The Report and Recommendation [Docket No. 62] is **ADOPTED**;
3. Defendant's Motion to Suppress Statements, Admissions, and Answers [Docket No. 46] is

DENIED; and

4. Defendant's Motion to Suppress Evidence Obtained as a Result of Search and Seizure [Docket No. 47] is **DENIED**.

BY THE COURT:

/s/ Ann D. Montgomery

ANN D. MONTGOMERY

U.S. DISTRICT JUDGE

Dated: July 8, 2015

Footnotes

1

The following facts are taken from Judge Rau's R&R. A condensed version of the facts is presented here; a full recitation of the facts is presented in Judge Rau's R&R.

2

Other items were also removed from Hill's pocket that are not subject to the suppression motion.

3

Judge Rau also noted that the seizure of ammunition from Hill's pocket was also justified as a search incident to arrest. See United States v. Rousseau, No. 13-CR-14, 2013 U.S. Dist. LEXIS 60176, 2013 WL 1788082, at *2 (D. Minn. Apr. 26, 2013). The Court agrees.

United States of America, Plaintiff, v. Leonard Dwayne Hill, Defendant.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA
2015 U.S. Dist. LEXIS 89114
Criminal No. 14-276 (ADM/SER)
June 26, 2015, Decided
June 26, 2015, Filed

Editorial Information: Subsequent History

Adopted by, Objection overruled by, Motion denied by United States v. Hill, 2015 U.S. Dist. LEXIS 88436 (D. Minn., July 8, 2015)

Counsel Benjamin Bejar and Craig R. Baune, Esqs., United States Attorney's Office, 300 South Fourth Street, Suite 600, Minneapolis, Minnesota 55415, for Plaintiff.
Robert D. Richman, Esq., P.O. Box 16643, St. Louis Park, Minnesota 55416, for Defendant.

Judges: STEVEN E. RAU, United States Magistrate Judge.

Opinion

Opinion by: STEVEN E. RAU

Opinion

REPORT AND RECOMMENDATION

STEVEN E. RAU, United States Magistrate Judge

The above-captioned case comes before the undersigned on Defendant Leonard Dwayne Hill's ("Hill") Motion to Suppress Statements, Admissions and Answers ("Motion to Suppress Statements") [Doc. No. 46] and Motion to Suppress Evidence Obtained as a Result of Search and Seizure ("Motion to Suppress Evidence") [Doc. No. 47]. This matter has been referred for the resolution of the issues raised in Hill's motion pursuant to 28 U.S.C. § 636(b)(1)(B)-(C) and District of Minnesota Local Rule 72.1. For the reasons stated below, the Court recommends denying Hill's motions.

I. BACKGROUND

On August 18, 2014, a grand jury indicted Hill on one count of felon in possession of ammunition (armed career criminal) in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). (Indictment) [Doc. No. 1 at 1-2]. On September 26, 2014, Hill pled guilty to the single count charged in the Indictment. (Minute Entry Dated Sept. 26, 2014) [Doc. No. 19]. Hill subsequently filed a motion to withdraw his guilty plea and a motion for leave to file pretrial motions, both of which were granted by the Honorable Ann D. Montgomery. (Order Dated Mar. 20, 2015) [Doc. No. 40].

The Court held a hearing on Hill's pretrial motions on May 6, 2015. (Minute Entry Dated May 6, 2015) [Doc. No. 53]. At the hearing, the Court heard testimony from Officer Chris Rhoades ("Officer Rhoades"), Officer Michael Soucheray ("Officer Soucheray"), and Sergeant John Wuorinen. (Ex. & Witness List) [Doc. No. 54]. The Court received nine exhibits into evidence. (*Id.*).

At the request of the parties, the Court ordered supplemental briefing. See (Minute Entry Dated May

6, 2015). Hill submitted his supplemental brief on May 15, 2015, and Plaintiff United States of America (the "Government") submitted its response on May 29, 2015. (Mot. in Supp. of Mot. to Suppress Evidence, "Mem. in Supp.") [Doc. No. 58]; (Gov't's Mem. in Opp'n to Def.'s Mot. to Suppress Evidence, "Mem. in Opp'n") [Doc. No. 59]. This case is set for trial before Judge Montgomery on August 3, 2015. (Minute Entry Dated May 6, 2015).

II. FACTS

Around midnight on July 9, 2014, Officer Rhoades and Officer Soucheray responded to a 911 call of shots fired at Willard's Bar, around North Grotto Street ("Grotto") and Edmund Avenue West ("Edmund") in St. Paul, Minnesota. (Tr. of Mots. Hr'g, "Tr.") [Doc. No. 61 at 8-9, 12]. The officers arrived at the scene minutes after the 911 call and stopped their squad car one block north of the Grotto/Edmund intersection. (*Id.* at 10, 13-14); see also (Gov't's Ex. 1) (map of scene). Officer Soucheray entered Willard's Bar to see if he could view surveillance video that might reveal information related to the shots-fired call. See (Tr. at 13, 47). Officer Rhoades walked south on Grotto. (*Id.* at 13). As he walked, Officer Rhoades observed several 9-millimeter shell casings on the sidewalk near Willard's Bar, "as well as farther south on Grotto." (*Id.* at 13-15).

Officer Rhoades spoke with witnesses gathered at the scene. (*Id.* at 13, 15). The witnesses stated that there had been two groups of people shooting at each other and that those involved in the shooting "had fled just prior to [law enforcement] arriving." (*Id.* at 15). One witness approached Officer Rhoades and asked him to "step off of the street" so that the witness could speak with him privately. (*Id.* at 16). This person informed Officer Rhoades that he had witnessed the "entire event" and that an individual Officer Rhoades had just spoken with-described by the witness as wearing a red shirt and shorts-had been with the shooter.¹ (*Id.* at 16-18). The witness told Officer Rhoades that the shooter was a heavysset black male also wearing a red shirt. (*Id.* at 31). Further, the witness informed Officer Rhoades that the shooter had approached a van parked nearby, opened the doors of the van, and said that "he was going to get more ammunition, and then closed the door." (*Id.* at 44-45). The shooter left, heading east on Edmund. (*Id.* at 18). Meanwhile, Officer Soucheray had reviewed surveillance video from Willard's Bar, and was providing his fellow officers with updates via radio "as he watched" the video. (*Id.* at 42); see also (*Id.* at 58). The surveillance video, which was in black and white, showed the area outside of the bar and showed someone shooting a firearm. (*Id.* at 47-50, 59). Officer Soucheray aired that two groups of people were involved in the shooting, and that the shooter was a black male, wearing a light-colored t-shirt, long shorts, and sneakers, but no hat. (*Id.* at 51, 59). Officer Soucheray also aired the shooter's "approximate height and that he was probably a heavy build." (*Id.* at 51).

Having gathered information from witnesses and Officer Soucheray, Officer Rhoades walked to the van identified by the witness. (*Id.* at 16-18, 42). He looked in the van's windows to see if there were any weapons inside the vehicle or "anything . . . that would help . . . determine the owner" of the vehicle. (*Id.* at 20). While inspecting the van, Officer Rhoades noticed a male, later identified as Hill, walking northbound on Grotto and turning east on Edmund. (*Id.* at 21). Officer Rhoades noticed that Hill matched the description of the shooter the witness provided as well as the description Officer Soucheray aired. (*Id.* at 21, 22, 24). Hill was walking slowly and, based on his gait, Officer Rhoades believed that he was intoxicated. (*Id.* at 22, 32). As Hill walked by, Officer Rhoades asked him how he was doing. (*Id.* at 24). Hill responded, but his speech was slurred, and Officer Rhoades was unable to understand him. (*Id.*). Officer Rhoades asked Hill where he was coming from, and Hill told Officer Rhoades that he was coming from a Wendy's restaurant. (*Id.* at 24-25). This answer raised Officer Rhoades's suspicions because he knew that the nearest Wendy's restaurant was a half-mile from the scene of the shooting, and Hill "wasn't carrying any sort of food bag." (*Id.* at 25). Officer Rhoades then asked Hill why he would walk if the nearby van was his, and Hill responded, stating

that the van was in fact his vehicle. (*Id.*).

At that point, Officer Rhoades suspected Hill was the shooter and placed him in handcuffs. (*Id.* at 25, 32). As he placed Hill in handcuffs, Officer Rhoades noticed that the left front "pocket of [Hill's] shorts was bulged." (*Id.* at 26, 33). Officer Rhoades conducted a pat-down for his safety, using "an open hand over [Hill's] outer clothing." (*Id.* at 25, 33). He began his pat-down of Hill with the left front pocket, but patted-down all of Hill's pockets. (*Id.* at 35). Because Hill was wearing a t-shirt and did not have any pockets on his shirt, Officer Rhoades was "mainly concerned with . . . [Hill's] waistband and shorts." (*Id.*).

When he conducted a pat-down of Hill's left front pocket, Officer Rhoades "could immediately tell it was full of loose rounds of ammunition." (*Id.* at 26). Officer Rhoades could discern the size of the items in Hill's pocket, could roughly determine their shape, and could tell that the items were "hard and smooth." (*Id.* at 39-40). Officer Rhoades testified that he knew immediately that Hill's pocket contained loose rounds of ammunition based on his experience at the shooting range. (*Id.* at 26). Specifically, Officer Rhoades stated that officers are

required to shoot roughly every other month at the range. You have to carry several boxes of ammo[,] but because of the size of the boxes you can't just put [the box] in your pockets. So it's standard practice for officers to simply empty the box into [their] pockets and that way you can reload from your pockets without having to go back to the office to get your ammunition. (*Id.*). Officer Rhoades further explained that it is "not uncommon to touch [one's] own pocket[.]," and that based on his experience at the shooting range, he was "pretty familiar with what a pocket full of ammo feels like." (*Id.* at 26, 34).

After the pat-down, Officer Rhoades radioed that he "had taken a possible suspect into custody." (*Id.* at 26). Officer Rhoades "reached in to empty [Hill's] pockets," but realized there were "too many items to control" between Hill and the "handful of ammunition." (*Id.* at 38). Officer Rhoades therefore walked with Hill over to a nearby squad car, where Officer Rhoades "emptied [Hill's] pockets onto the trunk so the items wouldn't roll away." (*Id.* at 26, 38-39). Officer Rhoades removed twenty-three rounds of ammunition and a twenty-dollar bill from Hill's left front pocket and a "set of car keys with [a] [key] fob" from Hill's right front pocket. (*Id.* at 27-28).² The rounds of ammunition removed from Hill's pocket were "9-millimeter rounds consistent with the casings . . . found on the street." (*Id.* at 28-29). Officer Soucheray ultimately arrived at Officer Rhoades's location and "confirmed that the male" with Officer Rhoades "was the one he had seen on the surveillance footage" from Willard's Bar, and "Hill [was] formally placed under arrest at that point." (*Id.* at 29, 56-57).

III. DISCUSSION

A. Motion to Suppress Statements

In his Motion to Suppress Statements, Hill asks the Court for "an order suppressing all statements, admissions and answers made by the defendant to law enforcement officers on July 10, 2014." (Mot. to Suppress Statements at 1). Hill did not, however, identify any issues or make any argument in support of his Motion to Suppress Statements in his supplemental briefing. *See generally* (Mem. in Supp.).³ The parties were instructed on the record at the motion hearing that the Court would only address the issues identified and supported by the parties in their supplemental briefing. (Minute Entry Dated May 6, 2015 at 2); *see also* (Tr. at 70-71). Because Hill has failed to identify or support any issues regarding the suppression of statements, the Court does not further address the Motion to Suppress Statements and recommends that the motion be denied without prejudice.

B. Motion to Suppress Evidence

1. Legal Standard

The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Consistent with the Fourth Amendment, "[l]aw enforcement officers may make an investigatory stop if they have a reasonable and articulable suspicion of criminal activity." *United States v. Bustos-Torres*, 396 F.3d 935, 942 (8th Cir. 2005) (citing *Terry v. Ohio*, 392 U.S. 1, 25-31, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). "A reasonable suspicion is a particularized and objective basis for suspecting the person who is stopped." *Id.* (internal quotation marks omitted).

During an investigative *Terry* stop "officers should use the least intrusive means of detention and investigation reasonably necessary to achieve the purpose of the detention." *United States v. Martinez*, 462 F.3d 903, 907 (8th Cir. 2006). Officers are "authorized to take such steps as are reasonably necessary to protect their personal safety and to maintain the status quo." *Id.* If, in the course of an investigative stop, "an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," the officer may conduct a pat-down search "to determine whether the person is in fact carrying a weapon." *Bustos-Torres*, 396 F.3d at 943 (quoting *Terry*, 392 U.S. at 24).

A pat-down or "protective frisk" for officer safety is warranted when "specific articulable facts taken together with rational inferences support the reasonable suspicion that a party was potentially armed and dangerous." *United States v. Binion*, 570 F.3d 1034, 1039 (8th Cir. 2009) (internal quotation marks omitted). Whether a frisk was supported by reasonable suspicion is an objective inquiry and requires the court to consider "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* (quoting *Terry*, 392 U.S. at 27).

While the "purpose of a pat-down search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence," and while the search must therefore "be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby," officers may lawfully seize contraband they incidentally discover in "plain touch" during a *Terry* frisk. *Bustos-Torres*, 396 F.3d at 943-44 (citation omitted).

Under the plain-touch doctrine, when an officer "lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent," the officer may seize the item without a warrant. *Id.* at 944 (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 375-76, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993)). "[T]he plain-touch doctrine extends to the lawful discovery of any incriminating evidence, not just contraband such as drugs." *Id.* In order to lawfully seize an item based on plain touch, the officer performing a *Terry* frisk must have "probable cause to believe the item in plain touch is incriminating evidence." *Id.* "To give rise to probable cause, the incriminating character of the object must be immediately identifiable." *Id.* at 945.

2. Analysis

The issues before the Court are whether Officer Rhoades had reasonable suspicion to conduct a pat-down of Hill and whether Officer Rhoades improperly expanded the scope of the pat-down. See (Mem. in Supp. at 2-5); (Mem. in Opp'n at 5-11). For the reasons stated below, the Court concludes that Officer Rhoades had, at a minimum, reasonable suspicion to conduct a pat-down of Hill and that Officer Rhoades did not improperly expand the scope of the pat-down, as the seizure of the ammunition in Hill's pocket was lawful under the plain-feel doctrine.

a. *Terry* Frisk

Based on the facts available to law enforcement at the time of Officer Rhoades's frisk of Hill, "taken together with the rational inferences" therefrom, there was reasonable suspicion that Hill was "potentially armed and dangerous." See *Binion*, 570 F.3d at 1039 (internal quotation marks omitted). At the time of the frisk, Officer Rhoades was canvassing the street in the middle of the night in response to a report that shots had been fired just minutes earlier. (Tr. at 8, 10, 13). The report was that shots had been fired near Willard's Bar. (*Id.* at 12). At the scene, Officer Rhoades observed several shell casings on the street. (*Id.* at 13, 15). An eyewitness had informed him that the shooter was a heavysset black male wearing a red shirt, and that the shooter said he was going to get more ammunition, stopped at a nearby van, and then ultimately headed east on Edmund. (*Id.* at 18, 31, 44-45).

Consistent with the witness's description of the shooter, Officer Soucheray radioed to his fellow officers that based on his review of surveillance video, the shooter was a black male with a heavy build wearing a light-colored t-shirt. (*Id.* at 51, 59). Officer Soucheray also aired that the shooter was wearing long shorts and sneakers, but no hat. (*Id.* at 51, 59). Officer Rhoades encountered Hill walking east on Edmund Avenue near a van-the van that was identified by the witness as the place the shooter went when he was going to get more ammunition. See (*id.* at 21, 44-45). Hill told Officer Rhoades that the van was his. (*Id.* at 25, 45). Hill matched the witness's and Officer Soucheray's description of the shooter. (*Id.* at 21, 22, 24, 31, 51, 59). Hill appeared intoxicated and, when asked where he was coming from, gave an answer that aroused Officer Rhoades's suspicions, given the distance between Hill's present location and his alleged previous whereabouts. See (*id.* at 22, 25, 32). Officer Rhoades also noticed that the left front "pocket of [Hill's] shorts was bulged." (*Id.* at 26, 33). Under these circumstances Officer Rhoades was "justified in believing that the individual whose suspicious behavior he [was] investigating at close range [was] armed and presently dangerous to the officer or to others," and was therefore justified conducting a *Terry* frisk.⁵ See *Bustos-Torres*, 396 F.3d at 943 (quoting *Terry*, 392 U.S. at 24).

Hill's arguments that the circumstances here do not demonstrate reasonable suspicion that he was potentially armed and dangerous are without merit. Hill first argues that Officer Rhoades lacked reasonable suspicion because Officer Rhoades knew there were "at least two individuals matching [the witness's] description" of the shooter, "because he had already spoken to another man in a red t-shirt," and because Officer Soucheray's statement that "the shooter was wearing a light-colored t-shirt," conflicted with the witness's statement that the shooter was wearing a red t-shirt. (Mem. in Supp. at 2-3). While it is true that Officer Rhoades had encountered another black male in a red shirt at the scene, the other individual did not actually match the witness's, or Officer Soucheray's, description of the shooter. The witness and Officer Soucheray described the shooter as heavysset or as having "a heavy build," while the other black male in a red shirt that Officer Rhoades encountered was described by Officer Rhoades as "smaller." Compare (Tr. at 18), with (*id.* at 31, 51). And Officer Soucheray radioed that the shooter was not wearing a hat, while Officer Rhoades noted that the other male was wearing a hat. Compare (*id.* at 18) with (*id.* at 51). Indeed, the witness specifically told Officer Rhoades that the other male had been **with** the shooter, not that he **was** the shooter.⁶ (*Id.* at 18). In addition, Hill's contention that Officer Soucheray's statement that the shooter was wearing a light-colored t-shirt and the witness's statement the shooter was wearing a red shirt creates a conflict is unconvincing: a description of the shirt as light-colored is simply not inconsistent with a description of the shirt as red.

Hill next argues that Officer Rhoades lacked reasonable suspicion to conduct a pat-down because the witness that described the shooter was "of unknown reliability." (Mem. in Supp. at 2). Hill cites no legal authority in support of his argument regarding the witness's reliability, see (*id.*), and the Court concludes that, applying the proper legal standards, the witness's tip contains sufficient indicia of

reliability.

The witness approached Officer Rhoades, provided an eyewitness account of the events that had just occurred, including a description of the shooter, and informed Officer Rhoades of the direction in which the shooter fled. See (Tr. at 16, 18, 31). The witness's basis of knowledge, as well as the timing and detail of his statement to Officer Rhoades all support the witness's reliability. *Navarette v. California*, 134 S. Ct. 1683, 1689, 188 L. Ed. 2d 680 (2014) (stating that "eyewitness knowledge . . . lends significant support to [a] tip's reliability" and that "contemporaneous report[s] [have] long been treated as especially reliable"); *United States v. Buchanan*, 574 F.3d 554, 561 (8th Cir. 2009) (noting the "indicia of reliability in the richness and detail of a first hand observation" (internal quotation marks omitted)). Officer Rhoades spoke with the witness in-person, a circumstance that also enhances the reliability and credibility of the witness, as in-person questioning provides law enforcement with an opportunity to "assess the credibility of [an] . . . informant[.]" *Buchanan*, 574 F.3d at 562; *United States v. Neal*, 528 F.3d 1069, 1074 (8th Cir. 2008); see also *United States v. Valentine*, 232 F.3d 350, 353-57 (3rd Cir. 2000) (concluding officers had reasonable suspicion in part because officers "received [a] face-to-face tip" and the "informant [gave] the police information about . . . someone nearby," thereby "expos[ing] [himself] to a risk of retaliation"). In addition, Officer Soucheray's description of the shooter based on the surveillance video corroborated the witness's description of the shooter. See *United States v. Manes*, 603 F.3d 451, 456 (8th Cir. 2010) (stating that an "informant's tip may support a reasonable suspicion if it has sufficient indicia of reliability, such as . . . independent corroboration of the tip"); see (Tr. at 21-22, 24-25, 31, 51, 59). Hill's argument that Officer Rhoades lacked reasonable suspicion because the witness was of unknown reliability is therefore without merit.⁷

In sum, "a reasonably prudent" officer faced with the circumstances faced by Officer Rhoades "would be warranted in the belief that his safety or that of others was in danger." See *Binion*, 570 F.3d at 1039 (quoting *Terry*, 392 U.S. at 27). Because Officer Rhoades had reasonable suspicion that Hill was potentially armed and dangerous, the protective frisk of Hill was lawful.

b. Scope of Terry Frisk and Plain-Feel Doctrine

Hill contends that [i]n all likelihood Officer Rhoades manipulated . . . Hill's pocket in order to get a sense of the size and shape of the objects in" the pocket and that Officer Rhoades therefore impermissibly expanded the scope of the *Terry* frisk. (Mem. in Supp. at 5). In other words, Hill contends that Officer Rhoades's seizure of the ammunition from his pocket was not permitted under the plain-feel doctrine because Officer Rhoades could not tell immediately, based on plain touch, that what he felt during his pat-down search of Hill was ammunition. See (*id.* at 3-5).

Officer Rhoades testified that he "could immediately tell" Hill's pocket "was full of loose rounds of ammunition." (Tr. at 26). Given the circumstances present at the time of the *Terry* frisk as thoroughly described above, and after observing Officer Rhoades's demeanor on the witness stand, the Court finds Officer Rhoades's testimony that he immediately identified the objects in Hill's pocket as loose rounds of ammunition to be credible.

Hill argues that Officer Rhoades's testimony is "incredible and should be rejected." (Mem. in Supp. at 4). In an effort to demonstrate Officer Rhoades's lack of credibility, Hill asserts that Officer Rhoades "came prepared with a backstory" about being familiar with the feel of ammunition in a pocket based on his experience of using his own pockets to store ammunition during target practice. (*Id.*). While Hill characterizes Officer Rhoades's testimony about his familiarity with the feel of ammunition in a pocket based on his experiences at the shooting range as a "backstory," the Court finds Officer Rhoades's testimony in this regard credible. Officer Rhoades explained that target practice is required regularly and that it is "standard practice" for officers to empty ammunition into their

pockets. (Tr. at 26). It is both logical and believable that Officer Rhoades's experiences during target practice familiarized him with the feel of an ammunition-filled pocket, which supports his testimony that he could immediately identify the loose rounds of ammunition in Hill's pocket as such, without manipulation.

Hill further argues that Officer Rhoades's testimony is unbelievable in light of his police report. (Mem. in Supp. at 5). In the report, Officer Rhoades stated that during the pat-down he "could feel what felt like a large amount of ammunition in [Hill's] front left pocket" and that he "then put [his] hand into the pocket and confirmed the item [he] felt was in fact a handful of 9[-millimeter] ammunition." (*Id.*). Hill appears to rely on Officer Rhoades's use of the word "confirm" in his report to demonstrate that the contents of Hill's pocket was not immediately apparent to Officer Rhoades during the pat-down. (*Id.*).

The Court concludes that Officer Rhoades's statements in his report do not undermine his testimony that it was immediately apparent to him, based on an open-handed pat-down, that the objects in Hill's pocket were loose rounds of ammunition, nor do these statements demonstrate that Officer Rhoades otherwise impermissibly expanded the scope of the *Terry* frisk. That is, Officer Rhoades's statement that he "put [his] hand into [Hill's] pocket and confirmed" that what he felt during the pat-down was ammunition is not inconsistent with his testimony that the objects in Hill's pocket were immediately identifiable as ammunition: It was immediately apparent to Officer Rhoades that Hill's pocket contained numerous loose rounds of ammunition, giving him, in light of the circumstances, "probable cause to believe the item in plain touch [was] incriminating evidence," and thus the ability to seize the items without a warrant. See *Bustos-Torres*, 396 F.3d at 944-45 (concluding that cash in defendant's pocket was "immediately identifiable to the . . . touch as incriminating evidence," considering the large amount of cash discovered in the pocket and the "circumstances which justified the *Terry* stop in the first place"); see also *United States v. Jackson*, 179 Fed. App'x 921, 931 (6th Cir. 2006) (rejecting defendant's argument that pat-down was "not confined to a search for weapons," and that seizure of ammunition was therefore unlawful, reasoning in part that "[t]he seizure was . . . reasonable under *Dickerson*, as [the officer] testified that he instantly recognized the feel of ammunition"). Officer Rhoades then put his hand into Hill's pocket "and confirmed . . . in fact" what was already immediately apparent to him.⁸ See (Mem. in Supp. at 5) (quoting Officer Rhoades's report). Under the circumstances, Officer Rhoades lawfully seized the ammunition without a warrant. See *Bustos-Torres*, 396 F.3d at 944-45.

c. Conclusion

For the reasons discussed above, the Court concludes that Officer Rhoades had reasonable suspicion that Hill was potentially armed and dangerous, justifying a *Terry* frisk of Hill's person. The Court further concludes that Officer Rhoades did not unlawfully expand the scope of the *Terry* frisk and that Officer Rhoades's warrantless seizure of the ammunition in Hill's pocket was lawful under the plain-feel doctrine.⁹

III. RECOMMENDATION

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY RECOMMENDED** that:

1. Defendant Leonard Dwayne Hill's ("Hill") Motion to Suppress Statements, Admissions and Answers [Doc. No. 46] be **DENIED without prejudice**; and
2. Hill's Motion to Suppress Evidence Obtained as a Result of Search and Seizure [Doc. No. 47] be **DENIED**.

Dated: June 26, 2015

/s/ Steven E. Rau

STEVEN E. RAU

United States Magistrate Judge

Footnotes

1

The man identified as accompanying the shooter was described by Officer Rhoades as a "black male in a red shirt, smaller, with a hat." (Tr. at 18). The man told Officer Rhoades that he did not know anything about the shooting. (*Id.* at 18, 30). He was released and proceeded north on Grotto. (*Id.* at 18). Once the witness informed Officer Rhoades that the individual he had previously spoken with had been with the shooter, Officer Rhoades shared this information with other officers via radio, and the suspect was located and questioned by those officers. (*Id.* at 43).

2

The Court references the twenty-dollar bill, car keys, and key fob taken from Hill's pockets in summarizing the facts, but does not discuss the seizure of these items elsewhere in this Report and Recommendation because Hill does not argue for suppression of these items. Rather he asks the Court to consider only whether the ammunition should be suppressed. (Mem. in Supp. at 2) ("The ammunition seized from . . . Hill without a warrant should now be suppressed."); (*Id.* at 5) ("The ammunition should be suppressed.").

3

Indeed, Hill's Memorandum in Support is titled as briefing offered only in support of his Motion to Suppress Evidence, rather than in support of both motions to suppress. See (Mem. in Supp. at 1).

4

Hill does not contend that Officer Rhoades lacked reasonable suspicion to conduct a *Terry* stop; instead he focuses only on the protective frisk and the subsequent seizure of ammunition from his pocket. See *generally* (Mem. in Supp.).

5

Hill does not specifically argue that Officer Rhoades's use of handcuffs was unlawful, but does state "there was no basis to **handcuff** . . . Hill and frisk him." (Mem. in Supp. at 3) (emphasis added). To the extent Hill specifically challenges Officer Rhoades's use of handcuffs, the Court finds the challenge to be without merit. *Cf. Martinez*, 462 F.3d at 907 (concluding that placing defendant in handcuffs "was a reasonable response to the situation in order to protect the officers' personal safety and to maintain the status quo" when officers knew the robbery they were investigating involved a gun, the defendant "was a close match to the description" of the perpetrator, was found "near the scene of the crime, acting suspiciously," and was found with a "wad of cash on [his] person").

6

Even if Officer Rhoades had encountered two men at the scene that matched the description of the shooter, this fact alone would not necessarily detract from or preclude a finding of reasonable suspicion as to one or both of the two men. That is, officers must consider the totality of the circumstances and, to warrant a *Terry* frisk, an officer need not be **certain** that the individual is armed and dangerous. See *Binion*, 570 F.3d at 1039 (noting that a "protective frisk" for officer safety

is warranted when "specific articulable facts taken together with rational inferences support the reasonable suspicion that a party was potentially armed and dangerous" (internal quotation marks omitted)).

7

In an apparent effort to support the witness's reliability, the Government states that the witness that spoke with Officer Rhoades was a "named citizen" (Mem. in Opp'n at 7). The Government did not however, elicit testimony on this point at the motion hearing. *See generally* (Tr.). Nonetheless, the Court finds the witness reliable for the reasons discussed above.

8

As noted, Officer Rhoades explained the he did not fully remove the ammunition when he first reached into Hill's pocket because as he started to empty Hill's pockets, (i.e., seize the ammunition), he realized there were "too many items to control." (Tr. at 38). He therefore moved Hill to a different location before fully removing the ammunition from Hill's pocket. (*Id.* at 38-39). The Court finds that this logistical issue is of no constitutional consequence, as Officer Rhoades already had probable cause to believe the items in plain touch constituted incriminating evidence when he reached into Hill's pocket.

9

The parties have primarily addressed the Fourth Amendment issues here under the *Terry* and plain-feel frameworks, and, as discussed above, the Court concludes that Officer Rhoades conducted a lawful *Terry* frisk of Hill and that he lawfully seized the ammunition in Hill's pocket under the plain-feel doctrine. The Government argues that the seizure of ammunition from Hill's pocket was also justified as a search incident to arrest. (Mem. in Opp'n at 11-13). Searches incident to arrest provide an exception to the warrant requirement. *See United States v. Rousseau*, No. 13-CR-0014 (PJS/FLN), 2013 U.S. Dist. LEXIS 60176, 2013 WL 1788082, at *2 (D. Minn. Apr. 26, 2013). An officer "who makes a lawful arrest may conduct a warrantless search of the arrestee's person and the area within his immediate control." *Id.* (quoting *Davis v. United States*, 131 S. Ct. 2419, 2424, 180 L. Ed. 2d 285 (2011)). Considering the facts described above, the Court concludes that the search of Hill and seizure of the ammunition was also lawful under the search incident to arrest exception.

UNITED STATES OF AMERICA, Plaintiff, v. LEONARD DWAYNE HILL, Defendant.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA
2014 U.S. Dist. LEXIS 200164
Criminal No. 14-276 (ADM/SER)
August 28, 2014, Decided
August 28, 2014, Filed

Counsel Leonard Dwayne Hill, Appeals court case numbers: 15-3350 USCA, 17-3508 USCA, 18-1293 USCA, Defendants, Pro se, Pine Knot, KY USA.

For Leonard Dwayne Hill, Appeals court case numbers: 15-3350 USCA, 17-3508 USCA, 18-1293 USCA, Defendants: James S Becker, LEAD ATTORNEY, Office of the Federal Defender, Minneapolis, MN USA; Douglas B Altman, Altman & Izek, Mpls, MN USA; Reynaldo A Aligada, Jr, Office of the Federal Defender, Mpls, MN USA; Robert D Richman.

For UNITED STATES OF AMERICA, Plaintiff: Benjamin Bejar, Craig R Baune, LEAD ATTORNEYS, United States Attorney's Office, Minneapolis, MN USA.

Judges: Tony N. Leung, United States Magistrate Judge.

Opinion

Opinion by: Tony N. Leung

Opinion

ORDER OF DETENTION

This matter came before the Court on August 25, 2014, for a detention hearing. The defendant appeared in custody and was represented by Assistant Federal Defender Reynaldo A. Aligada, Jr. The United States was represented by Assistant United States Attorney Benjamin Bejar. The United States moved for detention at the defendant's initial appearance on August 21, 2014, where the defendant was advised of his constitutional rights and afforded opportunity to consult with his appointed counsel. See Fed. R. Crim. P. 5(d).

After consideration of the pretrial services report, the record before the Court, the arguments of counsel, the seriousness of the current charge, and the factors listed in 18 U.S.C. § 3142(g), the Court concludes by clear and convincing evidence that no condition or combination of conditions of release will reasonably assure the safety of any other person and the community if the defendant is released pending trial. The Court further concludes by a preponderance of the evidence that no condition or combination of conditions of release will reasonably assure the appearance of the defendant as required at future Court proceedings. Accordingly, the Court grants the United States' motion for detention.

FINDINGS OF FACT

1. The defendant is presently charged in a one-count indictment with one count of being a felon in possession of ammunition, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

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2. The defendant has a significant criminal history that includes 7 prior felony convictions, including second-degree burglary of a residence, felony domestic assault, third-degree riot committed for the benefit of a gang, and theft from a person. Additionally, the defendant was on felony supervised release from state prison (for only 3 months) from a violation of an order-for-protection conviction at the time he allegedly committed the instant offense. The defendant's criminal history also includes theft convictions, another domestic assault conviction, and a fleeing-police-on-foot conviction. The defendant also has a significant history of non-compliance with court orders and supervision, including six arrest warrants, five probation violations, three supervised-release violations, at least three failures to appear for court, and his supervised release has been restructured twice and previously been revoked. Additionally, the defendant's pretrial release has also previously been revoked for violating court-ordered conditions.

3. Although the defendant appears to have significant ties to the local community, the defendant is currently unemployed and has a history of weapons possession, gang involvement, violent and assaultive behavior, and an admitted history of alcohol abuse.

4. The defendant is charged with a serious offense and faces a potential minimum-mandatory sentence of 180 months' imprisonment.

CONCLUSIONS OF LAW

Based upon the foregoing, the Court makes the following conclusions of law:

1. Based on the pretrial services report, the serious nature of the pending charge, the defendant's criminal history and circumstances, and considering the factors outlined in 18 U.S.C. § 3142(g), no condition or combination of conditions will reasonably assure the appearance of the defendant as required or reasonably assure the safety of the community should the defendant be released pending trial.

For the foregoing reasons, IT IS HEREBY ORDERED that:

1. The motion of the United States for detention of the defendant is GRANTED;

2. The defendant is committed to the custody of the Attorney General for confinement in a correctional facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

3. The defendant shall be afforded reasonable opportunity to consult privately with counsel; and

4. Upon Order of the Court or request by the United States Attorney, the person in charge of the corrections facility in which the defendant is confined shall deliver the defendant to the United States Marshal for the purpose of appearance in connection with further court proceedings.

Dated: August 28, 2014

/s/ Tony N. Leung

Tony N. Leung

United States Magistrate Judge