No. 19-_____

IN THE

SUPREME COURT OF THE UNITED STATES

JONATHAN MEIER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether law enforcement violates the Fourth Amendment right against unreasonable search and seizure when it holds an individual for a prolonged period of time after having cleared that individual from the basis of the call to law enforcement.

Whether law enforcement violates the Fourth Amendment right against unreasonable search and seizure when it pats down and searches an individual for weapons without having a reasonable suspicion that the individual has a weapon.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

There are no known related cases.

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TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit appears at Appendix A to the Petition and is unpublished.

The opinion of the United States District Court for the Northern District of Iowa Central Division appears at Appendix B to the Petition and is unpublished.

The report and recommendations of the United States Magistrate Judge for the Northern District of Iowa Central Division appears at Appendix C to the Petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Eighth Circuit decided Petitioner's was January 16, 2019.

A timely petition for rehearing was denied by the United States Court of Appeals for the Eighth Circuit on March 14, 2019, and a copy of the order denying rehearing appears at Appendix D.

The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 18 of the United States Code, Section 922(g)(1) provides:

> It shall be unlawful for any person—(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; … to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Title 18 of the United States Code, Section 924(a)(2) provides:

> Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

STATEMENT OF THE CASE

Petitioner was arrested on February 14, 2016, following an incident that occurred after his cousin placed a 911 call asking for an officer to come to her home because she was being harassed by Jim, last name unknown, and that he and his girlfriend had been harassing her for months. Law enforcement responded to the call, where the officer was told that the suspects had left but was shown a video of the two individuals outside of her home earlier. The officer then left and parked in the neighborhood to further investigate Jim's girlfriend's maroon van. While parked, a black Chevrolet pickup truck passed the officer but was the officer had no reason to believe the truck was connected to Jim or his girlfriend.

Fifteen minutes after the first call, Petitioner's cousin contacted 911 again, stating "that guy" was there, that there were two people, that Jim had a small handgun and that he was parked in her driveway in a black Chevy truck. The officer returned to the home and made contact with Petitioner, who was exiting the black Chevrolet truck in his cousin's driveway. The officer spoke with Petitioner, explained that he was responding to a gun call and asked what Petitioner was doing. Petitioner explained that he had thrown a snowball at his cousin's trailer to get her attention. Petitioner denied having any weapons and did not consent to the search of the truck because it was not his. Petitioner provided his identification

upon request, which was confirmed valid by dispatch, and law enforcement ran the plates of the truck with no indication that it was stolen. The officer quickly concluded that Petitioner was not one of the harassment suspects that were the subject of Ms. Ebner's 911 calls.

Petitioner then asked if he could leave but the officer would not allow him to leave, stating that he had to wait for the arrival of another officer. When the second officer arrived, he asked the first officer if he had patted down Petitioner, to which the first officer replied he did not because Petitioner "didn't appear to have anything on him." The first officer stated that he had run "his DL and everything" and was just going to speak to Petitioner's cousin. Petitioner asked that they confirm with his cousin that he was not the suspect the officers were looking for and the first officer inexplicably again asked for Petitioner's driver's license.

The second officer then stated he was going to pat down Petitioner, to which Petitioner refused to consent. Eventually, a struggle ensued and Petitioner was taken to the ground, during which time Petitioner's cousin exited her trailer and to the officers that Petitioner was her cousin and was not the subject of her call. As the officers rolled Petitioner over to stand him up, a Harrington & Richardson .38 caliber pistol and a digital scale fell from Appellant's sweatshirt pocket, so Petitioner was arrested. Officers then searched the truck, where allegedly drug paraphernalia and another firearm was located, but Petitioner was not charged with anything related to drugs, distribution, or paraphernalia.

Petitioner was charged with possession of firearms by a felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Petitioner filed a motion to suppress, based on his prolonged detention after being cleared of the basis for the call to law enforcement and the search of his person without reasonable suspicion that Petitioner had a weapon. The magistrate judge entered a Report and Recommendation that recommended Petitioner's motion to suppress be denied, which the District Court adopted. Petitioner entered a conditional plea pending resolution of the denial of his motion to suppress. Petitioner appealed to the United States Court of Appeals for the Eighth Circuit, which affirmed the District Court's order and denied Petitioner's Petition for Rehearing En Banc and Petition for Rehearing by the Panel. This Petition for Writ of Certiorari now follows.

REASONS FOR GRANTING THE PETITION

Petitioner respectfully submits this Petition for Writ of Certiorari because of the exceptional importance when an individual's Fourth Amendment rights are impinged and he is unlawfully stopped and detained for a prolonged period of time without reasonable suspicion, and that the unlawful stop is then expanded to include an unlawful search and seizure without reasonable suspicion. The decision of the Court of Appeals for the Eighth Circuit is inconsistent with *Rodriguez v. United States*, --- U.S. ---, 135 S. Ct. 1609, 1614-17 (2015); *Florida v. Royer*, 460 U.S. 491, 500 (1983); and *United States v. Watts*, 7 F.3d 122 (8th Cir. 1993). Accordingly, Petitioner argues that there is a compelling reason for the United States Supreme

Court to consider this case to help discourage law enforcement from engaging in conduct directly contrary to case law and the Fourth Amendment.

It has been undisputed that Petitioner was detained by the first officer to arrive on the scene and was not free to leave prior to the arrival of the second officer. Petitioner was unreasonably detained when the first officer refused to allow him to leave the scene upon his request to do so. See, *Rodriguez v. United States*, --- U.S. ---, 135 S. Ct. 1609 (2015). At this point, the police officer expressed clearly to Petitioner that he could not leave, and as such, a reasonable person would not have believed he or she could leave. See, *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); United States v. White, 81 F.3d 775, 779 (8th Cir. 1996).

The District Court found, and the Eighth Circuit affirmed, that this detention was objectively reasonable under the totality of the circumstances. However, this conclusion is contrary to the evidence contained in the record, as the first officer testified in a sworn deposition that he had concluded that Petitioner "wasn't one of the people that was here for the harassment call." This is notable, because the reason for the officer's encounter with Petitioner was a second 911 call that the people from the harassment call had returned. In addition, the first officer told the second officer upon arrival that he did not conduct a pat-down search on Petitioner because he "didn't appear to have anything on him."

Once the officer had gathered information from Petitioner, concluded that Petitioner

was not armed because he "didn't appear to have anything on him," the officer was obligated to release Petitioner. See, *United States v. Watts*, 7 F.3d 122, 126 (8th Cir. 1993). The officer even admitted during the hearing on Petitioner's Motion to Suppress that he lacked any concrete suspicion at that point that Petitioner was violating any laws. From this point forward, any further intrusion was not and could not possibly be "reasonably related in scope to the circumstances which justified the interference in the first place," and the detention became "longer than [wa]s necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500 (1983) (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968)); see, also, *Rodriguez v. United States*, --- U.S. ---, 135 S. Ct. 1609, 1614-17 (2015). After the officer had cleared Petitioner as not being "Jim," the identified armed harassment suspect, as identified by the 911 caller, the "continued detention was nothing more than an unlawful fishing expedition." *United States v. Babwah*, 972 F.2d 30, 34 (2d Cir. 1992). The fact that the continued detention resulted in the seizure of a firearm and drugs "does not, of course, make it lawful." *Id.*

The District Court and Eighth Circuit discounted the officer's own conclusions, but such conclusions are relevant in the analysis. Although a *Terry* stop is assessed from an objective perspective, the officer's conclusion that Petitioner was not "Jim", the individual that was the subject of the 911 call, was objectively reasonable. The officer was an experienced law enforcement professional who had been with the Fort Dodge Police Department for approximately 22 years

without any serious disciplinary issues. He was also the only officer who responded to the prior 911 call and had observed the footage of the video that the caller had taken of the suspect earlier. Prior to the arrival of the second officer, he had interacted with Petitioner in a calm conversation and based on his own observations, he reasonably concluded that Petitioner was not harassing his cousin and was not the subject of her 911 calls. With the officer's experience, background and involvement with the individual that night in mind, his own conclusions are highly relevant in assessing whether there was an objective basis for continuing Petitioner's detention.

Once the officer lacked reasonable suspicion to continue Petitioner's detention to investigate the 911 calls, the investigative stop was required to end. See, *Watts*, 7 F.3d at 126. The officer simply had no legitimate basis to detain Petitioner and wait for the second officer to arrive. Accordingly, the "continued detention was nothing more than an unlawful fishing expedition." *United States v. Babwah*, 972 F.2d 30, 34 (2d Cir. 1992). Only with the hindsight of all subsequent events, including the 911 caller's alleged error and the second officer's illegal pat-down, could one conclude that Petitioner's detention was anything more than a fishing expedition. The results of the subsequent unlawful search "does not, of course, make [the seizure] lawful." *Id.* As such, all of the evidence seized by law enforcement on the evening of February 14, 2016, as a result of Petitioner's unlawful continued detention, search and seizure, including the evidence obtained

from the search warrant after Petitioner's arrest, is fruit of the poisonous tree and therefore should be suppressed at trial. See, *Wong Sun v. United States*, 371 U.S. 471 (1963).

Notably, the Eighth Circuit held that under the totality of the circumstances, the first officer "was justified in being suspicious of [Petitioner] shutting the truck door in response to a question about weapons." However, the officer's prior reports and testimony were inconsistent with this assertion, and he never claimed that "something was not right" or that he was suspicious there could be a weapon in the truck until approximately 18 months after the event. When comparing the reports and depositions to the live testimony, the officer's testimony was clearly self-serving. In his deposition, he testified that when the second officer arrived, he was going to ask him to "keep an eye on [Petitioner] real quick" while he spoke to the Petitioner's cousin, and then essentially conducted the pat down as an afterthought.

Furthermore, Petitioner's act of closing the truck door and legally refusing to consent to a search of his vehicle does not constitute reasonable suspicion to continue Petitioner's detention. "[C]onduct typical of a broad category of innocent people" cannot, as a matter of law, figure into the reasonable suspicion analysis. United States v. Green, 52 F.3d 194 (8th Cir. 1995). Surely exercising one's constitutional right to refuse to consent to search, particularly of a vehicle that one does not own, would be conduct of a broad category of innocent people and therefore does not constitute reasonable suspicion. To hold otherwise is to effectively

eviscerate the Fourth Amendment, as the mere act of declining to consent to a search creates the justification to conduct the search without consent.

The Eighth Circuit stated that Petitioner overlooked that it was the second officer, not the second officer, who conducted the pat-down search of Petitioner, and therefore, the first officer's subjective reasons for failing to pat-down Petitioner are not material to the issue of whether the pat-down search was reasonable. However, this completely ignores the fact that Petitioner was illegally detained by the first officer, without reasonable suspicion to continue the detention. This illegal detention then "poisons the fruit of the tree," making the subsequent search of Petitioner and any evidence obtained therefrom inadmissible. The Eighth Circuit essentially bifurcated Petitioner's contact with the two separate officers, ignoring the contact with the initial officer, and relying only on the second officer that arrived much later to conduct a pat-down on an individual that was illegally detained.

The Eighth Circuit stated that Appellant "has not challenged whether [the second officer] had reasonable suspicion to believe that [Petitioner] was armed and dangerous to justify the pat-down search of [Petitioner], as opposed to the officers' continued seizure of [Petitioner]." This statement was not a fair representation of Petitioner's appeal, as Petitioner had challenged whether there was reasonable suspicion for the pat-down in its entirety. In addition, the record is not clear on which officer did various parts of the pat down and subsequent struggle, so to credit

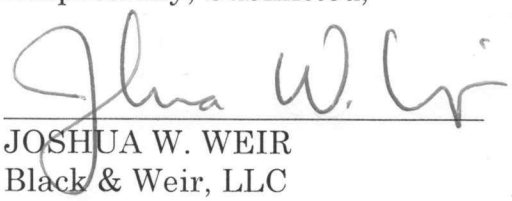
the entire pat down to the second officer and ignore the first officer's participation completely disregards the violation of Petitioner's constitutional rights because Petitioner had already been detained. Furthermore, this distinction by the Eighth Circuit is an implicit acknowledgment that there was not reasonable suspicion to believe that Petitioner was armed and dangerous to justify the pat-down search of Petitioner.

CONCLUSION

Petitioner argues that there is a compelling reason for the United States Supreme Court to consider this case because it is of exceptional importance when an individual's rights under the Fourth Amendment of the United States Constitution are impinged. Petitioner was unlawfully stopped and detained without reasonable suspicion, and the unlawful stop was then expanded to include an unlawful search and seizure, which violated his rights under the Fourth Amendment of the United States Constitution. Petitioner submits that the decision of the United States Court of Appeals for the Eight Circuit was inconsistent with *Rodriguez v. United States*, --- U.S. ---, 135 S. Ct. 1609, 1614-17 (2015); *Florida v. Royer*, 460 U.S. 491, 500 (1983); and *United States v. Watts*, 7 F.3d 122 (8th Cir. 1993). Because the detention, search and seizure of Petitioner was unlawful, all subsequent searches and seizures, as well as all evidence obtained therefrom, are inadmissible as fruit of the poisonous tree. See, *Wong Sun v. United States*, 371 U.S. 471 (1963).

For all of the foregoing reasons, Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted.

Respectfully, Submitted,



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United States Court of Appeals
For the Eighth Circuit

No. 17-3495

United States of America

Plaintiff - Appellee

v.

Jonathan Edward Meier

Defendant - Appellant

Appeal from United States District Court
for the Northern District of Iowa - Ft. Dodge

Submitted: October 18, 2018
Filed: January 16, 2019
[Unpublished]

Before SMITH, Chief Judge, LOKEN and GRUENDER, Circuit Judges.

PER CURIAM.

Jonathan Edward Meier conditionally pleaded guilty to being a felon in possession of a firearm. He appeals the district court's[1] denial of his motion to

[1]The Honorable Leonard T. Strand, Chief Judge, United States District Court for the Northern District of Iowa.

APPENDIX A

suppress, arguing that officers unlawfully detained him and lacked reasonable suspicion to justify a pat-down search. We affirm.

I. *Background*

A. *Underlying Facts*

On the evening of February 14, 2016, Madisen Ebner called 911 requesting that an officer come to her home located in a trailer park in Fort Dodge, Iowa. Ebner complained that a man named "Jim" was harassing her. She reported that Jim was leaving the trailer park. She said that Jim drove a maroon minivan or sport utility vehicle.

Officer Jay Lukawski arrived at the trailer park at approximately 9:15 p.m. He spoke with Ebner. Ebner told him that a woman named "Sweeney" had accompanied Jim. Ebner showed Officer Lukawski a video taken from her home surveillance system showing Jim unplugging a surveillance camera located in the carport and then Jim and Sweeney walking to the door. Ebner asked Officer Lukawski to contact the two individuals and advise them to stop their harassment.

Officer Lukawski returned to his patrol car. He then talked with dispatch and received contact information for the alleged harassers. Thereafter, he backed out of Ebner's driveway and parked at the end of the street near the trailer park's entrance. A black Chevy truck drove past Officer Lukawski. Thinking the driver of the truck intended to turn around, Officer Lukawski moved his patrol car out of the entrance. Moments later, dispatch advised Officer Lukawski of Ebner's new 911 call. Ebner reported that Jim was back at her house, had a handgun, and was possibly damaging her home. Specifically, Ebner reported that the suspect was "bashing her shit in," referring to her home." *United States v. Meier*, No. 3:16-cr-03013, 2016 WL 6305954, at *1 n.1 (N.D. Iowa Oct. 26, 2016), report and recommendation adopted, No. 3:16-cr-03013, 2016 WL 7013475 (N.D. Iowa Nov. 30, 2016). The dispatcher reported to Officer Lukawski that a male was outside of Ebner's house trying to get

inside. The dispatcher then reported that the male was in a Chevy truck that was parked in Ebner's driveway.

When Officer Lukawski received the second call, he was only about a half block away from Ebner's trailer. He immediately returned to Ebner's trailer and parked behind the Chevy truck, which was black like the one he had observed earlier. Given the short distance, Lukawski did not activate his emergency lights. Consequently, his dash camera did not activate.

As Officer Lukawski arrived at the trailer, he saw Meier beginning to exit the driver's side of the truck. In addition to resembling the truck that Officer Lukawski saw earlier, the truck also matched dispatch's information of a Chevy truck at Ebner's residence. Officer Lukawski approached Meier, unsnapping his holster and placing his hand on his weapon. He kept the weapon holstered. He identified himself to Meier and explained that he was responding to a call involving a gun. Officer Lukawski instructed Meier to keep his hands where he could see them. Meier complied. Officer Lukawski asked Meier if he had any weapons on him. Meier responded no. Officer Lukawski then moved to get a better view of the inside of the truck through the door that remained open. Officer Lukawski asked Meier if he had any weapons inside the truck. As Officer Lukawski attempted to look in the truck, Meier responded by "reach[ing] over with his right hand and push[ing] the door shut." Tr. of Suppression Hr'g at 15, *United States v. Meier*, No. 3:16-cr-03013 (N.D. Iowa Oct. 19, 2016), ECF No. 33. Meier stated that the truck did not belong to him and that he did not want the officer to look in it. Meier never answered whether there were weapons inside the truck. Officer Lukawski testified that Meier shutting the truck door in response to a question about weapons "was a sign that something here is not right." *Id.* at 16.

Officer Lukawski requested Meier's identification, and Meier provided the officer his driver's license. Officer Lukawski used his portable radio to ask dispatch

to run Meier's driver's license, as well as the license plate on the truck. This process took about three to four minutes. At about 9:34:19 p.m., dispatch advised Officer Lukawski that Meier's name was "Jonathan Meier" and that the truck was a black Chevy Colorado truck registered to another individual. Dispatch said nothing to make Meier's possession of the truck appear unlawful.

Officer Lukawski testified that his conversation with Meier throughout their short exchange was calm. Back-up arrived within five minutes. During that time, in addition to advising Meier he was there for a gun call, Officer Lukawski also told Meier that he had been at the residence earlier responding to a call alleging harassment. At this point, Officer Lukawksi determined that the first call was not connected to the second call regarding a gun. Officer Lukawski explained, "[B]efore I got there I thought it might have been related. But then I . . . knew the female from the harassment from earlier. So . . . once I got there, [I] realized that it probably wasn't the two of them." *Id.* at 19. Officer Lukawski further explained that even though he realized that Meier was not the person from the first call, he questioned Meier because "it was still a gun call"; there was still "a call that somebody was at the residence with a firearm." *Id.* Meier asked Officer Lukawski, "Well, if I'm not the guy you're looking for, can I just leave?" *Id.* at 44. Officer Lukawski responded that he "was going to wait for [his] back-up to show up and then [they] were going to check with [Ebner] and . . . if everything was fine, he'd be on his way." *Id.* at 45.

Officer Lukawski did not conduct a protective pat-down search of Meier while waiting for back-up due to "officer safety" reasons. *Id.* at 20. Officer Lukawski stated that Meier was "calm," and Officer Lukawski "knew Officer [Matthew] Burns was only a few minutes away, so [he] thought there was no sense in having this situation potentially get escalated by [himself] when [his] back-up was only another minute or two away." *Id.*

Also, Officer Lukawski testified that, during this time, he did not speak with Ebner to confirm that Meier was the actual subject of her call prior to Officer Burns's arrival for two reasons. First, Ebner did not come out of the trailer. And second, Officer Lukawski thought it unwise to leave Meier alone under the circumstances. There was no door or window in the trailer that would have allowed Ebner to see the location where Officer Lukawski and Meier were standing during their interaction. For Ebner to see Meier, she would have had to exit the trailer and come around the corner of the trailer. Officer Lukawski testified that he preferred that Ebner remain in the trailer for her safety.

Officer Burns arrived at the scene shortly after Officer Lukawski completed the driver's license and vehicle check. Specifically, Officer Burns arrived at 9:35:45 p.m., a little more than four minutes after Officer Lukawski first made contact with Meier. Officer Burns had learned from dispatch that the 911 call was for a man outside a trailer with a gun and that Officer Lukawski was on scene investigating. According to Officer Burns, "a man with a gun call's obviously a two-man call." *Id.* at 54. Upon his arrival to the scene, Officer Burns first asked Officer Lukawski if he had "pat[ted] [Meier] down or anything." *Meier*, 2016 WL 6305954, at *3 (first alteration in original) (quoting Ex. B at 9:35:45). Officer Lukawski responded that he had not, but he indicated that Meier "didn't appear to have anything on him." *Id.* (quoting Ex. B at 9:35:55). By that statement, Officer Lukawski did not mean that he "had concluded that [Meier] was unarmed." Tr. of Suppression Hr'g at 24. Officer Lukawski testified that he was just "advis[ing] [Officer Burns] that Mr. Meier[] had told [him] that [Meier] didn't have anything on him." The encounter occurred at night. Meier wore jeans and "a red hooded sweatshirt . . . with the pouch-type deal in the front." *Id.*

With Officer Burns present, Officer Lukawski again asked Meier for his driver's license and told Meier he was going to talk to Ebner. Meier complied and requested permission to leave. Officer Burns advised Meier that he was going to pat him down. Meier's demeanor then changed. He became nervous. "He stated that he

had anxiety and that the last time that he dealt with the police that they beat him up." *Id.* at 25. Officer Burns replied that the officers were not going to beat him. To help calm him, they advised him that Officer Burns's dash camera was recording both audio and video of the encounter.

Given the nature of the 911 call, the officers persisted in wanting to pat Meier down regardless of Meier's expressed anxiety and visible nervousness. Officer Burns asked Meier to turn around so that he could pat Meier down. Officer Burns asked Meier whether he had any weapons on him, and Meier responded that he had a pocket knife and offered to retrieve it. Officer Burns told Meier to keep his hands out of his pockets. He asked Meier if he had any weapons besides the knife. Meier did not respond. Meier, visibly agitated, began moving away from the truck and toward a carport. Officer Burns again asked Meier to cooperate and turn around so he could pat Meier down. Meier failed to comply. Officer Burns then grabbed Meier by the arm to turn him around. When Meier resisted, Officer Burns took Meier to the ground. Meier landed face down on the ground. His hands were beneath his body. Meier did not comply with the officers' commands to bring his arms behind his back. He also resisted their attempts to bring his arms from beneath his body. Officer Burns warned Meier several times that he would use his taser on Meier if he failed to cooperate. The officers eventually secured Meier's arms and handcuffed him without using the taser. They then rolled Meier over and sat him up. On the ground, they saw a small revolver that had fallen out of the pouch of Meier's hooded sweatshirt. The gun was "underneath where [Meier] had been laying." *Id.* at 30. Next to the gun, the officers also observed a digital scale.

After securing Meier, the officers arrested him on account of his resistance. The officers then searched Meier incident to arrest. They found a substance containing THC, among other items. Officers then looked into the truck through the passenger window and saw a handgun in plain view on the floor in the front of the driver's seat. Officers seized the handgun. They then applied for a search warrant for

the truck. They executed the search warrant and seized other incriminating evidence from the truck.

B. *Procedural History*

Meier was charged with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Meier moved to suppress the evidence seized. He argued that Officer Lukawski's initial seizure of Meier may have been justified by reasonable suspicion based on the 911 call. But, Meier asserted, that suspicion did not survive Officer Lukawski's determination that Meier was not the harassment suspect from the first 911 call and did not appear to be armed.

Following a suppression hearing, the magistrate judge recommended that the district court deny Meier's motion to suppress. The magistrate judge first found "that Officer Lukawski conducted a proper *Terry*[2] stop and his continued detention of [Meier] until a backup officer arrived was reasonable." *Meier*, 2016 WL 6305954, at *5 (italics added). Specifically, the magistrate judge found that Officer Lukawski had a reasonable suspicion to stop Meier and detain him to investigate whether Meier was the man that Ebner saw with a gun outside her trailer. The magistrate judge found irrelevant Officer Lukawski's conclusion that Meier "was not one of the people who had been harassing Ebner earlier that night." *Id.* This was "because Officer Lukawski had the facts supporting a reasonable suspicion that [Meier] was involved in criminal conduct and may be armed" based on the second 911 call. *Id.* The magistrate judge noted the short period of time that elapsed between when Officer Lukawski first made contact with Meier and when Officer Burns arrived and conducted the pat-down search. During that time, the magistrate judge found, nothing "dissipated the grounds for reasonable suspicion that [Meier] was the man Ebner saw outside her trailer with a handgun." *Id.* at *6.

[2]*Terry v. Ohio*, 392 U.S. 1 (1968).

Next, the magistrate judge found "that Officer Burns did not violate the Fourth Amendment when he conducted a pat[-]down search of [Meier]." *Id.* Specifically, the magistrate judge determined that "reasonable suspicion existed that [Meier] was the armed man Ebner" referenced and "nothing dissipated the basis for a reasonable officer to believe that [Meier] was the armed man Ebner had seen outside her trailer." *Id.* The magistrate judge also found credible Officer Lukawski's testimony "that although he did not see anything on [Meier] that made him look[] armed, [Meier] was wearing loose clothing such that visual inspection did not dispel his reasonable suspicion that [Meier] was armed." *Id.*

As a result, the magistrate judge found "that the officers conducted a lawful *Terry* stop and protective pat[-]down search of [Meier]. It follows, therefore, that the officers lawfully recovered the evidence they discovered as a result of conducting the stop and pat[-]down search." *Id.* at *7 (italics added).

The district court accepted the magistrate judge's report and recommendation to deny Meier's motion to suppress. First, the district court accepted the magistrate judge's conclusion that Officer Lukawksi had a reasonable suspicion to continue detaining Meier after concluding he was not "Jim" from the first 911 call. The court concluded that "[i]t was reasonable for Lukawski to continue investigating until he verified whether Meier was the individual with the firearm." *United States v. Meier*, No. 3:16-cr-03013, 2016 WL 7013475, at *7 (N.D. Iowa Nov. 30, 2016). The court also found "it . . . reasonable for Lukawski to wait for Burns before continuing his investigation" because Officer Lukawski testified "that a firearm investigation or 'gun call' required the presence of two officers for officer safety" and "[t]he continued detention was minimal and reasonable under the circumstances" given Officer Burns's short distance away from the scene. *Id.* at *8.

Second, the district court accepted the magistrate judge's conclusion that the officers had a reasonable suspicion to believe that Meier was armed and dangerous

to justify the pat-down search. The district court credited Officer Lukawski's testimony that his statement "that Meier didn't 'appear to have anything on him'" "did not mean he had concluded Meier was unarmed." *Id.* at *8. Furthermore, the district court found "that Burns had reasonable suspicion to believe that Meier was armed to justify the pat-down search." *Id.* at *9. The court based this finding on the following facts: Officer Burns was responding to a gun call; Meier was wearing clothes that could conceal a firearm and had not yet been patted down; and no circumstances existed suggesting that the caller was mistaken in seeing a firearm or that Meier was not the person the caller saw with the firearm.

II. *Discussion*

Meier appeals the district court's denial of his motion to suppress. Specifically, he argues that the district court (1) clearly erred in adopting certain factual findings of the magistrate judge, and (2) legally erred in denying his motion to suppress based on the dissipation of reasonable suspicion.

"We review *de novo* the district court's denial of a motion to suppress evidence and 'the factual determinations underlying the district court's decision for clear error.'" *United States v. Parks*, 902 F.3d 805, 812 (8th Cir. 2018) (quoting *United States v. Harris*, 747 F.3d 1013, 1016 (8th Cir. 2014)). "The district court's choice between two permissible views of the evidence cannot be considered clearly erroneous . . . ." *United States v. Cobo-Cobo*, 873 F.3d 613, 616 (8th Cir. 2017), *cert. denied*, 139 S. Ct. 57 (2018).

A. *Factual Findings*

Meier challenges three of the magistrate judge's factual findings, which the district court adopted.

1. *Meier's Failure to Answer Whether a Weapon was Inside the Truck*

First, Meier challenges the magistrate judge's finding that Officer Lukawski credibly testified that Meier's "action in shutting the truck door in response to a question about weapons made Officer Lukawski feel that something was not right." *Meier*, 2016 WL 6305954, at *2. Relatedly, Meier challenges the magistrate judge's finding that "[a] reasonable officer could conclude from [Meier's] failure to answer the question and suspicious conduct in shutting the door to the truck that a weapon was inside the truck." *Id.* at *5. Meier argues that Officer Lukawski's testimony is not credible because (1) prior to the suppression hearing, Officer Lukawski never claimed that Meier's actions made him feel that "something was not right," and (2) Officer Lukawski's testimony is inconsistent with his actions that evening, including having a calm conversation with Meier and determining that Meier was not the harassment suspect from the first 911 call. Even crediting Officer Lukawski's testimony, Meier contends that Officer Lukawski's feeling that "something was not right" was objectively unreasonable because Meier truthfully disclosed that the truck was not his. Meier asserts that it is "neither unreasonable, nor unlawful, for [him] to refuse to answer a question or permit a search of the truck." Appellant's Br. at 12.

Here, the magistrate judge found Officer Lukawski credible, and the district court adopted this finding. "A credibility determination made by a district court after a hearing on the merits of a motion to suppress is 'virtually unassailable on appeal.'" *United States v. Frencher*, 503 F.3d 701, 701 (8th Cir. 2007) (quoting *United States v. Guel-Contreras*, 468 F.3d 517, 521 (8th Cir. 2006)). We agree with the district court that none of the arguments that Meier advances "demonstrate that [Officer] Lukawski's testimony was not credible." *Meier*, 2016 WL 7013475, at *4. First, as the district court explained, "Just because [Officer] Lukawski did not mention his suspicions in his report or deposition, does not mean they did not exist." *Id.*

Second, the totality of the circumstances shows that Officer Lukawski was justified in being suspicious of Meier shutting the truck door in response to a question

about weapons. It is undisputed that within five minutes of the first 911 call, Officer Lukawski was alerted to another 911 call by Ebner. Ebner reported that "Jim" was back at her house, had a handgun, and was attempting to break into her house or doing something to her home. Ebner told the dispatcher (who passed the information along to Officer Lukawski) that the man had parked his Chevy truck in her driveway. Ebner stated that she saw the man with a small handgun in his hand as he approached her trailer. Ebner asked the dispatcher to send Officer Lukawski back to her residence quickly. It is also undisputed that Officer Lukawski arrived at the scene for a second time within one minute of that call and found Meier getting out of a Chevy truck—the same make of truck that Ebner had reported in her second 911 call. Meier does not dispute telling Officer Lukawski that he had thrown a snowball at Ebner's trailer to get her attention; this is consistent with Ebner's complaint that the individual driving the Chevy truck had done something to her home. Officer Lukawski reasonably concluded that Meier might also have a weapon in the truck, as Ebner had reported. Meier's behavior after being asked about whether there were weapons in the truck supported reasonable suspicion. Meier responded by gently shutting the truck door. Rather than answering the question directly, Meier proceeded to deny ownership of the truck and deny the officer permission to look into it. On this record, it was not clearly erroneous for the magistrate judge to credit Officer Lukawski's testimony that Meier shutting the door in response to a question about weapons made him feel that "something was not right."

2. *Pat-Down Search and Seizure*

Next, Meier challenges the magistrate judge's finding that "Officer Lukawski decided not to conduct a pat[-]down search of [Meier] . . . because he knew he had a backup officer on the way and the situation was currently stable. He testified that he decided to wait to conduct a pat[-]down [search] until the backup officer arrived for officer safety reasons." *Meier*, 2016 WL 6305954, at *2. Meier maintains that this finding is contrary to Officer Lukawski's deposition testimony and actions the night of the arrest. According to Meier, Officer Lukawksi's deposition testimony shows

that "Officer Lukawski performed the pat[-]down [search] as an afterthought—not that he intended to await backup in order to conduct the pat[-]down search until Officer Burns arrived, and not because it was due to any conduct or suspicion that he had of Mr. Meier." Appellant's Br. at 13. Meier points to Officer Lukawski's decision to not pat him down prior to Officer Burns's arrival as proof that Officer Lukawksi felt no threat to officer safety. Meier emphasizes Officer Lukawski's statement to Officer Burns that Meier "didn't appear to have anything on him." *Meier*, 2016 WL 6305954, at *3 (quoting Ex. B at 9:35:55). Meier argues that "[i]f Officer Lukawski truly believed that Mr. Meier might be armed, he would not have told Officer Burns that Mr. Meier did not appear to be armed, and would not have engaged in a calm, pleasant conversation with an armed criminal suspect without taking any measures to protect himself." Appellant's Br. at 14–15.

Meier overlooks that it was Officer Burns—not Officer Lukawski—who conducted the pat-down search. As a result, we agree with the district court that Officer "Lukawski's subjective reasons for failing to pat down Meier are not material to the issue of whether the pat-down search by [Officer] Burns was reasonable." *Meier*, 2016 WL 7013475, at *5 (citing *United States v. Hanlon*, 401 F.3d 926, 929 (8th Cir. 2005) (stating the relevant inquiry is whether "a hypothetical officer in exactly the same circumstances reasonably could believe that the individual is armed and dangerous")).

3. *Subject of the 911 Calls*

Finally, Meier challenges the magistrate judge's finding "[t]hat Officer Lukawski was able to determine that Ebner was mistaken and [Meier] was not one of the harassment suspects did not mean that Officer Lukawski had concluded that [Meier] was not the suspect of the second 911 call." *Meier*, 2016 WL 6305954, at *2 n.2. Meier argues that the overwhelming evidence shows "that Officer Lukawski concluded that Mr. Meier was not 'Jim,' and that Jim was the harassment suspect and the subject of both 911 calls." Appellant's Br. at 16. Meier points out that on the first

911 call, Ebner identified Jim and Sweeney as the harassers; on the second 911 call, when asked who had a gun, Ebner replied, "that Jim that stalks me." *Id.* (quoting Ex. A-2). Meier asserts that Ebner identified Jim as the subject of both 911 calls; this information was then relayed to Officer Lukawski. Meier notes that Officer Lukawski expressly told Meier that he was not the person that he was looking for and that as soon as backup arrived, he would speak to Ebner and "get him on his way." *Id.* at 17 (quoting Ex. C-1 at 1).

We conclude that this factual finding was not clearly erroneous. It was reasonable for Officer Lukawski to suspect Meier was the person with a firearm based on the second 911 call. "There were two 911 calls. The first 911 call involved harassment suspects. The second 911 call involved a man with a gun outside Ebner's home, whom she thought was one of the original harassment suspects." *Meier*, 2016 WL 6305954, at *2 n.2. The second 911 call gave identifying information to Officer Lukawski about the suspect, whom Ebner believed to be "Jim": (1) he drove a Chevy truck, (2) he had done something to Ebner's home, and (3) he had a gun. Meier argues Officer Lukawski was obligated to cease further investigation once he determined that Meier was not "Jim," as Ebner reported in the second 911 call. We disagree. Officer Lukawski still had two other pieces of identifying information from the second 911 call that Officer Lukawski confirmed: (1) Meier drove a Chevy truck, and (2) he admitted to throwing a snowball at Ebner's home. Also, even though Officer Lukawski did not believe Meier was Jim, it did not mean that Meier could not be the armed person for which the second call was made. The situation thus remained insecure. It was, therefore, "fair to say that Meier was the 'subject' of the second 911 call even though he was not the harassment suspect from the first call." *Meier*, 2016 WL 7013475, at *5.

B. *Reasonable Suspicion*

Meier also argues that the district court erred in denying his motion to suppress because (1) Meier was seized when Officer Lukawski approached him, and (2) any

reasonable suspicion justifying that seizure dissipated when Officer Lukawski concluded Meier was not the harassment suspect from the first 911 call and did not appear to be armed.

"The Fourth Amendment prohibits 'unreasonable searches and seizures' by the Government, and its protections extend to brief investigatory stops of persons . . . that fall short of traditional arrest." *United States v. Arvizu*, 534 U.S. 266, 273 (2002). "[A]n 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." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). "[T]he police officer must be 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.

We "must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *Arvizu*, 534 U.S. at 273 (quoting *United States v. Cortez*, 449 U.S. 411, 417–18 (1981)). "This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *Id.* (quoting *Cortez*, 449 U.S. at 418). "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). "In addition, a person's temporal and geographic proximity to a crime scene, combined with a matching description of the suspect, can support a finding of reasonable suspicion." *United States v. Quinn*, 812 F.3d 694, 698 (8th Cir. 2016). "In deciding whether the requisite degree of suspicion exists, we 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).

"During an investigative stop, officers should '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 temporary seizure." *United States v. Maltais*, 403 F.3d 550, 556 (8th Cir. 2005) (quoting *United States v. Navarrete-Barron*, 192 F.3d 786, 790 (8th Cir. 1999)). In executing an investigatory stop, officers are "authorized to take such steps as [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). "To establish an unreasonably prolonged detention, the defendant must show that the officer detained him beyond the amount of time otherwise justified by the purpose of the stop and did so without reasonable suspicion." *United States v. Donnelly*, 475 F.3d 946, 951–52 (8th Cir. 2007).

Here, the government does not dispute Meier's contention that he was seized within the meaning of the Fourth Amendment. The question, therefore, is whether the continued seizure of Meier was reasonable once Officer Lukawski concluded that Meier was not "Jim"—the harassment suspect from the first 911 call—and "didn't appear to have anything on him." *Meier*, 2016 WL 6305954, at *3 (quoting Ex. B at 9:35:55).

Based on the totality of the circumstances, we conclude that Officer Lukawski had reasonable suspicion for his continued investigation of Meier. First, we reject Meier's argument that Officer Lukawski lacked reasonable suspicion to continue Meier's detention once he determined that Meier was not "Jim" from the first 911 call. As we previously explained, Officer Lukawski could reasonably conclude that, despite not being "Jim," Meier was the subject of the second 911 call who was suspected of possessing a firearm. *See supra* Part II.A.3.

Second, we reject Meier's argument that Officer Lukawski lacked reasonable suspicion to continue Meier's detention based on his alleged admission to Officer

Burns that he did not conduct a pat-down search of Meier because Meier "didn't appear to have anything on him." *Meier*, 2016 WL 6305954, at *3 (quoting Ex. B at 9:35:55). Based on the totality of the circumstances, it was reasonable for Officer Lukawski to continue investigating Meier until he verified whether Meier was the individual with the firearm, as described in the second 911 call. Officer Lukawski responded to the second 911 call about a man outside of Ebner's residence with a gun who had parked his Chevy truck in the driveway. Officer Lukawski's statement that Meier "didn't appear to have anything on him,"*Meier*, 2016 WL 6305954, at *3 (quoting Ex. B at 9:35:55), does not detract from the totality of circumstances giving rise to a reasonable suspicion justifying Meier's continued seizure. This is especially true considering Meier was wearing loose clothing, including a hooded sweatshirt which could potentially conceal a firearm.[3]

III. *Conclusion*

Accordingly, we affirm the judgment of the district court.

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[3]Meier has not challenged whether Officer Burns had reasonable suspicion to believe that Meier was armed and dangerous to justify the pat-down search of Meier, as opposed to the officers' continued seizure of Meier.

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

UNITED STATES OF AMERICA, Plaintiff, vs. JONATHAN EDWARD MEIER, Defendant.	No. CR16-3013-LTS **ORDER**

This matter is before me on a Report and Recommendation (R&R) in which the Honorable C.J. Williams, United States Magistrate Judge, recommends that I deny defendant's motion to suppress. *See* Doc. No. 29.

I. BACKGROUND

A. Procedural History

On March 23, 2016, the grand jury returned an indictment (Doc. No. 1) against defendant Jonathan Edward Meier (Meier) charging him with one count of possession of firearms by a felon in violation of 18 U.S.C. § 922(g)(1). Meier filed a motion to suppress (Doc. No. 19) on September 26, 2016. The Government filed a resistance (Doc. No. 27) on October 12, 2016. Judge Williams held a hearing on October 19, 2016. During that hearing, defendant's exhibits A through D were admitted into evidence, which consisted of a video recording from a patrol car (Exhibit A), two 911 audio recordings (Exhibit B), police reports (Exhibits C-1, C-2, & C-3), and the depositions of Officer J. Lukawski and Matthew Burns (Exhibits D-1 and D-2).

APPENDIX B

Judge Williams issued his R&R (Doc. No. 29) on October 26, 2016. Meier filed his objections (Doc. No. 35) on November 9, 2016. The Government submitted a response (Doc. No. 38) on November 23, 2016.

B. Relevant Facts

Judge Williams made the following findings of fact:

> In the late evening of February 14, 2016, Madisen Ebner called 911 asking for an officer to come to her home in a Fort Dodge, Iowa, trailer park. She alleged that a man named Jim was harassing her. She said he was leaving the trailer park on foot and that Jim drove a maroon minivan or SUV. Exhibit A-1. Officer J. Lukawski responded, arriving at the trailer park at approximately 9:15 p.m. Officer Lukawski spoke with Ebner, who further informed him that a woman named Sweeny was with Jim. Ebner showed images of the two captured on her home security camera. Ebner asked Officer Lukawski to contact Jim and Sweeny and ask them not to come to her home anymore.
>
> Officer Lukawski left in his patrol car, stopping a short distance away (still in the trailer park), in order to use his computer in an attempt to find contact information for Jim and Sweeny. While parked on the road, he saw a black Chevy truck drive past him. Less than five minutes later, Officer Lukawski was alerted to another 911 call by Ebner. Ebner reported that Jim was back at her house, that he had a handgun, and was attempting to break into her house or doing something to her home.[1] Ebner told the 911 operator (who passed the information along to Officer Lukawski) that the man had parked his Chevy truck in her driveway. Ebner stated that she saw the man with a small handgun in his hand as he approached her trailer. Ebner asked that the dispatcher send Officer Lukawski back to her residence quickly. It is apparent from Ebner's voice and words on the recording that she was worried for her safety. The dispatcher directed Officer Lukawski back to Ebner's residence. The dispatcher also directed Officer Matthew Burns to Ebner's house as backup.
>
> Officer Lukawski responded in less than a minute, arriving the second time at Ebner's residence at 9:31 p.m. Exhibit C-1; Exhibit B, at

[1] On the recording, Ebner said the suspect was "bashing her shit in," referring to her home.

9:31:40. Officer Lukawski did not bother to activate the emergency lights on his vehicle (which would have activated his dash camera) because he was such a short distance away and there was no other traffic in the trailer park. When Officer Lukawski arrived, he saw defendant's black Chevy truck parked in Ebner's driveway and recognized it as the same Chevy truck that had driven past him a few minutes before. Officer Lukawski saw no other vehicle matching that description in the area and the vehicle was parked in the driveway as described by Ebner in the 911 call. Officer Lukawski parked his patrol car behind defendant's truck. As Officer Lukawski got out of his patrol car, he saw defendant appear to be getting out of the truck.

Officer Lukawski approached defendant, unsnapping his holster and placing his hand on his weapon, but he did not remove his weapon from its holster. Officer Lukawski told defendant that Officer Lukawski was responding to a gun call and for defendant to keep his hands visible. Defendant, standing next to his truck with the door still open, complied. Officer Lukawski asked defendant what he was doing. Defendant stated he had thrown a snowball at Ebner's trailer to get her attention. Officer Lukawski asked if defendant had any firearms on him, and defendant said he did not. Officer Lukawski moved to get a better view of the inside of defendant's truck through the door that remained open. Officer Lukawski asked defendant if there were any weapons inside the truck. Defendant responded by gently shutting the truck door. Defendant stated the truck did not belong to him and he did not want the officer to look in it. Defendant did not state whether there were weapons in the truck. Officer Lukawski testified that defendant's action in shutting the truck door in response to a question about weapons made Officer Lukawski feel that something was not right.

While Officer Lukawski was talking with defendant, Ebner told the 911 operator that Officer Lukawski was speaking to the man she had described as having a handgun.

Officer Lukawski asked defendant to provide identification, and defendant complied by retrieving his wallet from a back pocket. Officer Lukawski instructed defendant to do so slowly. Officer Lukawski "ran" defendant's license and the license plate on the truck, meaning he called the information in to dispatch to see if there were any "wants or warrants" on defendant or any information about the truck, such as a report that it had

been stolen. This process took about three to four minutes. At about 9:34:19, the dispatche[r] told Officer Lukawski that defendant was not wanted and provided Officer Lukawski the name of the truck's registered owner. The dispatcher did not indicate there was anything unlawful about defendant's possession of the truck.

Officer Lukawski testified that his conversation with defendant throughout this short exchange had remained calm. Officer Lukawski decided not to conduct a pat down search of defendant, therefore, because he knew he had a backup officer on the way and the situation was currently stable. He testified that he decided to wait to conduct a pat down until the backup officer arrived for officer safety reasons. Officer Lukawski told defendant he had been at the residence earlier regarding a harassment call, but that that call did not involve defendant. Defendant asked if he could leave, but Officer Lukawski told defendant that as soon as his backup officer arrived he would speak with Ms. Ebner and "would get [defendant] on his way."[2]

Officer Lukawski also testified that he decided not talk to Ms. Ebner (to determine if defendant was the man she saw with a handgun) until the backup officer arrived because, for officer safety reasons, he was not going to walk away from defendant. There was no door or window in the trailer that would have allowed Ebner to see the location where Officer Lukawski and defendant were standing during their interaction. For Ebner to see defendant, she would have had to exit the trailer and come around the corner of the trailer. Officer Lukawski testified that he did not want Ebner to come out of the trailer for her safety.

Officer Burns arrived at the scene within about 90 seconds of Officer Lukawski completing the driver's license and vehicle check. Officer Burns arrived at 9:35:45, a little more than four minutes after Officer Lukawski

[2] In his brief, defendant overstates Officer Lukawski's conclusion. Defendant wrote: "Officer Lukawski quickly concluded that Mr. Meier was not one of the harassment suspects that were the subject of Ms. Ebner's 911 calls . . . [and] Officer Lukawski told Mr. Meier that he was not the suspect . . . ." Doc. 19-1, at 5 (emphasis added). There were two 911 calls. The first 911 call involved harassment suspects. The second 911 call involved a man with a gun outside Ebner's home, whom she thought was one of the original harassment suspects. That Officer Lukawski was able to determine that Ebner was mistaken and defendant was not one of the harassment suspects did not mean that Officer Lukawski had concluded that defendant was not the suspect of the second 911 call.

first made contact with defendant. Upon arriving at the scene, Officer Burns immediately asked Officer Lukawski if he had "pat[ted] him down or anything." Exhibit B, at 9:35:45. Officer Lukawski responded that he had not. Officer Lukawski added that defendant "didn't appear to have anything on him." *Id.*, at 9:35:55. At the hearing, Officer Lukawski testified he did not mean that Officer Lukawski had concluded that defendant was not armed. It was dark out and defendant was wearing jeans and a red hoodie-type sweatshirt that was loose fitting. Officer Lukawski testified he could not tell simply by looking at defendant that he was armed. Officer Lukawski testified that he still suspected that defendant might be armed.

Officer Lukawski asked defendant for his driver's license again and indicated that he intended to talk to Ebner. Defendant complied and asked again for permission to leave. Officer Burns then informed defendant that Officer Burns was going to pat down defendant. Defendant's behavior changed immediately. He became agitated and indicated that he was anxious. He claimed he had been beaten by police officers before. Officer Burns attempted to reassure defendant that the officers were not going to beat him, advising defendant that the officer's dash camera was on and the audio was being recorded. Officer Burns again asked defendant to turn around so that the officer could pat him down. Officer Burns asked defendant if he had a weapon and defendant said he had a pocket knife and offered to retrieve it. Officer Burns told defendant to keep his hands out of his pockets and asked if defendant had any other weapons. Defendant did not answer the question. Defendant continued to be agitated and started moving away from the truck and toward a carport. Officer Burns again asked defendant to cooperate and turn around so the officer could pat him down, but defendant did not comply. Officer Burns grabbed defendant by the arm at this point in an effort to turn him around. Defendant resisted, and Officer Burns took defendant to the ground. Defendant landed on the ground, face down, with his hands beneath his body. Defendant refused officers' commands to bring his arms behind his back and resisted their efforts to remove his arms from beneath his body. Officer Burns warned defendant several times that he would deploy a taser if defendant did not cooperate. Eventually, the officers were able to secure defendant's arms and handcuff him behind his back. When the officers helped defendant up, they found a handgun and an electronic scale on the ground where defendant had been laying.

> After securing defendant, the officers arrested him for resisting them. The officers searched defendant incident to arrest and removed a substance containing THC, among other items. When officers looked into the truck through the passenger window, they saw a handgun in plain view on the floor in front of the driver's seat. Officers seized the weapon and applied for a search warrant for the truck. When they executed the warrant, officers seized other incriminating evidence from the truck.

Doc. No. 29 at 2-6 (footnotes in original). Judge Williams also found both officers were credible witnesses. *Id.* at 6.

Meier has nine objections to the factual findings in the R&R. These objections all reflect Meier's alternative view of the evidence, which he summarizes as follows:

> (1) upon arrival outside Ebner's trailer, Lukawski lawfully detained Meier, asked him questions and gathered information;
> (2) after gathering that information, Lukawski concluded that Meier was not an armed harassment suspected named "Jim;"
> (3) Lukawski did not otherwise suspect that Meier was armed;
> (4) because of that, Lukawski opted not to conduct a pat-down search and
> (5) despite that, Lukawski and later Burns continued detaining Meier until subjecting him to an attempted pat-down search.

Doc. No. 35 at 6-7.

Meier first objects to the introductory statement in the R&R that the charge arose from an incident on February 12, 2016. *See* Doc. No 29 at 1. Meier points out the correct date of the incident is February 14, 2016. The Government agrees. Doc. No. 38 at 1. The R&R's findings of fact correctly note the incident occurred on February 14, 2016. Doc. No. 29 at 2. Nonetheless, this objection is sustained.

Second, Meier objects to another statement in the introduction, which is that "officers discovered one gun on defendant and another in the truck he was driving." *Id.* at 1. Meier argues the gun was never found on him, but on the ground near him after a struggle. The Government argues it is reasonable to infer from these facts that the gun had been on defendant's person and fell out during the struggle. Doc. No. 38 at 2.

Indeed, the findings of fact more precisely explain that "[w]hen the officers helped defendant up, they found a handgun and an electronic scale on the ground where defendant had been laying." Doc. No. 29 at 6. This objection is overruled.

Third, Meier objects to the statement that "Officer Lukawski did not bother to activate the emergency lights on his vehicle (which would have activated his dash camera) because he was such a short distance away and there was no other traffic in the trailer park." *Id.* at 3. Meier acknowledges this finding is based on Lukawski's testimony at the suppression hearing. He argues the statement is self-serving and "potentially not credible" because it is "puzzling that Officer Lukawski failed to activate his dash camera while responding to a gun call – either by turning on his emergency lights or manually activating the camera, as he could have done." Doc. No. 35 at 2. Meier cites to Lukawski's deposition testimony in a related state court case in which Lukawski testified that he eventually did turn on the camera manually. Doc. No. 19-7 at 4. As noted above, Judge Williams found Lukawski credible and I have no reason to disagree with that assessment based on the deposition testimony cited by Meier. This testimony only indicates that Lukawski *could* have turned on his camera at the time he responded, even though he did not. In that same deposition, Lukawski testified that "being it was a gun call, I was kind of in a hurry." *Id.* Defendant has cited no other evidence indicating there was some other reason or improper motive that Lukawski had in not turning on the camera immediately. This objection is overruled.

Meier's fourth objection concerns another aspect of Lukawski's suppression hearing testimony. The R&R noted Lukawski testified that "defendant's action in shutting the truck door in response to a question about weapons made Officer Lukawski feel that something was not right." Doc. No. 29 at 3. Meier argues Lukawski's testimony is not credible for two reasons. First, Lukawski did not state in his report or deposition that Meier's conduct made him feel that "something was not right." Second, he argues that this statement is inconsistent with his other testimony that he and Meier

had a "calm conversation," that Meier had identified himself as Ebner's cousin and that he concluded Meier was not "Jim," the harassment suspect. In addition, Meier argues Lukawski did not make a distress call over the radio or draw his weapon. Meier also argues it was objectively unreasonable for Lukawski to conclude that Meier's shutting the door meant that there may have been weapons in the vehicle. Meier notes that he truthfully told Lukawski that the pickup was not his and it was reasonable for him to deny consent to search for that reason.

I find that none of these arguments demonstrate that Lukawski's testimony was not credible. Just because Lukawski did not mention his suspicions in his report or deposition, does not mean they did not exist. There is also nothing inconsistent about Lukawski's suspicions and the otherwise calm nature of his interaction with Meier. It was also reasonable for Lukawski to find Meier's conduct in closing the truck door suspicious. Lukawski testified it was suspicious because Meier closed it in response to a question about weapons, not in response to a question of who owned the truck. Finally, as the Government notes, this action by Meier only formed part of Lukawski's reasonable suspicion that Meier may have been armed. Other factors included the matching vehicle description and Meier's loose-fitting clothing. The fourth objection is overruled.

Meier next objects to the R&R finding that "Lukawski decided not to conduct a pat down search of defendant . . . because he knew he had a backup officer on the way and the situation was currently stable. He testified that he decided to wait to conduct a pat down until the backup officer arrived for officer safety reasons." *Id.* at 4. Meier argues Lukawski's testimony on this point should be discounted based on Lukawski's interaction with Officer Burns upon his arrival at the scene. Specifically, Meier references the following exchange, which can be heard on defendant's Exhibit B:

Lukawski: Could you keep an eye on him for just a second?

Burns: Did you pat him down or anything?

Lukawski: I did not.

Burns: Okay.

Lukawski: He doesn't appear to have anything on him. He won't let me look through the truck (unintelligible). I ran his DL and everything already (unintelligible).

Burns: Was there . . . . ?

Lukawski: I just want to go talk to these people.

See Doc. No. 35 at 4. Meier argues that had Lukawski actually suspected that Meier was armed, he could have easily conducted the pat-down search on his own without waiting for backup. He contends Lukawski's testimony that he was waiting for backup is a post-hoc explanation. Lukawski explained during the hearing that he did not conduct a pat-down search because things were calm and he knew Officer Burns was only a few minutes away. He specifically stated, "I thought there was no sense in having this situation potentially get escalated by myself when my back-up was only another minute or two away." Doc. No. 33 at 20.

I find that Lukawski's subjective reasons for failing to pat down Meier are not material to the issue of whether the pat-down search by Burns was reasonable. As the Government notes, Lukawski's subjective beliefs are immaterial to the analysis, which is objective. *See United States v. Hanlon*, 401 F.3d 926, 929 (8th Cir. 2005) (noting the relevant inquiry is whether "a hypothetical officer in exactly the same circumstances reasonably could believe that the individual is armed and dangerous."). Burns did not ask Lukawski *why* he had not patted Meier down. He only asked whether Meier had been patted down. Lukawski's comment that "he doesn't appear to have anything on him" could reasonably be interpreted by Burns that there was no visible firearm present, but one could still be concealed. Because Lukawski's actions and statements in the dash

cam video are not inconsistent with his testimony at the suppression hearing or otherwise demonstrate that his testimony is not credible, this objection is overruled.

Meier's sixth factual objection is to the finding that "[i]n his brief, defendant overstates Officer Lukawski's conclusion" that "Mr. Meier was not one of the harassment suspects that were the subject of Ms. Ebner's 911 calls." Doc. No. 29 at 4, n.2. Similarly, Meier objects to this finding: "that Officer Lukawski was able to determine that Ebner was mistaken and defendant was not one of the harassment suspects does not mean that Officer Lukawski had concluded that defendant was not the suspect of the second 911 call." *Id.* Meier argues the evidence demonstrates that "Jim" was the subject of both 911 calls and Lukawski concluded that Meier was not "Jim." After the second 911 call, the dispatcher told Lukawski that "the male" was back with a gun. Based on his first interaction with Ebner, Lukawski knew the male that had been harassing Ebner was named "Jim." When he responded to the second 911 call, Lukawski learned the suspect's name was Jonathan Meier. Lukawski told Meier that he had just been there for a harassment call, "but it wasn't for him." Doc. No. 19-4 at 1. Meier suggests the mistaken identity was enough for Lukawski to drop any further investigation with regard to the second call. I disagree. Regardless of Ebner's mistaken communication that "Jim" was back with a gun, there was still a male subject outside of Ebner's residence, who had exited a vehicle matching the description provided by Ebner. It is fair to say that Meier was the "subject" of the second 911 call even though he was not the harassment suspect from the first call. This objection is overruled.

Next, Meier objects to the finding that Lukawski "decided not [to talk] to Ms. Ebner . . . until the backup officer arrived because, for officer safety reasons, he was not going to walk away from defendant." Doc. No. 29 at 5. Meier again argues that this is a post-hoc explanation that is inconsistent with Lukawski's actions. He argues that Lukawski's failure to conduct a pat-down search demonstrates he had no concern about officer safety and no reasonable suspicion that Meier was an armed suspect. As noted

above, I find nothing inconsistent about Lukawski's actions and his testimony. Indeed, Burns corroborates Lukawski's explanation by testifying that a gun call is a "two-man call." Doc. No. 33 at 54. Lukawski also wrote in his report that he advised Meier once his backup showed up, he would speak to Ebner and get him on his way. Doc. No. 19-4 at 1. Meier does not offer an alternative explanation for why Lukawski would have waited for his backup if not for officer safety. He simply argues that there was no concern of officer safety. Meier's argument fails to demonstrate that Lukawski's testimony on this point is not credible. This objection is overruled.

Meier's eighth objection goes back to Lukawski's suspicions that Meier was armed. The R&R states that Lukawski told Burns that Meier "didn't appear to have anything on him." Doc. No. 29 at 5. Meier argues this is inconsistent with the R&R finding that "Officer Lukawski testified that he did not mean that [he] had concluded that defendant was not armed" and "Officer Lukawski testified that he still suspected that defendant might be armed." *Id.* Meier also argues these findings are inconsistent with Lukawski's actions in having a calm conversation with Meier and failing to conduct a pat-down search. For the reasons explained above, I fail to see the inconsistency. Moreover, Lukawski's subjective thoughts are irrelevant and have no impact on the analysis of whether it was reasonable for him to continue to detain Meier until Burns arrived and whether it was reasonable for Burns to conduct a pat-down search based on the totality of the circumstances at the time he arrived. This objection is overruled.

Finally, Meier objects to the R&R finding that "both Officer[s] Lukawski and Burns were credible witnesses." Doc. No. 29 at 6. Meier offers no reasons for why Burns' testimony was not credible. As to Lukawski, he contends his testimony was inconsistent with his actions on the date of Meier's arrest. As discussed above, I find no reason to disagree with Judge Williams' finding on the credibility of the officers. Other factors (such as the arrival of the backup officer) provide context for Lukawski's actions that night, which are consistent with his testimony. This objection is overruled.

II. STANDARD OF REVIEW

A district judge must review a magistrate judge's R&R under the following standards:

> Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. 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. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

28 U.S.C. § 636(b)(1); *see also* Fed. R. Crim. P. 59(b). Thus, when a party objects to any portion of an R&R, the district judge must undertake a de novo review of that portion.

Any portions of an R&R to which no objections have been made must be reviewed under at least a "clearly erroneous" standard. *See, e.g.*, *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (noting that when no objections are filed "[the district court judge] would only have to review the findings of the magistrate judge for clear error"). As the Supreme Court has explained, "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). However, a district judge may elect to review an R&R under a more-exacting standard even if no objections are filed:

> Any party that desires plenary consideration by the Article III judge of any issue need only ask. Moreover, while the statute does not require the judge to review an issue *de novo* if no objections are filed, it does not preclude further review by the district judge, sua sponte or at the request of a party, under a *de novo* or any other standard.

Thomas v. Arn, 474 U.S. 140, 150 (1985).

III. DISCUSSION

Meier's motion and objections focus on (A) whether Lukawski's continued detention of Meier was supported by reasonable suspicion after Lukawski had determined Meier was not "Jim," the harassment suspect and (B) whether the officers had reasonable suspicion to believe that Meier was armed to justify the pat-down search. Each of these will be discussed in turn.

A. Did Lukawski Have Reasonable Suspicion to Continue Detaining Meier After Concluding He Was Not "Jim"?

Meier objects to Judge Williams' conclusion that Lukawski's "continued detention of defendant until a backup officer arrived was reasonable." Doc. No. 29 at 8. Meier argues that once Lukawski had determined Meier was not "Jim" and concluded he was not armed he was obligated to release Meier. Any further detention constituted an unlawful fishing expedition.

In concluding the continued detention was reasonable, Judge Williams found it was irrelevant that Lukawski had concluded Meier was not one of the people who had been harassing Ebner earlier that night because "whether a *Terry* stop is reasonable under the Fourth Amendment is determined objectively, from the viewpoint of a reasonable officer." *Id.* at 9. Judge Williams concluded that Lukawski "had the facts supporting a reasonable suspicion that defendant was involved in criminal activity" and may have been armed.

Under *Terry v. Ohio*, officers are "permitted to conduct 'investigative stops' when they have 'reasonable, articulable suspicion that criminal activity may be afoot." *United States v. Watts*, 7 F.3d 122, 125 (8th Cir. 1993). "Courts are required to apply an objective test to resolve the question whether reasonable, articulable suspicion justified a protective search." *United States v. Roggeman*, 279 F.3d 573, 577 (8th Cir. 2002). Under the objective test, the "officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be

warranted in the belief that his safety or that of others was in danger." *Terry v. Ohio*, 392 U.S. 1, 27 (1968). "Whether the particular facts known to the officer amount to an objective and particularized basis for a reasonable suspicion of criminal activity is determined in light of the totality of the circumstances." *United States v. Maltais*, 403 F.3d 550, 554 (8th Cir. 2005) (quoting *United States v. Garcia*, 23 F.3d 1331, 1334 (8th Cir. 1994)).

"During an investigative stop, officers should 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 temporary seizure." *Maltais*, 403 F.3d at 556 (internal quotations omitted). "The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry*, 392 U.S. at 19. The duration of the detention is reasonable as long as it does not go "beyond the amount of time otherwise justified by the purpose of the stop" and is supported by reasonable suspicion. *United States v. Donnelly*, 475 F.3d 946, 951-52 (8th Cir. 2007). During the stop, officers may take additional steps that are "reasonably necessary to protect their personal safety." *United States v. Hensley*, 469 U.S. 221, 235 (1985).

Meier argues the fact that he was not "Jim" and that he was not violating any laws should have ended the investigation and detention by Lukawski. Moreover, he contends that any reasonable suspicion was dispelled when Meier identified himself as Ebner's cousin or could have easily been dispelled by confirming this with Ebner. These arguments would hold weight if the second 911 call was simply a complaint that "Jim" was back at Ebner's residence. Instead, the second 911 call was that "Jim" was back at the residence *and* he had a gun. While the first concern was resolved by Meier's identification, the second was not. At that point, the purpose of the stop was to determine whether Meier was in possession of a firearm.

It was reasonable for Lukawski to continue investigating until he verified whether Meier was the individual with the firearm. Ebner had reported to dispatch and dispatch

reported to Lukawski that the male with the gun was sitting in a Chevy truck parked in Ebner's driveway. When Lukawski arrived at Ebner's residence (within approximately 30 seconds after receiving the call), he saw Meier get out of a Chevy truck. Moreover, when Lukawski asked if there were any guns in the truck, Meier responded by shutting the door of the truck and stating it was not his truck and did not want the officer looking in it. In addition, Ebner reported to dispatch that "they are outside talking right now" suggesting that Luakwski had identified the correct suspect.[3] All of these circumstances taken together were enough to generate reasonable suspicion that Meier may have been armed or had a firearm in his vehicle that justified further investigation.

With regard to the reasonableness of the continued detention, Lukawski testified, and the facts support, that a firearm investigation or "gun call" required the presence of two officers for officer safety. Therefore, it was reasonable for Lukawski to wait for Burns before continuing his investigation. During this time, Lukawski ran Meier's information and asked Meier questions. The evidence shows Burns arrived approximately four minutes after Lukawski and approximately 90 seconds after Lukawski had dispatch run Meier's and the vehicle's information. The continued detention was minimal and reasonable under the circumstances.

Finally, Meier argues Lukawski did not use the least intrusive means to confirm or dispel any reasonable suspicion. He contends Lukawski could have asked the dispatcher to contact Ebner to determine whether she knew Meier and whether she was worried about him being outside her trailer. The Government points out that Ebner had essentially verified that Meier was the person she was concerned about when she told the dispatcher that "they are outside talking right now." Def. Ex. A-2. Moreover, the Government argues that whether Ebner knew Meier or was worried about him being

[3] Even though Lukawski was not aware of this, reasonable suspicion may be based on the collective knowledge of those involved in the investigation. *See United States v. Robinson*, 664 F.3d 701, 703 (8th Cir. 2011).

outside her trailer are not relevant facts to the issue of whether Meier was concealing a firearm. I agree. While there are other conceivable actions Lukawski could have taken to investigate whether Meier was concealing a weapon, he had already run through many of the lesser intrusive ones, which had not confirmed or dispelled his suspicions. Indeed, a pat-down search upon Burns' arrival appeared to be the most efficient and least intrusive means of investigation given that nothing else had confirmed or dispelled their suspicions that Meier was the subject Ebner had witnessed with the handgun.

Based on the totality of the circumstances, I find that Lukawski had reasonable suspicion to continue investigating Meier despite his conclusion that Meier was not "Jim." Moreover, the continued detention after verifying Meier's identity was reasonable because Burns was only a short distance away and the presence of two officers was preferred in response to gun calls for officer safety. Finally, the officers' actions were strictly tied to the purpose of their investigation – to determine whether Meier was in possession of a firearm – and employed the least intrusive means necessary to confirm or dispel their suspicions that Meier was armed.

B. Did The Officers Have Reasonable Suspicion to Believe That Meier Was Armed and Dangerous to Justify the Attempted Pat-Down Search?

Meier argues the pat-down search was unlawful because Lukawski had already determined Meier was not armed by the time Burns arrived. This is based on Lukawski's statement to Burns upon his arrival at the scene that Meier didn't "appear to have anything on him." Lukawski testified at the suppression hearing that this did not mean he had concluded Meier was unarmed. Doc. No. 33 at 24. Meier argues these positions are inconsistent and therefore, Lukawski's testimony is not credible. As discussed above, I find no reason to discredit Lukawski's testimony on this basis.

The Government argues that Lukawski's subjective thoughts are irrelevant to the objective inquiry which is whether "a hypothetical officer in exactly the same

circumstances reasonably could believe that the individual is armed and dangerous." *Hanlon*, 401 F.3d at 929. It contends that a hypothetical officer could easily believe Meier was armed based on the 911 call less than 30 seconds earlier reporting a man with a gun at that location, the matching vehicle description, Meier's suspicious actions and Ebner's confirmation to the dispatcher that the officer was speaking to the subject she had complained about.

Law enforcement officers are justified in making a "limited, warrantless search for the protection of [themselves] or others nearby in order to discover weapons if [they have] a reasonable, articulable suspicion that the person may be armed and presently dangerous." *Roggeman*, 279 F.3d at 577 (citing *Terry*, 392 U.S. at 30). "Courts are required to apply an objective test to resolve the question whether reasonable, articulable suspicion justified a protective search." *Id.* "Under this objective standard, the 'officer need not be absolutely certain that the individual is armed, the issue is 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.* (citing *Terry*, 392 U.S. at 27). Reasonable suspicion "is considerably less than proof of wrongdoing by a preponderance of the evidence" and "is obviously less demanding than that for probable cause." *Id.* (citing *United States v. Solkolow*, 490 U.S. 1, 7 (1989)). "In determining whether reasonable suspicion exists, [the court] must consider the totality of the circumstances in light of the officers' experience and specialized training." *United States v. Preston*, 685 F.3d 685, 689 (8th Cir. 2012).

Here, Burns was the officer who actually performed the attempted protective search or pat-down. Therefore, I must consider what a reasonable officer in Burns' position would have inferred from the facts and circumstances of the encounter. *See Roggeman*, 279 F.3d at 580, n.5 ("[w]hen conducting our objective, reasonable-suspicion analysis, we are required to put ourselves, as best we can, into the shoes of the officer

who actually performed the protective search."). Meier's argument focuses solely on Lukawski and fails to address any reasonable suspicion Burns may have had.

Burns testified that dispatch advised him to respond to a gun call around 9:30 p.m. Doc. No. 33 at 53. He knew that Lukawski was at the scene and testified that "a man with a gun call's obviously a two man call." *Id.* at 54. Burns arrived within three or four minutes. *Id.* at 55. While he was traveling, he heard Lukawski report over the radio that there was a man in the driveway and that dispatch had run his driver's license and license plate. *Id.* at 56. When Burns arrived, he saw Lukawski speaking with a male individual in the driveway by a pickup truck. He asked Lukawski if he had patted the subject down and learned that he had not. *Id.* at 57. He could not recall whether Lukawski told him it appeared that Meier did not have anything on him, but Burns testified that he would have wanted to pat him down anyway given that, in his experience, it is not always obvious from the outside if someone is concealing something. *Id.* at 58. Indeed, Burns could not tell by looking at Meier whether he was armed. *Id.* Once Burns told Meier that he was going to pat him down, Meier immediately became elusive and started backing away and acting jittery. *Id.* at 59. Meier explained that he had been assaulted by police officers before, and Burns assured him that that was not going to happen and that the camera in his squad car and audio were on. *Id.* As soon as Burns started patting Meier down, Meier failed to comply and eventually attempted to get away from Burns such that Burns had to physically restrain him on the ground. *Id.* at 61-62. With assistance from Lukawski, they handcuffed Meier and observed a digital scale and a revolver on the ground when they brought Meier to his feet. *Id.* at 62-63.

Based on the totality of the circumstances, I find that Burns had reasonable suspicion to believe that Meier was armed to justify the pat-down search. Burns was responding to a gun call. When he arrived at the scene, the suspect had not yet been patted down and was wearing clothes that could conceal a firearm. There were no other circumstances to suggest that the caller was mistaken in seeing a firearm or that Meier

was not the person she saw with the firearm.[4] For these reasons, Burns had the requisite reasonable suspicion to justify the pat-down search.

IV. CONCLUSION

For the reasons set forth herein, defendant's objections (Doc. No. 35) are **overruled**. I hereby **accept** Judge Williams' report and recommendation (Doc. No. 29) without modification. Defendant's motion to suppress (Doc. No. 19) is **denied**.

IT IS SO ORDERED.

DATED this 30th day of November, 2016.

LEONARD T. STRAND
UNITED STATES DISTRICT JUDGE

[4] While Lukawski was aware that Meier was not "Jim," Burns had none of this context. Doc. No. 33 at 67-68.

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

UNITED STATES OF AMERICA, Plaintiff, vs. JONATHAN EDWARD MEIER, Defendant.	No. 16-CR-3013-LTS **REPORT AND RECOMMENDATION TO DENY DEFENDANT'S MOTION TO SUPPRESS**

Before me is defendant's motion to suppress evidence allegedly seized in violation of the Fourth Amendment to the United States Constitution. Doc. 19. The grand jury charged defendant in a one-count indictment with possession of firearms as a felon. Doc. 1. The charge arose from an incident on February 12, 2016, when Fort Dodge police officers encountered defendant while responding to a 911 call reporting a man with a gun outside a trailer home. As a result of attempting to conduct a pat down search of defendant, officers discovered one gun on defendant and another in the truck he was driving. In his motion to suppress, defendant alleges that the officers' detention of him was unlawful and the officers lacked reasonable suspicion to justify a pat down search. Defendant argues, therefore, that the Court should suppress evidence of the firearms and other items discovered as a result of the allegedly unlawful detention and search.

The Honorable Leonard T. Strand, United States District Court Judge, referred this motion to me for a report and recommendation. For the reasons that follow, I respectfully recommend that the Court deny defendant's motion to suppress.

APPENDIX C

I. FINDINGS OF FACT

On October 19, 2016, I held an evidentiary hearing on defendant's motion. I admitted into evidence defendant's exhibits A through D, which consisted of a video recording from a patrol car (Exhibit A), two 911 audio recordings (Exhibit B), police reports (Exhibits C-1, C-2, & C-3), and the depositions of Officer J. Lukawski and Matthew Burns (Exhibits D-1 and D-2). (Except for recordings, exhibits previously filed at Doc. 19). The government called officers Lukawski and Burns as witnesses at the hearing. I make the following findings of fact based on this evidence.

In the late evening of February 14, 2016, Madisen Ebner called 911 asking for an officer to come to her home in a Fort Dodge, Iowa, trailer park. She alleged that a man named Jim was harassing her. She said he was leaving the trailer park on foot and that Jim drove a maroon minivan or SUV. Exhibit A-1. Officer J. Lukawski responded, arriving at the trailer park at approximately 9:15 p.m. Officer Lukawski spoke with Ebner, who further informed him that a woman named Sweeny was with Jim. Ebner showed images of the two captured on her home security camera. Ebner asked Officer Lukawski to contact Jim and Sweeny and ask them not to come to her home anymore.

Officer Lukawski left in his patrol car, stopping a short distance away (still in the trailer park), in order to use his computer in an attempt to find contact information for Jim and Sweeny. While parked on the road, he saw a black Chevy truck drive past him. Less than five minutes later, Officer Lukawski was alerted to another 911 call by Ebner. Ebner reported that Jim was back at her house, that he had a handgun, and was attempting to break into her house or doing something to her home.[1] Ebner told the 911 operator (who passed the information along to Officer Lukawski) that the man had parked his Chevy truck in her driveway. Ebner stated that she saw the man with a small handgun in his hand as he approached her trailer. Ebner asked that the dispatcher send Officer Lukawski back to her residence quickly. It is apparent from Ebner's voice and words on

[1] On the recording, Ebner said the suspect was "bashing her shit in," referring to her home.

the recording that she was worried for her safety. The dispatcher directed Officer Lukawski back to Ebner's residence. The dispatcher also directed Officer Matthew Burns to Ebner's house as backup.

Officer Lukawski responded in less than a minute, arriving the second time at Ebner's residence at 9:31 p.m. Exhibit C-1; Exhibit B, at 9:31:40. Officer Lukawski did not bother to activate the emergency lights on his vehicle (which would have activated his dash camera) because he was such a short distance away and there was no other traffic in the trailer park. When Officer Lukawski arrived, he saw defendant's black Chevy truck parked in Ebner's driveway and recognized it as the same Chevy truck that had driven past him a few minutes before. Officer Lukawski saw no other vehicle matching that description in the area and the vehicle was parked in the driveway as described by Ebner in the 911 call. Officer Lukawski parked his patrol car behind defendant's truck. As Officer Lukawski got out of his patrol car, he saw defendant appear to be getting out of the truck.

Officer Lukawski approached defendant, unsnapping his holster and placing his hand on his weapon, but he did not remove his weapon from its holster. Officer Lukawski told defendant that Officer Lukawski was responding to a gun call and for defendant to keep his hands visible. Defendant, standing next to his truck with the door still open, complied. Officer Lukawski asked defendant what he was doing. Defendant stated he had thrown a snowball at Ebner's trailer to get her attention. Officer Lukawski asked if defendant had any firearms on him, and defendant said he did not. Officer Lukawski moved to get a better view of the inside of defendant's truck through the door that remained open. Officer Lukawski asked defendant if there were any weapons inside the truck. Defendant responded by gently shutting the truck door. Defendant stated the truck did not belong to him and he did not want the officer to look in it. Defendant did not state whether there were weapons in the truck. Officer Lukawski testified that defendant's action in shutting the truck door in response to a question about weapons made Officer Lukawski feel that something was not right.

While Officer Lukawski was talking with defendant, Ebner told the 911 operator that Officer Lukawski was speaking to the man she had described as having a handgun.

Officer Lukawski asked defendant to provide identification, and defendant complied by retrieving his wallet from a back pocket. Officer Lukawski instructed defendant to do so slowly. Officer Lukawski "ran" defendant's license and the license plate on the truck, meaning he called the information in to dispatch to see if there were any "wants or warrants" on defendant or any information about the truck, such as a report that it had been stolen. This process took about three to four minutes. At about 9:34:19, the dispatched told Officer Lukawski that defendant was not wanted and provided Officer Lukawski the name of the truck's registered owner. The dispatcher did not indicate there was anything unlawful about defendant's possession of the truck.

Officer Lukawski testified that his conversation with defendant throughout this short exchange had remained calm. Officer Lukawski decided not to conduct a pat down search of defendant, therefore, because he knew he had a backup officer on the way and the situation was currently stable. He testified that he decided to wait to conduct a pat down until the backup officer arrived for officer safety reasons. Officer Lukawski told defendant he had been at the residence earlier regarding a harassment call, but that that call did not involve defendant. Defendant asked if he could leave, but Officer Lukawski told defendant that as soon as his backup officer arrived he would speak with Ms. Ebner and "would get [defendant] on his way."[2]

[2] In his brief, defendant overstates Officer Lukawski's conclusion. Defendant wrote: "Officer Lukawski quickly concluded that Mr. Meier was not one of the harassment suspects that were the subject of Ms. Ebner's 911 calls . . . [and] Officer Lukawski told Mr. Meier that he was not the suspect . . . ." Doc. 19-1, at 5 (emphasis added). There were two 911 calls. The first 911 call involved harassment suspects. The second 911 call involved a man with a gun outside Ebner's home, whom she thought was one of the original harassment suspects. That Officer Lukawski was able to determine that Ebner was mistaken and defendant was not one of the harassment suspects did not mean that Officer Lukawski had concluded that defendant was not the suspect of the second 911 call.

Officer Lukawski also testified that he decided not talk to Ms. Ebner (to determine if defendant was the man she saw with a handgun) until the backup officer arrived because, for officer safety reasons, he was not going to walk away from defendant. There was no door or window in the trailer that would have allowed Ebner to see the location where Officer Lukawski and defendant were standing during their interaction. For Ebner to see defendant, she would have had to exit the trailer and come around the corner of the trailer. Officer Lukawski testified that he did not want Ebner to come out of the trailer for her safety.

Officer Burns arrived at the scene within about 90 seconds of Officer Lukawski completing the driver's license and vehicle check. Officer Burns arrived at 9:35:45, a little more than four minutes after Officer Lukawski first made contact with defendant. Upon arriving at the scene, Officer Burns immediately asked Officer Lukawski if he had "pat[ted] him down or anything." Exhibit B, at 9:35:45. Officer Lukawski responded that he had not. Officer Lukawski added that defendant "didn't appear to have anything on him." *Id.*, at 9:35:55. At the hearing, Officer Lukawski testified he did not mean that Officer Lukawski had concluded that defendant was not armed. It was dark out and defendant was wearing jeans and a red hoodie-type sweatshirt that was loose fitting. Officer Lukawski testified he could not tell simply by looking at defendant that he was armed. Officer Lukawski testified that he still suspected that defendant might be armed.

Officer Lukawski asked defendant for his driver's license again and indicated that he intended to talk to Ebner. Defendant complied and asked again for permission to leave. Officer Burns then informed defendant that Officer Burns was going to pat down defendant. Defendant's behavior changed immediately. He became agitated and indicated that he was anxious. He claimed he had been beaten by police officers before. Officer Burns attempted to reassure defendant that the officers were not going to beat him, advising defendant that the officer's dash camera was on and the audio was being recorded. Officer Burns again asked defendant to turn around so that the officer could pat him down. Officer Burns asked defendant if he had a weapon and defendant said he

had a pocket knife and offered to retrieve it. Officer Burns told defendant to keep his hands out of his pockets and asked if defendant had any other weapons. Defendant did not answer the question. Defendant continued to be agitated and started moving away from the truck and toward a carport. Officer Burns again asked defendant to cooperate and turn around so the officer could pat him down, but defendant did not comply. Officer Burns grabbed defendant by the arm at this point in an effort to turn him around. Defendant resisted, and Officer Burns took defendant to the ground. Defendant landed on the ground, face down, with his hands beneath his body. Defendant refused officers' commands to bring his arms behind his back and resisted their efforts to remove his arms from beneath his body. Officer Burns warned defendant several times that he would deploy a taser if defendant did not cooperate. Eventually, the officers were able to secure defendant's arms and handcuff him behind his back. When the officers helped defendant up, they found a handgun and an electronic scale on the ground where defendant had been laying.

After securing defendant, the officers arrested him for resisting them. The officers searched defendant incident to arrest and removed a substance containing THC, among other items. When officers looked into the truck through the passenger window, they saw a handgun in plain view on the floor in front of the driver's seat. Officers seized the weapon and applied for a search warrant for the truck. When they executed the warrant, officers seized other incriminating evidence from the truck.

I found that both Officer Lukawski and Burns were credible witnesses.

II. 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 State 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, 666–667 (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." *Id*. 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). 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). In addition, a person's temporal and geographic proximity to a crime scene, combined with a matching description of the suspect, can support a finding of reasonable suspicion. *United States v. Juvenile TK*, 134 F.3d 899, 903–04 (8th Cir. 1998). 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'").

III. ANALYSIS

Defendant claims the officers violated his rights under the Fourth Amendment to the Constitution when they conducted an unlawful Terry stop and patted him down. Specifically, defendant argues: (1) Officer Lukawski violated the Fourth Amendment when, after concluding defendant was not the suspect involved in the first harassment call, he continued to detain defendant because by that point reasonable suspicion had dissipated; and (2) Officer Burns violated the Fourth Amendment when he conducted a pat down of defendant because there was no basis for a reasonable suspicion that defendant was armed. Defendant argues that all evidence discovered afterwards, including the firearms, must be suppressed as fruit of the poisonous tree.

A. The Legality of the Continued Terry Stop

I find that that Officer Lukawski conducted a proper Terry stop and his continued detention of defendant until a backup officer arrived was reasonable. Defendant is not disputing that Officer Lukawski acted well within his authority in making initial contact with defendant and requesting defendant's identification and running the plates on the truck. Indeed, I find that there was reasonable suspicion for Officer Lukawski to stop

defendant and detain him to investigate whether he was the man Ebner saw with a firearm outside her trailer. *See United States v. Walker*, 771 F.3d 449, 450 (8th Cir. 2014) (holding that officer had reasonable suspicion to stop defendant when dispatch reported a similar vehicle had been involved in a shooting in the area one minute earlier). Rather, defendant argues that once Officer Lukawski concluded defendant was not one of the people who had been harassing Ebner earlier, and absent learning additional information giving rise to a reasonable suspicion as a result of running defendant's license and the license plate information, Officer Lukawski was legally required to release defendant. I disagree.

It is true that Officer Lukawski concluded at some point during his three to four minute interaction with defendant that defendant was not one of the people who had been harassing Ebner earlier that night. That conclusion, however, is irrelevant for two reasons. First, whether a Terry stop is reasonable under the Fourth Amendment is determined objectively, from the viewpoint of a reasonable officer. An officer's subjective belief is, therefore, irrelevant. It is not what the officer actually believed, but what a reasonable officer with the same experience would reasonably believe, that is the test. *See United States v. Hanlon*, 401 F.3d 926, 929 (8th Cir. 2005) (holding that it is irrelevant whether an officer "actually fear[s]" the suspect is armed as long as "a hypothetical officer in exactly the same circumstances reasonably could believe that the individual is armed and dangerous.").

Second, that Officer Lukawski concluded at some point that defendant was not one of the people who had harassed Ebner earlier is irrelevant because Officer Lukawski had the facts supporting a reasonable suspicion that defendant was involved in criminal conduct and may be armed. Ebner called 911 and reported that a man was outside her trailer and had a handgun, he had parked his Chevy truck in her driveway, and he was attempting to enter or doing something to her trailer. She stated that the man was Jim, one of the people who had been harassing her earlier. She was clearly mistaken.

Officer Lukawski arrived at Ebner's house within a minute of this call. When he arrived, he found defendant getting out of a Chevy truck parked in Ebner's driveway. The truck and its location matched the description given by Ebner. This incident occurred at night when there were no other vehicles or people present; a reasonable officer could conclude that defendant was the suspect Ebner saw with a handgun. Defendant told the officer he had thrown a snowball at Ebner's trailer. A reasonable officer could conclude, therefore, that defendant had been outside his truck prior to the officer arriving, which is consistent with Ebner seeing defendant with a handgun. A reasonable officer could conclude that defendant's action of throwing a snowball at Ebner's trailer was consistent with her report that the man with the gun had done something to her trailer, or as Ebner described it, "bashing her shit in." When Officer Lukawski asked if there were weapons in the truck, defendant did not answer the question; instead, he shut the truck door. A reasonable officer could conclude from defendant's failure to answer the question and suspicious conduct in shutting the door to the truck that a weapon was inside the truck. Defendant was wearing loose clothing such that Officer Lukawski could not determine simply by looking at defendant whether he also was armed.

Therefore, even though Officer Lukawski realized that Ebner was mistaken in believing the man with a gun was the same man who harassed her earlier in the night, that did nothing to mitigate the reasonable suspicion that defendant was the man Ebner saw with a handgun outside her trailer. *See United States v. Watts*, 7 F.3d 122, 126 (8th Cir. 1993) (holding that reasonable suspicion that the defendant may be armed was not dispelled when officers learned that no burglary occurred, as they initially suspected). Officer Lukawski's continued detention of defendant for a short period of time until a pat down search could be conducted was reasonable. Less than five minutes elapsed from the time Officer Lukawski first made contact with defendant and when Officer Burns arrived and began to conduct a pat down of defendant. Approximately 90 seconds elapsed from the time Officer Lukawski received information back from dispatch about defendant's identification and the truck's license plates, and the time when Officer Burns

arrived and began to conduct a pat down of defendant. Nothing during the entire interaction with defendant, other than his self-serving denial that he had a handgun on his person, dissipated the grounds for reasonable suspicion that defendant was the man Ebner saw outside her trailer with a handgun. Officer Lukawski did not violate the Fourth Amendment by detaining defendant for this short period of time to investigate whether he was carrying a firearm. Officer may continue an investigatory stop so long as it is "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20. Here, Officer Lukawski did not expand the scope of the stop beyond the purpose of determining if defendant was the armed man Ebner saw outside her trailer.

Defendant argues that Officer Lukawski violated the Fourth Amendment because there were other ways he could have dispelled reasonable suspicion short of conducting a pat down search. Defendant argues, for example, that Officer Lukawski could have spoken with Ebner to determine if defendant was the man she saw with a handgun. Defendant argues that even if it was not feasible for Ebner to step outside her trailer for safety reasons, Officer Lukawski could have spoken to Ebner through dispatch to ask her if she knew defendant (defendant had told Officer Lukawski that Ebner was his cousin). Defendant's argument goes too far. Although 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. Here, Officer Lukawski's decision to wait for a back up officer to arrive before speaking with Ebner was not unreasonable given his suspicion that defendant was potentially armed and dangerous.

B. The Legality of the Pat Down

I find that Officer Burns did not violate the Fourth Amendment when he conducted a pat down search of defendant. Defendant argues that Officer Lukawski's statement to

Officer Burns that defendant "didn't appear to have anything on him" eliminated reasonable suspicion to believe defendant was armed. Doc. 19-1, at 9. Defendant also relies on the fact that Officer Lukawski did not activate the emergency lights on his car, or unholster his weapon, or take other more aggressive or defensive actions, as future proof that Officer Lukawski believed defendant was not armed. Defendant's argument fails for two reasons.

First, again, the officer's subjective beliefs are irrelevant to Fourth Amendment review of his actions. Rather, the reasonableness of his actions is measured not by what he actually believed, but by what a reasonable officer of his experience would believe given the totality of the circumstances. Here, as I previously noted, reasonable suspicion existed that defendant was the armed man Ebner saw outside her trailer. She saw a man who parked a Chevy truck in her drive way. Defendant and his truck matched this description. When Officer Lukawski made contact with defendant, Ebner told the dispatcher that Officer Lukawski was talking to the man about whom Ebner had called 911. Defendant did not answer Officer Lukawski's question about whether there was a firearm in the truck. When defendant shut the truck door, it heightened Officer's Lukawski's suspicion. Although Officer Lukawski did not receive additional information from running defendant's identification and license plate, nothing dissipated the basis for a reasonable officer to believe that defendant was the armed man Ebner had seen outside her trailer.

Second, Officer Lukawski clarified his statement in his testimony at the hearing. He testified that although he did not see anything on defendant that made him looked armed, defendant was wearing loose clothing such that visual inspection did not dispel his reasonable suspicion that defendant was armed. I found Officer Lukawski to be a credible witness. Therefore, Officer Lukawski's statement that defendant did not "appear" to be armed did not mean that Officer Lukawski had concluded defendant was not armed. Therefore, the officers had reasonable suspicion to believe defendant was armed and to conduct a pat down.

IV. CONCLUSION

In summary, I find that the officers conducted a lawful Terry stop and protective pat down search of defendant. It follows, therefore, that the officers lawfully recovered the evidence they discovered as a result of conducting the stop and pat down search. For those reasons, I respectfully recommend the Court **deny** defendant's motion to suppress (Doc. 19).

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.

DATED this 26th day of October, 2016.

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

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-3495

United States of America

Appellee

v.

Jonathan Edward Meier

Appellant

Appeal from U.S. District Court for the Northern District of Iowa - Ft. Dodge
(3:16-cr-03013-LTS-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Kelly did not participate in the consideration or decision of this matter.

March 14, 2019

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

/s/ Michael E. Gans

APPENDIX D