NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

Airrington Sykes - Petitioner,

vs.

United States of America - Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. AIRRINGTON L. SYKES, Defendant.	No. 17-CR-2009-LRR **REPORT AND RECOMMENDATION TO DENY DEFENDANT'S MOTION TO SUPPRESS**

I. INTRODUCTION

This case is before me pursuant to defendant's motion to suppress evidence allegedly seized in violation of the Fourth Amendment to the United States Constitution. (Doc. 11). The grand jury charged defendant in a one-count indictment with possession of a firearm as a felon. (Doc. 2). The charge arose from an incident on December 4, 2016, when Waterloo police officers encountered defendant while responding to a report at a laundromat where a woman found a loaded handgun magazine in a laundry basket. As a result of conducting a pat down search of defendant, officers discovered a handgun in his pants. In his motion to suppress, defendant argues that the officer lacked a reasonable articulable basis to conduct the pat-down search. Defendant argues, therefore, that the Court should suppress evidence of the firearm discovered as a result of the allegedly unlawful detention and search, and any incriminating statements defendant made after the firearm was seized.

The Honorable Linda R. Reade, United States District Court Judge, referred this motion to me for a report and recommendation. On Monday, April 17, 2017, I held an

evidentiary hearing on defendant's motion at which Waterloo Police Officers Ryan Muhlenbruch and Luke Lamere testified, and the Court admitted into evidence a videotape from Officer Muhlenbruch's body camera (Exhibit A), and the officers' reports (Exhibit 1). At the conclusion of the hearing, I invited the parties to submit additional legal authority regarding two of the sub-issues identified below. Each party submitted additional authorities and arguments in emails they sent me.

For the reasons that follow, I respectfully recommend that the Court deny defendant's motion to suppress.

II. FINDINGS OF FACT

On December 4, 2016, at approximately 11:50 p.m., Waterloo Police Officer Ryan Muhlenbruch was dispatched to a laundromat in Waterloo, Iowa. Officer Muhlenbruch drove an unmarked police car. There, he met with a patron, Angie Lindsey, in the parking lot in front of the laundromat, approximately 100 feet away from the front door. The front of the laundromat has large plate-glass windows on either side of double doors. The double doors are glass doors.

Lindsey told Officer Muhlenbruch that she found a loaded .40 caliber handgun magazine in a laundry basket she was using while inside the laundromat. Lindsey gave the magazine to Officer Muhlenbruch. Lindsey stated that she had taken some of her clothes out of one of the dryers in the laundromat and placed them in a laundry basket. There was no handgun magazine in the laundry basket at that time. When Lindsey later took her clothes back out of the basket, she found the loaded handgun magazine in the basket. Lindsey told Officer Muhlenbruch that there were only two other males in the laundromat at the time, and that she had seen them near the laundry basket at one point. Lindsey emphasized that she did not know if those males had anything to do with the magazine, but that they were the only other people present at the time. Finally, Lindsey

told Officer Muhlenbruch those same two men were still in the laundromat, having just walked back into the laundromat from their car.

By the time Officer Muhlenbruch arrived, there were several more people in the laundromat. Officer Muhlenbruch had Lindsey look into the laundromat from the parking lot and describe which of the people inside the laundromat were the men she saw present when she found the handgun magazine. Lindsey described the two men as black males wearing black clothes. By this time, there was another person wearing tan standing with those two men. Lindsey stated the person in tan was not present at the time she found the handgun magazine. The entirety of this conversation is captured on Officer Muhlenbruch's body camera and I only summarize it here. (Exhibit A).

Officer Muhlenbruch requested assistance and Officer Lamere responded to the laundromat. Officer Lamere drove a marked police vehicle. He pulled up in front of the laundromat as Officer Muhlenbruch approached the laundromat on foot from the parking lot. The officers approached from the left side of the laundromat, crossing in front of two large plate-glass windows on the left side of the glass entrance door. Defendant was standing in an aisle inside the laundromat on the left side, approximately twenty feet from the front windows. It appears from the video that defendant was facing the windows at the time.

Officers Muhlenbruch and Lamere, both in uniform, then entered the laundromat. They approached the two men identified by Lindsey, who were standing in an aisle on the left side of the laundromat. Defendant was still facing the front of the laundromat when the officers entered. As the officers approached, defendant turned and walked briskly toward the back of the laundromat. Officer Muhlenbruch testified that he did not

make eye contact with defendant before defendant turned, but Officer Lamere said he did make eye contact with defendant before defendant turned and walked away.[1]

Officer Muhlenbruch quickly followed defendant, taking a different route between the washing machines. Officer Muhlenbruch could see defendant's head, but could not see the rest of his body until they both emerged from rows of machines in an aisle on the right side of the laundromat. Defendant had passed an exit in the rear of the laundromat and entered a bathroom. Officer Muhlenbruch reached the bathroom just as defendant had entered it and closed the door. Officer Muhlenbruch opened the door and asked defendant to come out of the bathroom, indicating he just needed a minute of defendant's time. Defendant complied. Officer Muhlenbruch grabbed hold of the sleeve of defendant's sweatshirt and guided defendant out of the bathroom. Officer Muhlenbruch testified that he did not see a bulge in defendant's clothing indicative that defendant was armed at any time during his encounter with defendant.

Officer Muhlenbruch asked for defendant's identification, but defendant indicated that he did not have any identification. Officer Muhlenbruch then announced that he was going to pat down defendant for weapons. Officer Muhlenbruch still had a hold of defendant's sleeve and he directed defendant in a manner to face the wall. In response and as defendant was turning toward the wall, defendant said something like "I got my homey's" and pointed toward his waist. Officer Muhlenbruch interpreted this to mean that defendant was armed.

[1] The video from Officer Muhlenbruch's body camera is not terribly helpful regarding eye contact. The camera was apparently located on the front of his chest, so does not show what can be seen by the officers' eyes a foot or so above the location of the camera. The washing machines in the laundromat are just tall enough that they blocked the view of defendant until Officer Muhlenbruch rounded the corner and entered the aisle where defendant was standing. The video does clearly show, however, that defendant does not turn around and walk away until the officers rounded the corner and entered his aisle.

Officer Muhlenbruch then conducted a pat-down search of defendant and recovered a Smith & Wesson .40 caliber handgun from defendant's left front pants pocket. The firearm contained a loaded magazine. Officer Muhlenbruch advised defendant of his rights. Defendant waived his rights, stated he was a felon, and admitted he had the handgun because his friend, Michael Liggons, the other male in the laundromat, had given him the gun to hold while they were in the laundromat.

Officer Lamere spoke with Liggons. Liggons told Officer Lamere that the firearm was his and that he had a permit to carry a concealed weapon, which he showed to Officer Lamere. Liggons explained that he had given the gun to defendant to hold because Liggons was not wearing a belt and therefore could not carry the gun. Liggons admitted knowing defendant was a felon.

Officer Muhlenbruch described the area immediately behind the laundromat as a low income housing area. He testified that it was neither a low crime or a high crime area. He indicated that he had been on multiple calls to the low income area for fights, other disturbances, and at least one "shots fired" call within the last two years. He also indicated that he had been called to the parking lot of the complex where the laundromat was located sometime in the past, but he could not recall when. During that call, officers had seized a firearm from a suspect.

Officer Muhlenbruch has been on the Waterloo Police Department for 14 years, and has always been on patrol duty. He graduated from the Iowa Law Enforcement Academy and receives continuous training, especially as a member of the police department's tactical response unit. He testified that in the last several years he has seized firearms from suspects on three to five occasions. None of those suspects had a permit to carry a concealed weapon, although he testified that it is an increasingly common occurrence to encounter people with permits to carry concealed weapons.

Officer Lamere has been on the Waterloo Police Department for 8 years and has always been on patrol duty. He graduated from the Iowa Law Enforcement Academy and receives continuous training. He is also a member of the police department's tactical response unit.

I found both Officers Muhlenbruch and Lamere to be credible witnesses.

III. APPLICABLE STANDARDS

An officer may stop an individual if the officer has reasonable suspicion that "criminal activity may be afoot." *Terry v. Ohio*, 392 U.S. 1, 30 (1968); s*ee also United States v. Harris*, 747 F.3d 1013, 1016 (8th Cir. 2014). A *Terry* stop is justified when a police officer is "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21; *see also United States v. Davison*, 808 F.3d 325, 329 (8th Cir. 2015). In deciding whether to conduct a *Terry* stop, an officer may rely on information provided by other officers as well as any information known to the team of officers conducting the investigation. *See*, *e.g.*, *United States v. Robinson*, 664 F.3d 701, 703 (8th Cir. 2011) (reasonable suspicion may be based on information known not only to the officer at the scene, but also on information known to other law enforcement personnel at the time, even if not communicated to the officer at the scene); *United States v. Maltais*, 403 F.3d 550, 554 (8th Cir. 2005) (same); *United States v. Robinson*, 119 F.3d 663, 666–67 (8th Cir. 1997) (same). Further, an officer may conduct a protective pat down if he has reasonable suspicion that the person "is potentially armed and dangerous." *United States v. Cotton*, 782 F.3d 392, 396 (8th Cir. 2015) (internal quotation marks and citation omitted).

Officers must employ the least intrusive means of detention and investigation, in terms of scope and duration, that are reasonably necessary to achieve the purpose of the

Terry stop. *See Florida v. Royer*, 460 U.S. 491, 500 (1983). A *Terry* stop may transform into an arrest, requiring probable cause, "if the stop lasts for an unreasonably long time or if officers use unreasonable force." *United States v. Newell*, 596 F.3d 876, 879 (8th Cir. 2010) (citation omitted). As part of a lawful *Terry* stop, however, officers may take any measures that are "reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop." *United States v. Hensley*, 469 U.S. 221, 235 (1985).

A court must determine whether reasonable suspicion exists based on "the totality of the circumstances, in light of the officer's experience." *United States v. Stigler*, 574 F.3d 1008, 1010 (8th Cir. 2009) (quotation omitted). What constitutes reasonable suspicion is not "readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232 (1983). "Factors that may reasonably lead an experienced officer to investigate include time of day or night, location of the suspect parties, and the parties' behavior when they become aware of the officer's presence." *United States v. Dawdy*, 46 F.3d 1427, 1429 (8th Cir. 1995). When evaluating whether reasonable suspicion exists, courts must "view the [officers'] observations as a whole, rather than as discrete and disconnected occurrences." *United States v. Poitier*, 818 F.2d 679, 683 (8th Cir. 1987); *see also United States v. Arvizu*, 534 U.S. 266, 274 (2002) (rejecting court of appeal's reasonable suspicion analysis where the "court's evaluation and rejection of seven of the listed factors in isolation from each other does not take into account the 'totality of the circumstances'").

IV. ANALYSIS

Defendant argues Officer Muhlenbruch violated his rights under the Fourth Amendment to the Constitution when the officer conducted an unlawful pat-down search because there was no basis for a reasonable suspicion that defendant was engaged in

criminal conduct or was armed. This motion raises three sub-issues, in my view. First, does the possibility that defendant had a concealed weapons permit (as did his friend) negate the presumption that he was carrying a concealed weapon in violation of Iowa law? Second, in determining whether the officer had a reasonable basis to determine if defendant was armed, could the officer consider defendant's statement and gesture that he had his "homey's"? In other words, when did the officer's pat-down search begin? Third, were the facts known to the officer when he began his pat-down search sufficient to give rise to a reasonable suspicion that defendant was armed and dangerous? The Court will address each of these questions in turn.

A. What Difference Does the Possibility of a Permit to Carry Make?

Defendant argues that the pat-down search was unlawful in part because there was no crime afoot for the officers to investigate when mere possession of a firearm is not necessarily illegal. Defendant emphasizes the possibility that defendant could have had a permit to carry a concealed weapon just, as it turned out, Liggons did. Lindsey had not reported that defendant or anyone else had brandished a firearm, threatened anyone with it, or committed any other illegal activity with a firearm. Therefore, defendant argues, when the officers arrived at the laundromat, they had no reason to believe that any crime had been or was being committed. Defendant relies on *United States v. Ubiles*, 224 F.3d 213, 218 (3rd Cir. 2000), for the proposition that a report of a firearm possession "gives rise to neither sufficient belief that criminal activity is afoot, nor that the possessor is dangerous." (Doc. 11-1, at 2-3).

I begin with finding that there was a reasonable articulable basis for officers to believe that one of the two men dressed in black inside the laundromat was carrying a concealed weapon. The information provided by the witness was sufficient for officers to reach that logical conclusion. She found a loaded handgun magazine in a laundry

basket she had been using and the only other people in the laundromat at the time were the two men dressed in black. And those men had been near the laundry basket.

It is illegal in Iowa to carry a concealed weapon, including a handgun. Iowa Code § 724.4[2]. It is an affirmative defense to the offense, however, if a defendant can prove that he or she has a valid permit to carry a concealed weapon. The government does not, however, have to prove as an element of the crime that the defendant did not have a valid permit. *See State v. Bowdry*, 337 N.W.2d 216, 218-19 (Iowa 1983) (holding that the absence of a permit to carry a concealed weapon is not an element of the offense itself which the government must initially prove).

I find that *Ubiles* is easily distinguishable. That case arose in the Virgin Islands. It is not illegal to possess a concealed firearm in the Virgin Islands. *Ubiles*, 224 F.3d at 217-28. It is illegal there to possess a gun with an altered serial number, or an unregistered firearm, but mere possession of a firearm by itself is not a crime. In Iowa, on the other hand, it is. Although it may be an affirmative defense for a person to have a permit to carry a concealed weapon, officers do not have to eliminate the possibility of affirmative defenses before they can find reasonable suspicion that a crime, in this case possession of a concealed firearm, is afoot.

Indeed, the Third Circuit itself has distinguished the holding in *Ubiles* based on the same reasoning. In *United States v. Gatlin*, 613 F.3d 374, 378-79 (3rd Cir. 2010), the case arose in Delaware and the only information officers had was that the defendant was carrying a concealed weapon. The court found that evidence sufficient, distinguishing *Ubiles* because in Delaware possession of a concealed weapon is presumptively illegal and a concealed weapons permit is an affirmative defense, while in the Virgin Islands the government has the affirmative burden of proving a person does

[2] Iowa Code § 724.4 was amended on April 13, 2017. *See* 2017 Iowa Legis. Serv. 64 (West) (amending Section 724.4(4)(b) pertaining to peace officers). This does not alter my analysis.

not have a concealed weapons permit. *Id*. *See also*, *e.g.*, *United States v. Collins*, Civil Action Nos. 05-1810, 01-CR-00780, 2007 WL 4463594, at *3 (E.D. Penn. Dec. 19, 2007) (distinguishing *Ubiles* on the ground that in Pennsylvania, it is a crime for a person to carry a concealed weapon and the government does not have to prove as an element of the crime that the defendant did not have a permit to carry a concealed weapon). *See also United States v. Montague*, 437 Fed. App'x 833, 836 (11th Cir. 2011) (rejecting premise that officers cannot conclude that criminal activity is afoot simply because a person might have a permit to carry a concealed weapon because the absence of a permit is not an element of the offense).

In his post-hearing email submission, defendant cited *Commonwealth v. Couture*, 552 N.E.2d 538, 541 (Mass. 1990) for the proposition that "[t]he mere possession of a handgun was not sufficient to give rise to a reasonable suspicion that the defendant was illegally carrying that gun, and the stop was therefore improper under Fourth Amendment principles." I found a similar holding in *Regalado v. State*, 25 So. 3d 600, 604 (Fla. Dist. Ct. App. 2009), where a Florida state court held that evidence that a person is carrying a concealed firearm is not alone sufficient to give rise to a reasonable suspicion of criminal activity. These state court decisions are, of course, not binding. Nor do I find their reasoning correct. Indeed, other Florida courts rejected *Regalado*, as have federal courts in Florida. *See*, *e.g.*, *United States v. Spann*, No. 15-20070, 2015 WL 1969111, at *5 (S.D. Fla. May 1, 2015) (rejecting idea that officers have to eliminate the possibility of an affirmative defense before finding reasonable suspicion of criminal activity); *United States v. Montague, Jr.*, No. 10-20638-CR, 2010 WL 3294289, at * 6-8 (S.D. Fla. Jul. 27, 2010), *report and recommendation adopted*, No. 10-20368-CR, 2010 WL 3294283 (S.D. Fla. Aug. 20, 2010) (same, and collecting cases).

In sum, although states, including Iowa, appear to be increasingly granting permits for citizens to carry concealed weapons, that does not detract from an officer's basis to

have a reasonable suspicion of criminal activity when reasonable articulable facts lead an officer to believe a person may possess a concealed handgun. As the Supreme Court has recognized, firearms are dangerous and officers must be able to respond to the potential that people are armed in a manner that provides for their own and the public's protection. *See Florida v. J.L.*, 529 U.S. 266, 272 (2000) ("Firearms are dangerous, and extraordinary dangers sometimes justify unusual precautions. Our decisions recognize the serious threat that armed criminals pose to public safety; *Terry's* rule, which permits protective police searches on the basis of reasonable suspicion rather than demanding that officers meet the higher standard of probable cause, responds to this very concern."). That means that no matter how prevalent concealed weapons permits become, an officer need not eliminate that possible affirmative defense to the crime of carrying a concealed weapon before conducting a pat-down search when the officer otherwise has a reasonable basis to believe the suspect is carrying a concealed weapon. In other words, as the Court in *Gatlin* stated, possession of a concealed handgun in Iowa is presumptively illegal. That is not to say, however, that officers can ignore evidence suggesting a person has a concealed weapons permit. If the officer is aware of facts that suggest a suspect is authorized to carry a concealed weapon, then the officer may need to investigate further before concluding that criminal activity is taking place. There is nothing in the facts of this case, however, that would have led a reasonable officer to believe defendant had a concealed weapons permit.

Therefore, I find there were reasonable articulable facts to believe that criminal activity was occurring; that is, that one of the two men in the laundromat identified by the witness was committing the offense of carrying a concealed weapon. I further find that officers did not have to eliminate the possibility that the men had concealed weapons permits before conducting a *Terry* stop of them to further investigate the crime.

B. When Does a Pat-Down Search Begin?

Having determined that the officers did not have to eliminate the possibility that the two men had permits to carry a concealed weapon before believing that one of them may be committing the offense of carrying a concealed weapon, the question then becomes what evidence did the officer have to suggest defendant was the one carrying a concealed weapon. "The reasonableness of official suspicion [for purposes of a pat-down search] must be measured by what the officers knew before they conducted their search." *J.L.*, 529 U.S. at 271. Here, the government argues that defendant's statement, "I've got my homey's" and defendant's gesture toward his pants, are among the facts that give rise to a reasonable suspicion that defendant was armed. I agree that a reasonable officer could interpret the statement and gesture as indicating that defendant was armed. The question, though, is whether the pat-down search had already begun when defendant made that statement and therefore cannot be considered as among the facts justifying the pat-down search in the first instance.

There appears to be very little case law on this precise question. There are some obvious parameters to this analysis, however. Clearly an officer has not initiated a pat-down search when the officer has formulated the intent to do so, but has not articulated that intent verbally to the suspect. *See United States v. Tinnie*, 629 F.3d 749, 752-53 (7th Cir. 2011) (finding that a pat-down search had not begun simply because the officer had formed the mental intention of conducting a pat-down search, and therefore statements and the absence of responses by defendant when asked to exit a vehicle could be considered in determining if the officer had a reasonable basis to believe the defendant was armed and dangerous). On the other hand, clearly a pat-down search has started when an officer physically begins patting down the outside of a suspect's clothing, regardless of whether the officer announces the intent or explains the conduct.

This case presents a set of facts between those two bookends. Here, the officer told defendant that he was going to conduct a pat-down search. The officer was also holding onto the sleeve of defendant's sweatshirt and directing defendant's body against the wall at the time. The officer did this before defendant made any statements or gestures indicating he had a firearm.[3]

I could find one decision with somewhat similar facts. In *United States v. Key*, 621 Fed. App'x 321 (6th Cir. 2015), officers stopped several men wearing heavy coats in the middle of summer as they were walking in the street late at night. Officers approached them, asked for identification, and announced an intention of patting them down for weapons. The defendant stated "Oh, I have nothing on me and you can check me. I am good." When officers attempted to pat-down the defendant, however, he began to walk away from the officers. He continued to walk away despite commands not to, so officers pushed the defendant against the police car, at which time the defendant told the officer he had a gun. In *Key*, the court stated that any one of the facts, including the defendant's statement, was sufficient to establish a reasonable basis to believe the defendant was armed. *Key*, 621 Fed. App'x at 323. The problem with the analysis in Key, however, is that the opinion did not discuss when the pat-down began. It does not appear from the opinion that the defendant challenged the use of his admission in determining reasonable cause to conduct a pat-down search. Accordingly, I find the *Key*

[3] In his post-hearing email submission, defendant emphasizes that Officer Muhlenbruch stated in his report: "I had him face the wall and started a pat down for weapons. Sykes then started mumbling something." Exhibit 1. I find the officer's report irrelevant to this analysis. What the officer believed he was doing is first subjective and second a legal conclusion. Fourth Amendment analysis is objective; the subjective beliefs of the officer are irrelevant in determining the constitutionality of the officer's conduct. Moreover, the officer's own legal interpretation of his conduct is not binding on this Court. Nor should defendant want it to be. For example, had the officer written "I had him face the wall but had not yet started a pat down for weapons when Sykes started mumbling something," then defendant would not suggest the Court should be bound by the officer's legal interpretation of his conduct.

decision's holding regarding use of the defendant's admission to be dictum regarding the precise question posed here.

I find that the pat-down search began in this case before defendant made the statement about having "my homey's" or gesturing toward his pants. The officer told defendant he was going to conduct a pat-down and was physically directing defendant's movement against the wall for the purpose of conducting the pat-down. Defendant made the statement and gesture only in response to the officer's statement and conduct initiating the pat-down search. I find that in determining whether reasonable suspicion existed for a pat-down search, the Court cannot rely on defendant's statement and gesture because they occurred after the officer began the pat-down search. In other words, either the officer had reasonable suspicion to believe defendant was armed before that or not; the officer cannot use evidence obtained from the pat-down search to justify the pat-down search.

C. Was There A Reasonable Basis to Conduct the Pat-Down Search?

The final question is whether (ignoring defendant's statement and gesture) Officer Muhlenbruch had a reasonable basis to believe defendant was armed and dangerous sufficient to justify a pat-down search of defendant. I find that he did and that the pat-down search was lawful.

There are a number of objective facts from which a reasonable officer of similar experience could conclude that a crime was afoot (possession of a concealed weapon) and that defendant possessed a firearm. The reporting citizen, Lindsey, indicated that defendant was one of two males near the laundry basket in which she found a loaded handgun magazine. I have already found the officers had a reasonable articulable basis to believe that one of those two males were carrying a concealed weapon in violation of Iowa law. It was near midnight and thus dark outside, although the laundromat was well-

lit and the parking lot in front of the laundromat reasonably well-lit. The area immediately behind the laundromat was known for some criminal activity, including at least one shots fired incident in the preceding two years. The officers approached the laundromat in front of large plate-glass windows, both dressed in uniforms clearly identifying them as police officers. When they entered the laundromat, defendant made eye contact with Officer Lamere, then turned abruptly and walked briskly away from the officers toward the back of the laundromat. Defendant's companion, in contrast, did not walk away from the officers when they entered the laundromat.

I find that a reasonable officer could believe, based on these facts, that defendant was in possession of a concealed handgun and would be justified in conducting a pat-down search for the safety of the officer and others before further investigating the case. When an officer harbors a reasonable suspicion that a person is armed, a *Terry* pat-down search is warranted. *Arizona v. Johnson*, 555 U.S. 323, 332 (2009). A reasonable suspicion does not require "absolute[ ] certain[ty]." *Terry*, 392 U.S. at 27. The facts gave rise to a reasonable suspicion that one of the two men wearing black in the laundromat was carrying a concealed weapon. The Supreme Court has held that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). Defendant's conduct in walking briskly away from the officers when they entered the laundromat singled him out and gave rise to a reasonable suspicion that he was the one carrying the concealed firearm. *See*, *e.g.*, *United States v. Trogdon*, 789 F.3d 907, 911 (8th Cir. 2015) (suspect's conduct in "walking briskly around the building toward a blocked-off street where it would be difficult to follow" after seeing police officers gave rise to a reasonable suspicion); *United States v. Horton*, 611 F.3d 936, 939 (8th Cir. 2010) (finding reasonable suspicion to believe the defendant was armed because, among other things, he "briskly walked away" from police officers). *See also United States v. Sharp*, No. 11-CR-197, 2013 WL

4522929, at *11 (E.D. Wis. Aug. 27, 2013) (finding reasonable cause to pat-down a suspect who walked up to a drug house during a search, but walked briskly away when he made eye contact with a police officer); *Hadley v. United States*, No. 1:09-CV-278, 2010 WL 2573490, at *4 (W.D. Mich. June 22, 2010) (finding that a suspect's conduct in walking briskly away from officers gave rise to a reasonable suspicion to support a pat-down search).

Defendant posits that his conduct in walking toward the bathroom was itself lawful and not necessarily suspicious, even with him walking briskly, because it is not unreasonable to believe that a person who urgently needs to use a restroom may walk briskly to go do so. The Supreme Court has noted that even where all of the suspect's conduct is lawful and could be susceptible to an innocent explanation, officers may conduct a *Terry* stop where that same conduct is also susceptible to an interpretation of criminal activity. *Wardlow*, 528 U.S. at 125. *See also United States v. Beck*, 140 F.3d 1129, 1136 (8th Cir. 1998) (holding that it is "not necessary that the behavior on which reasonable suspicion is grounded be susceptible only to an interpretation of guilt."). *Terry* permits a limited intrusion into a person's freedom to allow a limited detention or search, recognizing that it is possible that the person may be engaged in lawful conduct.

Defendant suggests in his brief that Officer Muhlenbruch could have taken other, less-intrusive steps than patting down defendant, and argues that had the officer let defendant enter the bathroom it would have decreased the danger because defendant may have discarded the weapon, eliminating the danger. The government responds, based in part on Officer Muhlenbruch's testimony about his subjective fears, that allowing defendant to enter the bathroom may have increased the risk because for all Officer Muhlenbruch knew, defendant may have been entering the bathroom to ready the firearm for use. It is true that the methods employed in a *Terry* stop "should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of

time." *Florida*, 460 U.S. at 500. "However, as part of a lawful *Terry* stop, officers may take any measures that are 'reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop.'" *Newell*, 596 F.3d at 879 (quoting *United States v. Hensley*, 469 U.S. 221, 235 (1985)). As this Court has previously stated, "[a]lthough officers must use the least intrusive means in relation to the scope and duration of a *Terry* stop in order to dispel reasonable suspicion, this does not mean that they must think creatively of every possible means of doing so short of conducting a pat down of a potentially armed suspect." *United States v. Meier*, No. 16-CR-3013-LTS, 2016 WL 6305954, at *6 (N.D. Iowa Oct. 26, 2016). I find Officer Muhlenbruch's decision to stop defendant before defendant entered the bathroom where the officer would have lost sight of him and his actions, at a time the officer had reasonable suspicion to believe defendant was armed with a handgun, to be reasonable under *Terry* and the Fourth Amendment.

V. CONCLUSION

In summary, I find the officer had a reasonable articulable basis to believe that defendant was engaged in criminal activity (carrying a concealed weapon) and had a reasonable basis to believe defendant was armed sufficient to justify a pat-down search. For the reasons set forth above, I respectfully recommend the Court **deny** defendant's motion to suppress (Doc. 11).

Objections to this Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1) and FED. R. CRIM. P. 59(b) must be filed within fourteen (14) days of the service of a copy of this Report and Recommendation. Objections must specify the parts of the Report and Recommendation to which objections are made, as well as the parts of the record forming the basis for the objections. *See* FED. R. CRIM. P. 59. Failure to object to the Report and Recommendation waives the right to *de novo* review by the

district court of any portion of the Report and Recommendation as well as the right to appeal from the findings of fact contained therein. *United States v. Wise*, 588 F.3d 531, 537 n.5 (8th Cir. 2009).

IT IS SO ORDERED this 21st day of April, 2017.

C.J. Williams
Chief United States Magistrate Judge
Northern District of Iowa

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. AIRRINGTON L. SYKES, Defendant.	No. 17-CR-2009-LRR **ORDER**

I. INTRODUCTION

The matter before the court is Defendant Airrington L. Sykes's Objections (docket no. 26) to United States Chief Magistrate Judge C.J. Williams's Report and Recommendation (docket no. 19), which recommends that the court deny Defendant's "Motion to Suppress" ("Motion") (docket no. 11).

II. RELEVANT PROCEDURAL BACKGROUND

On March 2, 2017, a grand jury returned a one-count Indictment (docket no. 2) charging Defendant with possession of a firearm by a felon in violation of 18 U.S.C. §§ 992(g)(1) and 924(a)(2). The Indictment also contained a forfeiture allegation. On April 3, 2017, Defendant filed the Motion. On April 10, 2017, the government filed a Resistance (docket no. 14). On April 17, 2017, Judge Williams held a hearing ("Hearing") on the Motion. *See* April 17, 2017 Minute Entry (docket no. 15). Defendant appeared in court with his attorney, Christopher Nathan. Assistant United States Attorney Anthony Morfitt represented the government. On April 21, 2017, Judge Williams issued the Report and Recommendation, which recommends that the court deny the Motion. On

May 5, 2017, Defendant filed the Objections. The Report and Recommendation regarding the Motion and the Objections are fully submitted and ready for decision.[1]

III. STANDARD OF REVIEW

When a party files a timely objection to a magistrate judge's report and recommendation, a "judge of the 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); *see also* Fed. R. Crim. P. 59(b)(3) ("The district judge must consider de novo any objection to the magistrate judge's recommendation."); *United States v. Lothridge*, 324 F.3d 599, 600 (8th Cir. 2003) (noting that a district judge must "undertake[] a de novo review of the disputed portions of a magistrate judge's report and recommendations"). "A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1); *see also* Fed. R. Crim. P. 59(b)(3) ("The district judge may accept, reject, or modify the recommendation, receive further evidence, or resubmit the matter to the magistrate judge with instructions."). It is reversible error for a district court to fail to engage in a de novo review of a magistrate judge's report when such review is required. *Lothridge*, 324 F.3d at 600. Accordingly, the court reviews the disputed portions of the Report and Recommendation de novo.

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[1] On April 24, 2017, Defendant entered a conditional plea of guilty to the offense alleged in the Indictment. *See* April 24, 2017 Minute Entry (docket no. 20). On April 25, 2017, Judge Williams issued a Report and Recommendation (docket no. 22), which recommended that the court accept Defendant's plea of guilty. Both parties waived objections to the April 25, 2017 Report and Recommendation regarding Defendant's plea of guilty. *See* Waiver (docket no. 23). On April 26, 2017, the court accepted the April 25, 2017 Report and Recommendation. Order Accepting Conditional Guilty Plea (docket no. 24).

IV. RELEVANT FACTUAL BACKGROUND[2]

On December 4, 2016, at approximately 11:50 p.m., Waterloo Police Officer Ryan Muhlenbruch was dispatched to Clean Laundry, a laundromat, in Waterloo. Exhibit 1 (docket no. 14-2) at 1. Officer Muhlenbruch was in uniform, but drove an unmarked police car. When Officer Muhlenbruch arrived at the laundromat parking lot, he made contact with Angie Lindsey. *See id*. Lindsey stated, that while doing her laundry, "she had [placed] clothes inside of a laundry basket after taking them from the dryer and when she took the clothes out of the basket, she located [a loaded] silver handgun magazine." *Id*. Lindsey told Officer Muhlenbruch that "there were only two other people inside the [laundromat] when she was there and," although she did not know if they had anything to do with the magazine, "they had been hanging around the basket [in which] she located the magazine." *Id*.; *see also* Exhibit A.[3] Lindsey identified two "young[] black males wearing mostly dark clothing," one of whom was Defendant, as the individuals who were in the laundromat. Exhibit 1 at 1.

Officer Muhlenbruch requested assistance and Officer Luke Lamere arrived shortly thereafter in a marked police vehicle. The officers approached the laundromat entrance on foot, crossing in front of two large plate-glass windows. Defendant was standing in an aisle approximately twenty feet from the front windows. Once the officers entered the laundromat, they approached the two men Lindsey had identified. Officer Muhlenbruch testified that he did not see a bulge in Defendant's clothing indicating that Defendant was

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[2] After reviewing the Hearing Transcript (docket no. 29), the court finds that Judge Williams accurately and thoroughly set forth the relevant facts in the Report and Recommendation. *See* Report and Recommendation at 2-6. Accordingly, the court only briefly summarizes the facts. When relevant, the court relies on and discusses additional facts in conjunction with its legal analysis.

[3] Exhibit A is a video from Officer Muhlenbruch's body camera depicting the December 4, 2016 encounter. Exhibit A was offered by Defendant and accepted by the court at the hearing. *See* April 17, 2017 Minute Entry at 2.

armed. As the officers approached, Defendant turned and walked briskly[4] toward the back of the laundromat. Officer Muhlenbruch followed Defendant, who passed by an exit in the rear of the laundromat and entered a bathroom. Officer Muhlenbruch reached the bathroom door just as Defendant entered it. Officer Muhlenbruch opened the bathroom door and asked[5] Defendant to come out of the bathroom. Defendant complied as Officer Muhlenbruch grabbed hold of Defendant's sleeve to guide Defendant out of the bathroom. Officer Muhlenbruch subsequently directed Defendant against the wall. As Officer Muhlenbruch did so, Defendant said "I have my homies [sic]" and pointed toward his waist. Hearing Transcript at 4. Officer Muhlenbruch then conducted a pat-down search of Defendant and ultimately recovered a handgun from Defendant's pants pocket.

V. ANALYSIS

Pursuant to the Fourth Amendment, warrantless searches are per se unreasonable, "subject only to a few specifically established and well delineated exceptions." *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993). "A police officer 'may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot.'" *United States of America v. Fields*,

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[4] In his Objections, Defendant "objects to the Report [and Recommendation]'s characterization of [his] brisk walk to the bathroom as flight." Brief in Support of Objections at 1 (docket no. 26-1). The description of Defendant's walk as brisk is supported by the record. *See* Hearing Transcript at 4. Additionally, Judge Williams does not characterize the "brisk walk" as "flight." Rather, he references the brisk walk as a factor in assessing whether there is reasonable suspicion. Therefore, the court will address this as a factor in the reasonable suspicion analysis below.

[5] Judge Williams found that Officer Muhlenbruch "asked" Defendant to come out of the bathroom. Report and Recommendation at 4. Defendant objects to Judge Williams's "use of the word 'asked' to the extent that it suggests that the encounter was consensual." Brief in Support of Objections at 1. The court assumes for the purposes of this order that the encounter was not consensual. However, this assumption does not impact the court's analysis of reasonable suspicion giving rise to the *Terry* stop.

832 F.3d 831, 834 (8th Cir. 2016) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000)). Officers may conduct a pat-down search for weapons if they have reasonable suspicion that the person is armed. *See Terry v. Ohio*, 392 U.S. 1, 27 (1968). "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger." *Id.* "The existence of reasonable, articulable suspicion is determined by the totality of the circumstances, taking into account an officer's deductions and rational inferences resulting from relevant training and experience." *Fields*, 822 F.3d at 834 (quoting *United States v. Horton*, 611 F.3d 936, 940 (8th Cir. 2010)); *see also United States v. Hollins*, 685 F.3d 703, 706 (8th Cir. 2012) ("'The determination of whether probable cause,' or reasonable suspicion, 'existed is not to be made with the vision of hindsight, but instead by looking to what the officer reasonably knew at the time.'" (quoting *United States v. Sanders*, 196 F.3d 910, 913 (8th Cir. 1999))). "Although an officer's reliance on a mere hunch is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (citations and internal quotation marks omitted). "A determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct." *Id.* at 277; *accord United States v. Stewart*, 631 F.3d 453, 457 (8th Cir. 2011).

In this case, Officer Muhlenbruch arrived at the laundromat at approximately 11:50 p.m. in response to a call from a patron who reported finding a handgun magazine inside the laundry basket she was using. When the officers arrived at the laundromat, they made contact with the patron. She identified the only two other people who had been inside the laundromat when she found the magazine. Although she did not know whether they had anything to do with the magazine, she did report that they had been hanging

around the basket in which she located the magazine. When the officers entered the laundromat, Defendant turned and walked briskly toward the bathroom at the back of the laundromat. *See* Hearing Transcript at 4, 12; *see also United States v. Roelandt*, 827 F.3d 746, 749 (8th Cir. 2016) ("[Defendant's] acts, although largely 'consistent with innocent behavior,' when taken together with all of the facts and circumstances known to the officers, '[gave] rise to reasonable suspicion.'" (second alteration in original) (quoting *United States v. Stewart*, 631 F.3d 453, 457 (8th Cir. 2011)). Based on the information the officer received from the patron and Defendant's act of immediately walking away as the uniformed officers approached, the officers had reasonable suspicion to believe that the Defendant may have been armed. *See United States v. Quinn*, 812 F.3d 694, 697-98 (8th Cir. 2016) ("Factors that may reasonably lead an experienced officer to investigate include time of day or night, location of the suspect parties, and the parties' behavior when they become aware of the officer's presence.") (quoting *United States v. Dawdy*, 46 F.3d 1427, 1429 (8th Cir. 1995)); *United States v. Davison*, 808 F.3d 325, 329-30 (8th Cir. 2015) (finding reasonable suspicion where defendant "appeared to be walking in a circle near [a] stolen truck in a high-crime neighborhood" and took "actions suggesting [he was] trying to avoid police contact").

Defendant does not appear to dispute that the officers "had reason to believe that the Defendant may be armed." Brief in Support of Objections at 2. Rather, Defendant argues that Judge Williams erred in finding that the *Terry* stop was proper because firearm possession is not per se unlawful in Iowa, where persons are permitted to carry concealed firearms. *Id*. at 1-2. Because it is increasingly common for a person to possess a permit to lawfully carry weapons, Defendant argues that the officers did not have reasonable suspicion Defendant was committing a crime. *Id*. at 2. Defendant asserts that, to hold otherwise, "would strip away the Fourth Amendment rights of . . . persons . . . in possession of permits to carry." *Id*. at 2.

As noted by Judge Williams, Iowa Code § 724.4(1) provides that, subject to certain exceptions, "a person who goes armed with a dangerous weapon concealed on or about the person . . . commits an aggravated misdemeanor." Iowa Code § 724.4(1). "[A]bsence of a permit [is not] an element of the offense." *State v. Bowdry*, 337 N.W.2d 216, 218 (Iowa 1983). Rather, "statutory exceptions are affirmative defenses." *State v. Leisinger*, 364 N.W.2d 200, 202 (Iowa 1985); *see also State v. Nelson*, 828 N.W.2d 325, 2013 WL 104796, at *2 (Iowa Ct. App. Jan. 9, 2013) ("[T]he defendant, rather than the State, possesses personal knowledge of whether an exception may apply."). The cases cited by Defendant are unpersuasive because they involve jurisdictions where concealed and/or open carry are presumptively lawful. While Defendant's position may or may not have merit in such jurisdictions, it plainly fails in jurisdictions like Iowa, where possessing a permit is an affirmative defense. *Compare United States v. Ubiles*, 224 F.3d 213, 218 (3d Cir. 2000) ("For all the officers knew, even assuming the reliability of the tip that [the defendant] possessed a gun, [he] was . . . lawfully exercising his rights under Virgin Islands law to possess a gun in public."), *with United States v. Gatlin*, 613 F.3d 374, 378 (3d Cir. 2010) (distinguishing *Ubiles* because, "under Delaware law, carrying a concealed handgun is a crime to which possessing a valid license is an affirmative defense, and an officer can presume a subject's possession is not lawful until proven otherwise").

Because the officers had reasonable suspicion that Defendant was carrying a concealed weapon, which is presumptively illegal in Iowa, Judge Williams correctly found that "there were reasonable articulable facts to believe criminal activity was occurring"—specifically, "that one of the two men in the laundromat identified by the witness was committing the offense of carrying a concealed weapon." Report and Recommendation at 11. Because the officers had reasonable suspicion, the *Terry* stop was proper.

Defendant argues that, even if the *Terry* stop was lawful, Judge Williams erred in finding that the *Terry* frisk was lawful. Brief in Support of Objections at 3.

"Following a valid *Terry* stop, the officer may conduct a limited pat-down search of the individual's outer clothing for the purpose of uncovering concealed weapons if the officer has a reasonable, articulable suspicion that the person is armed and dangerous." *United States v. Gilliam*, 520 F.3d 844, 847-48 (8th Cir. 2008) (citing *Terry*, 392 U.S. at 30). "[T]he totality of the circumstances is the touchstone of [the court's] analysis—facts such as the time of day, the suspect['s] location, and [his or her] behavior when [he or she] become[s] aware of the officer's presence, considered together with the inferences and deductions made by the officer." *Davison*, 808 F.3d at 330. "[A] pat-down is permissible if a 'reasonably prudent [person] in the circumstances would be warranted in the belief that his [or her] safety or that of others was in danger.'" *Horton*, 611 F.3d at 941 (quoting *Terry*, 392 U.S. at 27). As discussed above, the officers had reasonable suspicion that Defendant was armed. The encounter also happened late at night and involved unusual circumstances, that is a loaded magazine for a firearm being left in a laundry basket. *See United States v. Douglas*, 964 F.2d 738, 741 (8th Cir. 1992) (finding officer "was warranted in the belief that his safety was in danger in light of the fact that it was late at night" among several other factors). Additionally, Officer Muhlenbruch testified that when Defendant walked toward the back of the laundromat he became concerned that Defendant may have been attempting to ready a weapon by locking himself in the bathroom. *See* Hearing Transcript at 4. In light of these facts, the court agrees with Judge Williams's finding that the pat-down search of Defendant's outer clothing was supported by reasonable suspicion that Defendant was armed and dangerous.

VI. CONCLUSION

In light of the foregoing, it is hereby **ORDERED**:

(1) The Objections (docket no. 26) are **OVERRULED**;

(2) The Report and Recommendation (docket no. 19) is **ADOPTED**; and

(3) The Motion to Suppress (docket no. 11) is **DENIED**.

DATED this 5th day of June, 2017.

LINDA R. READE, JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

United States Court of Appeals
For the Eighth Circuit

No. 17-3221

United States of America

Plaintiff - Appellee

v.

Airrington L. Sykes

Defendant - Appellant

Appeal from United States District Court
for the Northern District of Iowa - Waterloo

Submitted: October 18, 2018
Filed: January 30, 2019

Before WOLLMAN, ARNOLD, and BENTON, Circuit Judges.

ARNOLD, Circuit Judge.

After the government indicted Airrington Sykes for being a felon in possession of a firearm, *see* 18 U.S.C. § 922(g)(1), he moved to suppress evidence that a police officer obtained after he stopped Sykes and frisked him. When the district court[1]

[1]The Honorable Linda R. Reade, United States District Judge for the Northern District of Iowa, adopting the report and recommendation of the Honorable C.J.

denied the motion, Sykes pleaded guilty to the charge but reserved his right to appeal the denial of his motion. He appeals and we affirm.

On a December evening just shy of midnight, a police officer in Waterloo, Iowa, was dispatched to a 24-hour laundromat where he met a woman in the parking lot who reported finding a loaded handgun magazine in a laundry basket. She explained that the only other people in the laundromat at the time she discovered the magazine were two men dressed in black. She stated she was unsure if they had anything to do with the magazine, but she noticed they had stood near her basket at one point. She said that the men were still in the laundromat, though other people had since arrived.

The officer entered the laundromat and began approaching the two men in question. His body camera shows that, when he entered the aisle where the men stood, one of the men, Sykes, turned and began walking away. The officer attempted to intercept Sykes at a back corner of the laundromat near an exit and a bathroom. The officer's body camera shows Sykes bypass the exit, enter the restroom, and close the door. Moments later the officer opened the restroom door and told Sykes to "give me one second" and that he needed "one second of [his] time." Sykes complied, and the officer grabbed Sykes's sleeve and guided him out of the restroom. He then patted Sykes for weapons and discovered a handgun in Sykes's pants pocket.

Sykes's primary argument on appeal is that the officer lacked a reasonable suspicion that Sykes was committing a crime. The government disagrees, responding that Iowa Code § 724.4(1), which makes it an aggravated misdemeanor for someone to go "armed with a dangerous weapon concealed on or about the person," supplied the legal basis for the stop. Sykes counters that the officer had no reason to believe

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Williams, then Magistrate Judge for the Northern District of Iowa, now United States District Judge for the Northern District of Iowa.

that he lacked a permit for the gun or that he was anything other than a lawful gun carrier.

We recently decided a case that presented this very issue. *See United States v. Pope*, 910 F.3d 413 (8th Cir. 2018). We held in *Pope* that an officer in Iowa may briefly detain someone whom the officer reasonably believes is possessing a concealed weapon. *Id.* at 416. We explained that, since a concealed-weapons permit is merely an affirmative defense to a charge under § 724.4(1), an officer may presume that the suspect is committing a criminal offense until the suspect demonstrates otherwise. *Id.* at 415–16. We therefore reject Sykes's contention.

Sykes also argues that the officer lacked a reasonable suspicion that he even possessed a gun. We disagree. It is true that this case is unlike *Pope*, where an officer saw the suspect conceal a weapon in his pants. But here we have a report from a known person with whom the officer had an extensive discussion and who asserted that she found a loaded handgun magazine of unknown origins; and she identified the only two people who had access to the location where the magazine was found. We think it reasonable to suspect that a person with loaded handgun magazines may have a handgun since, without the handgun, the magazines are of little use. We also believe it was reasonable to suspect that Sykes or his companion had a concealed gun, as opposed to a gun openly carried, since the woman who found the magazine never reported that she actually saw a gun in Sykes's or his companion's possession. And the officers who approached Sykes never testified to seeing a gun being openly displayed, either through the windows of the laundromat or during their approach of Sykes. *See United States v. Polite*, 910 F.3d 384, 388 (8th Cir. 2018).

We want to emphasize that we give no weight to the fact that Sykes turned and walked away from the officers as they approached him. Though a person's unprovoked "flight" from police may be considered in the reasonable-suspicion calculus, a person's decision during a consensual police encounter "to ignore the police and go about his

business" cannot. *See Illinois v. Wardlow*, 528 U.S. 119, 124–26 (2000). After reviewing the body-camera video ourselves, we think Sykes's avoidance of the officer lies near the intersection of these two principles. But we need not decide the legal significance, if any, of Sykes's walking away from the officer because we think the officer had reasonable suspicion to detain Sykes even before Sykes began to leave.

Sykes suggests that the officer did not have reasonable suspicion at that point because he had no reason to suspect that Sykes, as opposed to the other person present, was engaged in criminal activity, and the Fourth Amendment requires "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *See United States v. Cortez*, 449 U.S. 411, 417–18 (1981). As he sees it, "nothing points to Sykes possessing the firearm instead of his friend."

For stop-and-frisk purposes, however, the Fourth Amendment does not require that an officer must suspect only one person to the exclusion of all others. "[T]he simultaneous stopping of multiple 'suspects' for a one-person crime may sometimes be justified by the virtual certainty that the perpetrator is a member of that group and that means of singling him out will soon be available." 4 Wayne R. LaFave, Search & Seizure: A Treatise on the Fourth Amendment § 9.5(b) (5th ed. Oct. 2018). The Third Circuit's decision in *United States v. Ramos* nicely illustrates this principle. 443 F.3d 304 (3d Cir. 2006). There, when police officers drove between two vehicles in an otherwise empty parking lot, one of the officers smelled marijuana. After one of the vehicles left the lot, the officers conducted a traffic stop and discovered illegal contraband. A defendant in the vehicle argued that the officers' stop violated the Fourth Amendment because the officers' suspicion of him was not sufficiently particularized since the odor could have been coming from the other vehicle. The Third Circuit disagreed, holding that "it would have been reasonable for the officers to conclude that the odor was coming from one, the other, or both vehicles," and so their suspicion was sufficiently particularized under the Fourth Amendment to allow them to stop the vehicle they stopped. *Id.* at 309.

We conclude that it would likewise have been reasonable here for the officer to suspect that Sykes, his companion, or both were carrying a concealed firearm, so we detect no constitutional violation. In the abstract, we recognize that as the number of suspects to be stopped increases, it will be less likely that suspicion will be sufficiently particularized to meet constitutional standards. Various considerations will bear on whether a given search is particularized enough in the circumstances. The key, as is typical in the Fourth Amendment context, is reasonableness, *see Cty. of L.A. v. Mendez*, 137 S. Ct. 1539, 1546 (2017), and we think it was reasonable in the circumstances here for the officer to detain Sykes briefly to investigate whether he was unlawfully carrying a concealed weapon.

Sykes also maintains that, even if the officer had reasonable suspicion to stop him, he lacked reasonable suspicion to frisk him. An officer may frisk a suspect whom he has lawfully stopped if he believes the suspect is "armed and dangerous." *Terry v. Ohio*, 392 U.S. 1, 27 (1968). According to Sykes, the officer had no reason to believe that he was dangerous just because he was carrying a concealed weapon. We resolved this very issue in *Pope*, holding that an officer may indeed frisk someone he has lawfully stopped if he reasonably believes the person is armed with a gun, regardless of whether the person possesses the gun legally. *See Pope*, 910 F.3d at 416–17. Sykes's argument therefore fails.

We also note that Sykes appears to raise a Second Amendment challenge to § 724.4(1) in his reply brief. Because he failed to raise the argument in his opening brief, we decline to address it. *See id.* at 417.

We turn now to Sykes's sentence. Under USSG § 2K2.1(a), the base offense level of a person convicted of being a felon in possession of a firearm increases if he has previously been convicted of a crime of violence. A "crime of violence" is defined, in relevant part, as a federal or state offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another."

USSG § 4B1.2(a)(1). Sykes argues that the district court erred when it deemed his prior Illinois conviction for aggravated vehicular hijacking a crime of violence. *See* USSG § 2K2.1(a)(4)(A). We review de novo the district court's designation of a prior conviction as a crime of violence. *United States v. Williams*, 899 F.3d 659, 662 (8th Cir. 2018).

Sykes was convicted of aggravated vehicular hijacking because, while armed with a firearm, he "knowingly t[ook] a motor vehicle from the person or the immediate presence of another by the use of force or by threatening the imminent use of force." 720 Ill. Comp. Stat. 5/18–3(a), –4(a)(4). Though the definition of this crime explicitly requires the actual or threatened use of force, Sykes maintains that the crime still does not have "as an element the use, attempted use, or threatened use of physical force against the person of another" because it does not require, as it must, "force capable of causing physical pain or injury." *See Johnson v. United States*, 559 U.S. 133, 140 (2010).

To make his point, Sykes invites us to consider Illinois robbery, which similarly requires the taking of property "by the use of force or by threatening the imminent use of force." *See* 720 Ill. Comp. Stat. 5/18–1(a). Indeed, Illinois courts have explained that the robbery and vehicular-hijacking statutes are "so similar that vehicular hijacking could be fairly described, for all practical purposes, as robbery of a specific kind of property, a motor vehicle," and "[g]iven the similarity in language," Illinois courts have "analogized to the robbery statute when interpreting the vehicular hijacking statute." *People v. Jackson*, 65 N.E.3d 550, 559 (Ill. App. Ct. 2016). Sykes then argues that one can commit robbery in Illinois with nonviolent force, and he purports to identify cases in which those convicted of Illinois robbery did not use violent force. For example, he points to *People v. Taylor*, 541 N.E.2d 677, 678 (Ill. 1989), which involved a robbery conviction where the defendant snatched a necklace off the victim's neck, and *People v. Merchant*, 836 N.E.2d 820, 821 (Ill. App. Ct.

2005), where someone was convicted of robbery after "tussling on the sidewalk" with the victim over money.

The Supreme Court's recent decision in *Stokeling v. United States*, No. 17–5554, 2019 WL 189343 (Jan. 15, 2019), forecloses Sykes's argument. In *Stokeling*, the Court considered whether a Florida robbery conviction constituted a violent felony under the Armed Career Criminal Act. The relevant definition of a violent felony under the ACCA and the definition of a crime of violence under the Guidelines are so similar that we generally consider cases interpreting them "interchangeably." *See Boaz v. United States*, 884 F.3d 808, 810 n.3 (8th Cir. 2018). The *Stokeling* Court held that the ACCA intended common-law robberies to be violent felonies even though common-law robbery required only sufficient force to overcome a victim's resistance, "however slight the resistance." 2019 WL 189343, at *4. Courts in Florida, and in most states for that matter, had subscribed to this common-law notion of force, and the Court "declined to construe the statute in a way that would render it inapplicable in many States." *Id.*, at *5–6.

Illinois's definition of robbery fits the common-law mold. As in Florida, one commits robbery in Illinois when he uses force sufficient to overcome a victim's resistance, however slight. *See Taylor*, 541 N.E.2d at 679–80. As in Florida, one does not commit robbery in Illinois when he snatches property from the person of another if the force involved was "seemingly imperceptible to the victim." *People v. Bowel*, 488 N.E.2d 995, 997–98 (Ill. 1986); *see also Stokeling*, 2019 WL 189343, at *9. Florida and Illinois appear to draw the same line between robbery, which requires force, and less serious crimes like theft or larceny, which don't. And as the Court explained in *Stokeling*, though in some cases only slight force is necessary to overcome a victim's resistance, such force "is inherently 'violent' in the sense contemplated by *Johnson*" and capable of causing physical pain or injury because it "necessarily involves a physical confrontation and struggle." *See Stokeling*, 2019 WL 189343, at *7. Since the Supreme Court has held that common-law robbery "has as

an element the use, attempted use, or threatened use of physical force against the person of another," and Illinois adheres to the common-law definition of robbery, we reject Sykes's argument.

Sykes also points to a case called *In re Thomas T.*, 63 N.E.3d 284, 287–88 (Ill. App. Ct. 2016) to argue that Illinois courts define "force" in the vehicular-hijacking context as "power, violence, compulsion, or constraint exerted upon or against a person or thing"—a definition he maintains does not require violent force. Even if the *Thomas T.* court actually adopted such a definition, a matter we need not decide, *Thomas T.* involved vehicular invasion, a wholly different crime. *See* 720 Ill. Comp. Stat. 5/18–6. Illinois courts have distinguished vehicular invasion from vehicular hijacking by the amount of force each requires: A person can "commit the offense of vehicular invasion without the use of physical force or violence against an individual," *People v. McDaniel*, No. 1-13-2679, 2015 WL 6460052, at *9–10 (Ill. App. Ct. Dec. 14, 2015) (unpublished), but an Illinois court could not "conceive of[] a situation in which a defendant could commit vehicular hijacking without using or threatening the use of physical force or violence." *People v. Wooden*, 16 N.E.3d 850, 855 (Ill. App. Ct. 2014). We therefore see no error here.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-3221

United States of America

Plaintiff - Appellee

v.

Airrington L. Sykes

Defendant - Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Waterloo
(6:17-cr-02009-LRR-1)

JUDGMENT

Before WOLLMAN, ARNOLD and BENTON, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

January 30, 2019

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans