[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14884

D.C. Docket No. 2:18-cr-00168-LSC-TFM-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

JARODERICK HARDY,

Defendant - Appellant.

Appeal from the United States District Court
for the Middle District of Alabama

(March 17, 2020)

Before ED CARNES, Chief Judge, ROSENBAUM, and BOGGS,* Circuit Judges.

BOGGS, Circuit Judge:

---

* Honorable Danny J. Boggs, United States Circuit Judge for the Sixth Circuit, sitting by designation.

Jaroderick Hardy appeals his conviction for being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1), on the ground that the *Terry* stop that led to the discovery of the firearm was unconstitutional under the Fourth Amendment. We affirm.

I

At around 1:21 a.m. on Wednesday, November 8, 2017, a resident of the Spring Valley neighborhood in Montgomery, Alabama, called 911 to report that she could hear someone outside her home. The caller reported that she had heard the same noises the previous two nights, but she did not look outside and so was unable to provide a description of what had made the noise. Montgomery Police Officer Joshua Howell arrived outside the caller's home seven minutes later, at around 1:28 a.m. At the subsequent suppression hearing, Howell testified that he understood that he was responding to a "prowler call," a common term in police parlance. After arriving outside the home, Howell patrolled the immediate area for a few minutes, but saw no one. He then began to leave the neighborhood. At around 1:35 a.m., as he was driving out of the neighborhood, Howell saw Hardy walking by himself at the intersection of Spring Valley Road and Adler Drive. The intersection is approximately 0.3 miles—or around a five-minute walk—away from the caller's home. At the time, Hardy was dressed in loose-fitting, all-black clothing, which

Howell knew to be common for those who commit property crimes in the neighborhood.

Howell stopped his police car, got out, and approached Hardy. Howell testified that he did this because Hardy was in the vicinity of where the 911 call had been made, it was around 1:30 a.m. on a Wednesday, and because Hardy was dressed in all black and was the only person walking in the neighborhood at the time. Howell asked Hardy where he was coming from and where he was going. Hardy said that he was heading home from the store where he had just purchased some cigarillos, which he displayed to Howell. Given his familiarity with the area, Howell knew that the nearest store to the intersection was closed at the time, and that the second nearest store, Singh's Mart, was about a mile and a half away.

Howell then told Hardy to "stand still," and asked him if he was armed. Both parties acknowledge that Hardy's interactions with Howell up to that point were consensual and that the encounter became a nonconsensual *Terry* stop only thereafter. According to Howell, Hardy was "evasive" with his answers and also said "don't shoot me" several times, which Howell said further heightened his suspicions. Although Howell later acknowledged that he did not observe any visible bulge in Hardy's clothing that would have suggested the presence of a weapon, he nevertheless proceeded to frisk Hardy, which revealed a handgun in the waistband of Hardy's pants.

Prior to trial, Hardy filed a motion to suppress the evidence recovered by Howell during his search. A magistrate judge then conducted an evidentiary hearing, where Howell was the only witness. Although the magistrate judge recommended that the evidence be suppressed, the district judge disagreed and denied the motion without a further hearing.[1] Hardy then pled guilty pursuant to a plea agreement that allowed him to preserve the right to appeal the order denying his motion to suppress. He was sentenced to fifteen months of imprisonment. This appeal followed.

II. DISCUSSION

A. Standard of Review

We review a district court's denial of a motion to suppress as a mixed question of law and fact. *United States v. Delancy*, 502 F.3d 1297, 1304 (11th Cir. 2007). Accordingly, we review de novo the district court's application of law to facts but review its factual findings for clear error, with the facts construed in the light most favorable to the prevailing party below. *United States v. Folk*, 754 F.3d 905, 910 (11th Cir. 2014) (citation omitted).

B. Reasonable Suspicion

[1] Hardy claims that it was inappropriate for the district court to decide the motion without rehearing the evidence, citing cases that suggest there is reversible error whenever the district court rejects a magistrate judge's credibility determinations without a rehearing. *See, e.g.*, *United States v. Cofield*, 272 F.3d 1303 (11th Cir. 2001). However, the district court did not reject the magistrate judge's credibility determinations nor his factual findings. Indeed, the district court largely incorporated all of the magistrate judge's factual findings into its order. The district court merely disagreed with the magistrate judge's legal conclusions.

A law-enforcement officer may conduct a brief, investigatory stop of an individual if there is a "reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000); *see also Terry v. Ohio*, 392 U.S. 1, 27 (1968). Despite reasonable suspicion being a less demanding standard than probable cause, a *Terry* stop cannot be based on an officer's "inchoate and unparticularized suspicion or 'hunch.'" *Terry*, 392 U.S. at 27; *Wardlow*, 528 U.S. at 123–24. When evaluating reasonable suspicion, we consider the totality of the circumstances, which must be viewed in "light of the officer's special training and experience." *United States v. Matchett*, 802 F.3d 1185, 1192 (11th Cir. 2015). This is because "behavior, seemingly innocuous to the ordinary citizen, may appear suspect to one familiar with [criminal] practices." *Ibid*. (citation omitted); *see also Terry*, 392 U.S. at 27 (noting that a reasonable suspicion must be based on "the specific reasonable inferences which [an officer] is entitled to draw from the facts in light of his experience").

Courts have articulated specific factors that, when present, may support a finding of reasonable suspicion. Among others, these include: presence in a high-crime area, *Wardlow*, 528 U.S. at 124; nervous or evasive behavior, *ibid*.; unprovoked flight or conspicuous avoidance of police, *United States v. Hunter*, 291 F.3d 1302, 1306 (11th Cir. 2002); a visible bulge in the individual's clothes that could signify a gun, *Pennsylvania v. Mimms*, 434 U.S. 106, 112 (1977); or

corroboration of reports or tips to the police, *United States v. Lindsey*, 482 F.3d 1285, 1291 (11th Cir. 2007). While the presence of simply one of these factors, *standing alone*, cannot serve as the basis for a *Terry* stop, reasonable suspicion is often found when more than one of these factors are present. *See, e.g.*, *Wardlow*, 528 U.S. at 124.

We hold that there was reasonable suspicion for a *Terry* stop and search of Hardy. First, Officer Howell was not in the neighborhood based on a mere "hunch" but was responding to a specific type of 911 call, a "prowler" call. Such calls were not uncommon for that area, which had a high rate of property crime. Second, Hardy's all black clothing—while it could be innocuous—raised Howell's suspicions when observed at 1:30 a.m. on a weeknight. According to Howell, dark clothing was something that officers dealt with daily when responding to criminal calls at nighttime. In other words, someone who was committing or likely to commit property crimes (i.e, a "prowler") would likely be wearing all black at that time of night. Third, Hardy was the only person that Howell encountered during his drive through the neighborhood, and he was in close proximity to the caller's house. This, too, would have likely raised suspicions about whether he could have been responsible for the "prowler" noises that the caller had heard. Finally, Hardy's account of how he had gone to the store to purchase cigarillos, though possible, seemed unlikely. Evidence in the record showed that the only store open at the time

was a mile and a half—or a thirty-minute walk—away from the caller's house. This meant that when Howell encountered Hardy, Hardy would have been on the tail end of an hour-long round trip to the store just to purchase a few cigarillos at 1:35 in the morning on a weeknight. It was reasonable for Howell to have viewed Hardy's story with at least some skepticism.

All of these factors served to *increase* Officer Howell's already heightened suspicions (from the 911 call) and did little to point to Hardy's non-involvement in the purported "prowler" incident.[2] Put differently, nearly every additional piece of information that Howell acquired during his interaction with Hardy raised further suspicions about Hardy's possible criminal activity instead of alleviating them. The information that Howell acquired "operate[d] to distinguish" Hardy from being a normal bystander or a normal pedestrian. *United States v. Ballard*, 573 F.2d 913, 916 (5th Cir. 1978).[3] Indeed, "where nothing in the initial stages of the encounter serves to dispel [an officer's] reasonable fear for his own or others' safety, he is entitled . . . to conduct a carefully limited search[.]" *Terry*, 392 U.S. at 30.

[2] In support of his argument, Hardy relied heavily on an unpublished opinion. However, it is our policy that "[u]npublished opinions are not binding precedent." *United States v. Izurieta*, 710 F.3d 1176, 1179 (11th Cir. 2013). For that reason, we have no occasion to decide whether such unpublished cases are distinguishable or not, and we do not imply any view about the correctness of their reasoning or result.

[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

Importantly, even if Hardy's actions were open to innocent explanations, that does not necessarily render the *Terry* stop unconstitutional. "A reasonable suspicion of criminal activity may be formed by observing exclusively legal activity," *United States v. Gordon*, 231 F.3d 750, 754 (11th Cir. 2000), and "[e]ven in *Terry*, the conduct justifying the stop was ambiguous and susceptible of an innocent explanation." *Wardlow*, 528 U.S. at 125. *Terry* recognized that an officer could stop a person simply "to resolve the ambiguity" created by that person's actions. *Ibid*. Officer Howell's attempts at resolving that ambiguity only served to further heighten his suspicions.

III. CONCLUSION

Hardy's conviction is **AFFIRMED.**

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

March 17, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 18-14884-CC
Case Style: USA v. Jaroderick Hardy
District Court Docket No: 2:18-cr-00168-LSC-TFM-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Carol R. Lewis, CC at (404) 335-6179.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Jeff R. Patch
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JARODERICK HARDY, Defendant.	)	2:18-cr-00168-LSC-TFM

MEMORANDUM OF OPINION AND ORDER

I. Introduction

The magistrate judge to whom the defendant's "Motion to Suppress" (doc. 16) and the United States' "Response to Defense Motion to Suppress" (doc. 21) were referred has entered a Report and Recommendation recommending that the motion to suppress be granted. (Doc. 24.) The magistrate judge found that the detaining officer lacked reasonable suspicion to conduct a lawful *Terry* stop. The United States timely filed an objection to the magistrate judge's Report and Recommendation (Doc. 28). After now having thoroughly reviewed the entire record, this Court finds that the magistrate judge's Report and Recommendation is

not due to be adopted and accepted. Rather, for the following reasons, the motion to suppress is due to be denied.

II. Background

On November 8, 2017, at 1:21 a.m., the resident of 400 West Wilding Drive called the Montgomery Police Department ("MPD") and informed the operator that she heard someone making noise outside her house and that this was the third night in a row she heard someone outside her house. The responding police officer, Joshua Howell ("Officer Howell"), who had nine months' experience as a patrol officer on the night shift in the neighboring district and who was familiar with the caller's Spring Valley neighborhood, arrived at the resident's home at 1:28 a.m., only seven minutes after the 911 call. Given that dispatch told Officer Howell that the resident "could hear someone around her house," Officer Howell treated the call as a prowler call.

After arriving at the caller's residence and failing to locate the source of the sound, Officer Howell drove around to investigate the immediate area. Officer Howell was familiar with the neighborhood, which was adjacent to his normal patrol district, and he knew that it was a "high crime area." Officer Howell knew that that "property crime," including burglary, was typical in this neighborhood.

Officer Howell had himself responded to burglary calls in this neighborhood in the past and knew that it was not uncommon for burglary suspects to be armed.

At 1:32 a.m., only 11 minutes after the resident made a call reporting that "someone" was making noise outside her house, Officer Howell encountered the defendant at the intersection of Adler and Spring Valley, which is only 0.3 miles from the residence, about a six-to-seven minute walk. Officer Howell did not see anyone else on the street other than the defendant. Based on his familiarity with the neighborhood, Officer Howell knew that it was it was uncommon for people to be out and about at 1:32 a.m. on a weeknight in this neighborhood. In addition, the defendant's all-black clothing provided further evidence in Officer Howell's calculation that the defendant was connected to the prowler call. Officer Howell knew that the MPD received calls on a daily basis describing criminal suspects wearing all-black clothing.

When Officer Howell engaged the defendant in conversation, the defendant responded evasively to Officer Howell's inquiries as to where the defendant was coming from and whether the defendant was armed. The defendant told Officer Howell that he was headed home from the store, but the nearest store had been closed for an hour and a half, and the nearest open store, Singh's Market, was approximately a mile and a half away, a thirty-minute walk. Officer Howell found

the defendant's claim that he walked thirty minutes to a store and thirty minutes back in the middle of the night in a high crime neighborhood just to get cigarillos to be unbelievable.

After noting the defendant's black clothing, evasive responses, unbelievable story for why he was out at 1:30 a.m. on a weeknight in a high crime area that often features property crime, standing only a six-to-seven minute walk from an 11-minute-old prowler call, Officer Howell testified that he believed the defendant was not only connected to the prowler call, but that the defendant was armed. Officer Howell testified that the defendant's conduct in reaching for his pockets further created officer safety concerns and influenced Officer Howell's decision to frisk the defendant for weapons. In addition to reaching into his pockets once, the defendant also kept his hands at his sides near his pockets during the entire encounter, which made Officer Howell nervous. Officer Howell knew that pockets could be where weapons are stored. Officer Howell instructed the defendant to stand still and informed the defendant that he would pat him down for weapons. Howell asked the defendant if he was armed, which resulted in the defendant pleading with Officer Howell not to shoot him, another bizarre act. The defendant complied with Officer Howell's commands to stand still and put his hands out to his sides. Officer Howell testified that "don't shoot me" is not a normal response to the question of whether

a person is armed, which further made Officer Howell suspicious that the defendant was armed. Officer Howell started his frisk at the front of the waistband where he immediately felt the pistol grip of a weapon. The weapon was secured and the defendant was charged with its possession.

III. Standard of Review

Following a timely written objection, the standard of review for a magistrate judge's report and recommendation is *de novo*. 28 U.S.C. § 636(b)(1). *De novo* review requires the court to conduct an independent consideration of factual issues based on the record. *Jeffrey S. by Ernest S. v. State Bd. of Educ. of State of Ga.*, 896 F.2d 507, 513 (11th Cir. 1990). "If the magistrate makes findings based on the testimony of witnesses, the district court is obliged to review the transcript." *Id.*

IV. Discussion

The *Terry* stop and subsequent pat down for weapons were lawful, and therefore the evidence obtained during the stop will not be suppressed. On the basis of the late hour, the high-crime neighborhood, the defendant's temporal and geographic proximity to a prowler call, the defendant's all-black clothing, and the defendant's evasive conduct and unbelievable story, Officer Howell had a reasonable suspicion that there was criminal activity afoot and that the defendant was connected to the prowler call. This justified a lawful *Terry* stop. Furthermore,

the defendant's reaching for his pockets and the fact that burglary suspects are often armed provided reasonable suspicion that the defendant was armed and justified Officer Howell's pat down for weapons.

A. The seizure

The defendant seeks to suppress evidence under the Fourth Amendment's protection from unreasonable searches and seizures. *See* U.S. Const. amend. IV. Courts can order the suppression of evidence obtained in unreasonable searches and seizures. *United States v. Gilbert*, 942 F.2d 1537, 1541 (11th Cir. 1991). However, not all law enforcement encounters constitute "seizures" and merit scrutiny under the Fourth Amendment. *United States v. Jordan*, 635 F.3d 1181, 1185 (11th Cir. 2011). An encounter only becomes a seizure when an officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Terry v. Ohio,* 392 U.S. 1, 19 n. 16 (1968). Police can stop and detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity "may be afoot," even if the officer lacks probable cause. *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry*, 392 U.S. at 30).

There are three categories of law enforcement-citizen interactions: (1) consensual police-citizen exchanges; (2) temporary detentions; and (3) full-scale

arrests. *United States v. Perez,* 443 F.3d 772, 777 (11th Cir. 2006). The first two categories are at issue in this case given that the decisive concerns are when the consensual encounter became a seizure, and whether the detention and accompanying pat down were supported by reasonable suspicion.

The first category of encounters, consensual and non-coercive encounters, are not seizures and do not implicate any sort of scrutiny under the Fourth Amendment. *Jordan*, 635 F.3d at 1186. The mere fact that a law enforcement officer approaches an individual on the street or asks him to answer some questions does not create a seizure. *Florida. v. Royer*, 460 U.S. 491, 497 (1983). A law enforcement encounter remains consensual if, considering all of the surrounding circumstances, "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick*, 501 U.S. 429, 436 (1991).

A consensual encounter only becomes a seizure if there is either (a) an application of physical force, even if extremely slight, or (b) a show of authority to which the subject yields. *California v. Hodari D.*, 499 U.S. 621, 625 (1991). Relevant factors include:

> Whether a citizen's path is blocked or impeded; whether identification is retained; the suspect's age, education and intelligence; the length of the suspect's detention and questioning; the number of police officers

> present; the display of weapons; any physical touching of the suspect, and the language and tone of voice of the police.

Perez, 443 F.3d at 778.

Officer Howell's stern command to "stand still" at 1:33 of the body camera footage was a show of authority sufficient to indicate a seizure pursuant to *Hodari D.* and *Bostick*. *Hodari D.* stated that tone matters, and the tone of Officer Howell's command clearly demonstrated his intention that the defendant remain where he was. As per the standard set in *Bostick*, this command initiated a seizure in that a reasonable person would not feel as if he could terminate the encounter where a law enforcement officer instructs him to remain still and informs him that he will be frisked. The defendant took a step back, but did not turn and run or display any sort of combative or uncooperative behavior beyond pleading with Officer Howell not to shoot him. Therefore, the defendant clearly complied with Officer Howell's show of authority, indicating that the seizure had in fact begun when Officer Howell ordered him to stand still.

Prior to the command to stand still, the encounter remained consensual. When Officer Howell exited his car and approached the defendant to question him, he did not block his path, did not retain his identification, and did not draw his weapon. Officer Howell simply asked the defendant a series of questions, including

where he was coming from, where he was going, and whether he was armed. As noted above in *Hodari D.*, a seizure does not occur until an officer applies physical force or displays a show of authority to which a citizen yields. Up until this point, Officer Howell had not touched the defendant nor issued any directive or displayed a show of authority that would cause a reasonable person to believe his liberty was restrained. As stated in *Royer*, the mere fact that an officer approaches an individual on the street and asks a series of questions does not turn a consensual encounter into a seizure.

Certainly, the consensual encounter became a seizure when Officer Howell ordered the defendant to raise his hands at his sides and frisked the Defendant. The significance of determining that the seizure began about a minute earlier, when Officer Howell instructed the defendant to stand still, is that the defendant's response of "please don't shoot me" would have happened after the seizure had already occurred. Therefore, the defendant's conduct in pleading "please don't shoot me," which Officer Howell believed created further suspicion that the defendant was armed, is likely excluded from the reasonable suspicion analysis. However, as will be explained below, there was already sufficient evidence from the totality of the circumstances prior to Officer Howell's command to stand still that

created reasonable suspicion that the defendant was connected to the prowler call and that the defendant may have been armed and dangerous.

B. Reasonable suspicion for a *Terry* stop

To determine whether an investigatory stop is lawful under the Fourth Amendment, "we first ascertain whether the stop was justified at its inception." *United States v. Griffin*, 696 F.3d 1354, 1358 (11th Cir. 2012). Temporary detentions are governed by *Terry*, which held that "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot," the officer may detain the suspicious person and make "reasonable inquiries" aimed at confirming or dispelling his suspicions. *Minnesota v. Dickerson*, 508 U.S. 366, 372–73, (1993) (quoting *Terry*, 392 U.S. at 30). Whereas full-scale arrests require probable cause, *Terry* stops only require that an officer have "a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot.'" *Griffin*, 696 F.3d at 1358 (quoting *Sokolow,* 490 U.S. at 7).

The mere fact that a temporary detainee's conduct was ambiguous and susceptible to innocent explanation does not establish a violation of the Fourth Amendment. *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000). The reasonable suspicion standard for *Terry* stops "accepts the risk that officers may stop innocent

people." *Id.* at 126. While officers must be able to articulate more than an "inchoate and unparticularized suspicion or 'hunch'" of criminal activity, *id.* at 124 (quoting *Terry*, 392 U.S. at 27), courts cannot reasonably demand scientific certainty from law enforcement officers. *Id.* at 125. Furthermore, courts must look at the totality of the circumstances of each case to determine whether the detaining officer has a particularized and objective basis for suspecting wrongdoing. *United States v. Arvizu*, 534 U.S. 266, 273 (2002). Officers may draw reasonable inferences about the cumulative information available to them as informed by their training and experience. *Id.*

Factors that appear innocent in isolation may warrant further investigation when taken together. *Arvizu*, 534 U.S. at 274. For example, in *Sokolow*, 490 U.S. at 3, the Supreme Court reversed the Ninth Circuit and held that Drug Enforcement Administration agents had reasonable suspicion that the defendant was transporting illegal drugs on the basis of the following six factors concerning the defendant's conduct:

> (1) he paid $2,100 for two airplane tickets from a roll of $20 bills; (2) he traveled under a name that did not match the name under which his telephone number was listed; (3) his original destination was Miami, a source city for illicit drugs; (4) he stayed in Miami for only 48 hours, even though a round-trip flight from Honolulu to Miami takes 20 hours; (5) he appeared nervous during his trip; and (6) he checked none of his luggage.

Id. While each of these factors alone may have innocent explanations, under a "totality of the circumstances" analysis, they create reasonable suspicion justifying a valid stop. *Id.* at 8. The Ninth Circuit had held that on the basis of these factors, "there was no evidence of ongoing criminal behavior, and thus that the agents' stop was impermissible." *Id.* at 6. The Supreme Court rejected this "overly mechanistic" requirement to identify at least one factor demonstrating evidence of ongoing criminal activity in order to establish reasonable suspicion. *Id. Sokolow* clarified that the reasonable suspicion analysis "does not deal with hard certainties, but with probabilities." *Id.* at 8. Determinations of reasonable suspicion are made on a "case-by-case determination of reasonable articulable suspicion based on *all* the facts." *Id.* at 6.

Here, there were enough specific, articulable facts prior to Officer Howell's seizure of the defendant to support a determination that Officer Howell had a reasonable suspicion that the defendant was involved in criminal activity: (1) Officer Howell was responding to a 911 call that someone was outside of a resident's home; (2) the call was made at 1:21 a.m. on a weeknight in a high crime neighborhood; (3) after seeing no one else in the area, Officer Howell located the defendant in close temporal and geographic proximity to the residence; (4) the defendant was wearing all black clothing; (5) the defendant was evasive and

provided an unbelievable story about making an hour long walking trip to a store to get cigarillos.

Officer Howell reasonably treated the call as a prowler call when he responded and investigated the residence and surrounding area. The resident of 400 West Wilding Dr. reported that "someone" was outside her house and that this was the third night in a row that she heard someone outside her home. The fact that the resident did not visually identify the source of the sound is not significant in using this call, together with other pieces of evidence, to create a reasonable suspicion of criminal activity. When dispatch relayed the call to Officer Howell, they simply told him that the resident heard someone outside her home.

Officer Howell was familiar with the neighborhood, despite it not being in his normal patrol area, due to his personal experience in responding to burglary calls in the neighborhood, which abutted his normal patrol area. Officer Howell also knew from the daily MPD roll call that this area was a high crime neighborhood that often featured property crimes, including burglary. While presence in a "high crime area" cannot alone create a reasonable suspicion of criminal activity, this factor is among the relevant contextual considerations in a *Terry* analysis. *Wardlow*, 528 U.S. at 124 (citing *Adams v. Williams,* 407 U.S. 143, 144 (1972)).

As noted in *Arvizu*, officers may draw on their training and experience in making inferences from the evidence available to them. The Supreme Court also recognizes that based on their experience, law enforcement officers can make observations about facts and behavior and infer criminal activity in situations that would elude a layman. *Ornelas v. United States*, 517 U.S. 690, 700 (1996). When Officer Howell proceeded to drive by the residence and investigate the surrounding neighborhood, he did not see anyone until he located the defendant standing on the sidewalk only a six to seven minute walk away from the residence and only 11 minutes after the call. The close temporal and geographic proximity afforded the defendant ample time to possibly have been the source of the sound outside the caller's home. Furthermore, the defendant was wearing all black clothing, which Officer Howell knew from experience is a type of attire regularly reported in connection with similar criminal calls.

Officer Howell had good reason to question the defendant and dispel the question as to whether criminal activity was afoot. Yet this Court does not need to determine whether these facts alone are sufficient to create a reasonable suspicion for a *Terry* stop because Officer Howell had not yet initiated a seizure. However, the responses to Officer Howell's consensual questioning of the defendant, the defendant's evasive conduct, and his voluntary provision of an unbelievable story

added additional facts that under the totality of the circumstances generated a reasonable suspicion to support a lawful *Terry* stop.

C. Reasonable suspicion for a *Terry* frisk

Law enforcement officers "may take reasonable action, based upon the circumstances, to protect themselves during investigative detentions." *United States v. Hastamorir,* 881 F.2d 1551, 1556 (11th Cir.1989). Following a legitimate stop, officers may conduct a pat down and frisk detainees for weapons if the officer has a reasonable suspicion that he is dealing with an individual who may be armed and dangerous. *Terry*, 392 U.S. at 27. "Great deference is given to the judgment of trained law enforcement officers 'on the scene.'" *United States v. Chanthasouxat,* 342 F.3d 1271, 1276 (11th Cir. 2003). Furthermore, an "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*, 392 U.S. at 27.

Furthermore, the *type* of crime that an officer suspects to be afoot can support a reasonable suspicion that an individual is armed. *Griffin*, 696 F.3d at 1359 (citing *United States v. Moore*, 817 F.2d 1105, 1108 (4th Cir. 1987)). In *Moore*, the Fourth Circuit explicitly asserted that the suspected crime of burglary, which often

involves weapons, provides support for a determination of reasonable suspicion to frisk for weapons:

> The circumstances surrounding the stop support the officer's belief that a further frisk for weapons was warranted. The hour was late, the street was dark, the officer was alone, and the suspected crime was burglary, a felony that often involves the use of weapons.

817 F.2d at 1108.

Here, Officer Howell had a reasonable suspicion that the defendant was involved in a property crime, which creates a strong suspicion that the defendant was armed and dangerous. Officer Howell knew from his experience that the neighborhood was known for property crimes and that burglars are often armed. The facts here are similar to those in *Moore.* Here, just like in *Moore*, the officer was alone, it was dark outside, the hour was late, and most significantly, the suspected crime was a property crime, which, as Officer Howell testified, often involves weapons.

Furthermore, the defendant's conduct, namely his reaching for his pockets, further created suspicion that the defendant was a danger to Officer Howell. While the defendant only reached for his pockets once, and did not flee or make any sudden movements, he did keep his hands at his sides by his pockets during the encounter. Officer Howell, informed by his experience as a law enforcement officer, knew that pockets can be places where weapons are stored.

In summary, the *Terry* doctrine empowers law enforcement officers to temporarily detain individuals under certain circumstances to determine whether the individuals are involved in criminal activity. This *Terry* stop and subsequent pat down for weapons was lawful, and the evidence gathered will not be suppressed.

V. Conclusion

Upon review of the record, the Court finds the magistrate judge's Report and Recommendation (doc. 24) is not due to be adopted and accepted but is REVERSED. The Motion to Suppress (doc. 16) is hereby **DENIED**.

DONE AND **ORDERED** ON AUGUST 7, 2018.

L. SCOTT COOGLER
UNITED STATES DISTRICT JUDGE

160704

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CASE NO. 2:18-cr-168-LSC
	)	
JARODERICK HARDY	)	

REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b)(1) this case was referred to the undersigned United States Magistrate Judge for review and submission of a report with recommended findings of fact and conclusions of law. The defendant, Jaroderick Hardy ("Hardy" or "Defendant") was charged in an indictment returned on May 1, 2018. The Indictment charged Hardy, with one count of possession of a firearm and ammunition by a convicted felon in violation of 18 U.S.C. § 922(g)(1). *See* Doc. 1. Pending before this Court is the Defendant's *Motion to Suppress* (Doc. 16) and the *United States' Response to Defense Motion to Suppress* (Doc. 21). The Court held an evidentiary hearing on June 11, 2018. Based on the evidence presented to the Court, arguments of the parties, and for the reasons set forth herein, the Magistrate Judge recommends that the motion to suppress (Doc. 16) be **GRANTED**.

I. FACTUAL BACKGROUND

The parties agree that the facts of the case are essentially not in dispute. On November 8, 2017 around 1:21 a.m. the Montgomery Police Department ("MPD") received a 911-call from a resident on Wilding Drive. The caller said she could hear someone outside the front of her home and that she heard the same noises the two previous nights. The caller did not look outside her home; thus, she was unable to provide any description of anyone or verify at all that the noise was made by a person. In addition, the caller said she did not want the police to visit her home.

Officer Howell arrived on scene at approximately 1:28 a.m. The home is in the Spring Valley neighborhood which is a completely residential area. Per the caller's request, Officer Howell did not stop or make further contact with the caller. Instead, Officer Howell made a drive by inspection around the home as he attempted to discern who or what made the noises. Seeing nothing which he could discern as the source of the noise, Howell drove away to expand his search.

At approximately 1:35 a.m. Howell saw Hardy walking on the sidewalk at the intersection of Spring Valley Road and Adler Road which is approximately 0.30 miles from the scene. Hardy had on all black attire including a black hoodie. At the time, Howell had been a police officer 9 months, but he knew Spring Valley is a high crime area with respect to property crimes such as burglary, breaking and entering, and theft crimes. From his training and experience, Howell knew the all black clothing was consistent with those who commit property crimes in Spring Valley and that there was an extremely high likelihood that Hardy or anyone else out in the wee morning hours on a week day in Spring Valley would have a firearm concealed on his person. Howell got out of his patrol car, stopped Hardy and asked him where he was going. Hardy said that he was coming from the store and headed to his mother's house. From his experience Howell knew that only two stores were within walking distance of his present location and that one of the two stores would have been closed for business for several hours. Howell never asked follow up questions to ensure the store Hardy mentioned were the same stores Howell had in mind. During this brief encounter Hardy had a cigarillo in one hand and with another hand pulled a cell phone from his pants pocket. Howell became nervous and asked Hardy if he had any weapons on him. Hardy said no. Howell asked again and in Howell's view, Hardy was evasive in his answer. Howell said in his experience the people he encounters

answer that question directly by either yes or no. The evasive answer coupled with what Howell described as a funny look in Hardy's demeanor made him conclude Hardy did have a weapon. Howell asked again and Hardy denied having any weapon on him. Howell did not believe Hardy but he saw no outward objective signs that led him to conclude otherwise. Hardy had on loose fitting clothes and a loose fitting hoodie; thus, Howell could not see any bulges or other evidence consistent with an armed person. Howell told Hardy to extend his arms. Howell felt around Hardy's waistband and immediately found a pistol tucked in Hardy's waistband. Hardy claimed the pistol belonged to his cousin. Shortly thereafter, while talking back and forth, Hardy made statements about receiving the weapon a few days ago and that he was on probation. Officer Howell eventually placed Hardy under arrest.

II. MOTION TO SUPPRESS

Hardy moves to suppress the evidence obtained from the pat down conducted during the *Terry* stop. *See* Doc. 16. Hardy asserts that the officer lacked reasonable suspicion to conduct the search and therefore all physical and testimonial items recovered must be suppressed. *Id*. He also filed his notice of intent to use certain evidence at the evidentiary hearing. *See* Doc. 20. The Government filed its response on June 8, 2018. *See* Doc. 21. The Government asserts that Officer Howell did have reasonable suspicion. Specifically, the United States argues that the officer knew the neighborhood was a high crime area known for property crimes and Hardy was in the general vicinity of a place where a 911-call had been made late in the evening. Further, Hardy wore dark clothes and in the officer's opinion was acting suspiciously, so the frisk was done for officer safety since individuals who commit property crimes frequently carry firearms.

The Court held an evidentiary hearing on the matter on June 11, 2018 and heard testimony from Officer Joshua Howell. The Court also received evidence in the form of a map,

911 calls, service report, and video footage from the officer's body camera. The Court also heard arguments from counsel after testimony.

III. LAW AND DISCUSSION

Hardy seeks suppression under the Fourth Amendment, which guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. AMEND. IV. Warrantless searches and seizures are per se unreasonable unless an exception applies. *Arizona v. Gant*, 129 S. Ct. 1710, 1716, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514, 19 L.Ed.2d 576 (1967)).

"The Fourth Amendment protects individuals from unreasonable search and seizure." U.S. CONST. IV; *United States v. Purcell*, 236 F.3d 1274, 1277 (11th Cir. 2001). A seizure takes place "whenever a police officer accosts an individual and restrains his freedom to walk away." *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975).

> The Supreme Court has identified at least three separate categories of police-citizen encounters in determining which level of Fourth Amendment scrutiny to apply: (1) brief, consensual and non-coercive interactions that do not require Fourth Amendment scrutiny, *Florida v. Bostick*, 501 U.S. 429, 115 L. Ed. 2d 389, 111 S. Ct. 2382 (1991); (2) legitimate and restrained investigative stops short of arrests to which limited Fourth Amendment scrutiny is applied, *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968); and (3) technical arrests, full-blown searches or custodial detentions that lead to a stricter form of Fourth Amendment scrutiny, *Brown v. Illinois*, 422 U.S. 590, 45 L. Ed. 2d 416, 95 S. Ct. 2254 (1975).

United States v. Perkins, 348 F.3d 965, 969 (11th Cir. 2003).

At issue in this case are the first two categories. Brief, consensual and non-coercive interactions between police and citizens do not require any particular level of suspicion on the part of the officer and do not constitute a seizure under the Fourth Amendment. *United States v.*

Griffin, 696 F.3d 1354, 1360 (11th Cir. 2012) (quoting *Muehler v. Mena*, 544 U.S. 93, 101, 125 S. Ct. 1465, 161 L. Ed. 2d 299 (2005)). The second category – investigatory stops short of arrest – are governed by *Terry v. Ohio*, 88 S. Ct. 1868 (1968), 392 U.S. 1, 20 L. Ed. 2d 889. When determining if reasonable suspicion exists for a *Terry* stop, the court looks to whether "the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot,' even if the officer lacks probable cause." *United States v. Griffin*, 696 F.3d at 1358)(quoting *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989)). "[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883. Courts look to the totality of the circumstances to ascertain "whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002). Yet, in evaluating the totality of the circumstances, the court may not consider each fact in isolation. *United States v. Hunter*, 291 F.3d 1302, 1306 (11th Cir. 2002). Rather, "[b]ased upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981).

Turning to the case at hand, the evidence shows that the very early interaction between Hardy and Officer Howell fell into the first category of interactions – specifically a brief interaction which did not implicate the Fourth Amendment. *See, e.g., Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991) ("[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions."). Officer Howell

testified that the unrecorded 30 seconds of his interaction with Hardy entailed Howell asking Hardy to explain his presence and actions. The body-cam footage does not have sound for the first thirty seconds and also begins shortly after the initial interaction. Regardless, the Court finds Officer Howell's testimony credible that he came upon Hardy at the intersection of Spring Valley Road and Adler Road (approximately 0.30 miles from the location of the 911-caller's residence) and Hardy stated he had been coming to or from the store. However, the interaction quickly converts to a *Terry* stop when Officer Howell informed Defendant that he would do a pat down. Though there was no audio leading into the interaction, at the point the audio starts it is clear that no reasonable person would have felt free to terminate the encounter given Officer Howell's statement that he was going to do a pat-down for weapons. Further, given the questions and statements by Defendant Hardy it is clear he did not consent to the search and appeared afraid with statements of "please don't shoot me." Officer Howell was polite, but firm in his insistence that he was going to conduct a pat-down for weapons even though Defendant stated he did not have a weapon. Officer Howell told Hardy to put his hands out to his sides, proceeded to frisk him, and immediately found the 9-millimeter handgun.

To determine whether the pat down/frisk was reasonable, the Court must look to the totality of the circumstances leading to the encounter between Hardy and Officer Howell and decide whether reasonable suspicion exists. This case is very similar to the circumstances presented in *United States v. Heard*, --- F. App'x ---, 2018 U.S. App. 3447, 2018 WL 823895 (11th Cir. Feb. 12, 2018). When viewing the totality of the circumstances of the encounter, the Court concludes that reasonable suspicion was lacking at the time Officer Howell began giving Hardy orders. The Government argues the following facts support reasonable suspicion. Officer Howell encountered Hardy at 1:35 a.m. less than 15 minutes from the time a 911-caller reported

a possible prowler approximately 0.30 miles away. Hardy was wearing dark clothes and walking in a high crime area known for property-related crimes. Officer Howell also did not believe Hardy when he stated he was going to/from the store as the closest store had been closed since around midnight. Officer Howell also indicated the Defendant was acting funny in his opinion. The fact Hardy was in the general neighborhood of the West Wilding residence in no way links Hardy to the actual noises heard by the 911-caller. In fact, the 911-caller stated that she heard sounds outside her residence, she did not give a description of a person or even give enough detail to confirm that a person made the concerning sounds. The Court in no way faults the caller in her actions. The caller's voice sounds as that of an elderly woman who was afraid. Nonetheless, the call so lacked enough useful information that Howell might as well have been looking for a ghost. Here, the 911 call as a matter of fact is merely a means to account for Howell's presence in the Spring Valley neighborhood that morning and nothing more. Howell had no crime evident at the scene, no description of a perpetrator or that there was truly a perpetrator, no means to know in which direction the perpetrator might be headed or how the perpetrator came or went such as by foot, bike, or motor vehicle. When Officer Howell came upon Hardy, had a clone of Hardy been on the opposite sidewalk, Officer Howell had no more reason to question or suspect the clone than he did Hardy. The same would hold true if Howell had gone a completely different direction and encountered another person. While the facts are as what they are, the Court cannot ignore that at the point where Howell first lays eyes on Hardy, he had no reasonable articulable suspicion that Hardy did anything other than walk the streets during the early morning hours in a high crime area while wearing dark clothes or had any connection whatsoever to the 911- call. As Officer Howell rightly said on the stand, absent the

call, in his mind, his search would have been improper as Hardy was not committing a crime when he saw him and any person may walk the streets at any time in whatever attire they choose.

The Court concludes from the facts and circumstances, Howell acted on a hunch that Hardy had a concealed weapon. The facts at hand are quite similar to those in *Heard*. As the Court views the facts, the facts are less favorable to the government than the factual scenario in *Heard.* The temporal and geographical links are weak because Officer Howell saw Hardy more than a quarter of a mile away over ten minutes after Howell came to the scene, and an interminable amount of time after the noises which generated the 911 call. Additionally as reiterated in *Heard*, signs of nervousness and apparent refusal to cooperate are "insufficient to tip the balance to reasonable suspicion." --- F. App'x at ---, 2018 U.S. App. 3447 at * 21. 2018 WL 823895 at * 8. "We must credit the officers' common sense conclusions about [Defendant's] behavior. Yet we have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." *Id*. at ---, 2018 U.S. App. 3447, at *22, 2018 WL 823895 at * 8 (citations, internal quotations, and modifications omitted). Factors like known criminal activity in an area; time of day; proximity, both temporal and geographic, to reported suspicious activity; unusual nervousness; and refusal to cooperate can certainly contribute to reasonable suspicion. However, ultimately, this case hinges on Officer Howell's gut instinct that Defendant was someplace where he should not have been potentially doing something he should not have been doing. While Officer Howell was absolutely right as to whether Hardy had a firearm, the means must justify the ends not vice versa.[1] Simply put the court agrees that from the testimony and the video evidence that Officer

[1] The Court notes that there was nothing malicious about Officer Howell's conduct and that with a few more questions at the time, he may have been able to satisfy the particularized and objective basis for suspecting legal wrongdoing. However, based on the facts and

Howell or any reasonable person might conclude Hardy was likely up to no good this evening. The discovery of the firearm certainly bears out the conclusion. Unfortunately, nothing objective or sufficiently weighty was before Howell at the time of the search to indicate Hardy was up to **criminal** no good (emphasis supplied).

As the Court finds that articulable reasons suspicion did not exist at the inception of the *Terry* stop or thereafter before the discovery of the firearm, the stop violated the Fourth Amendment. Therefore, the gun and ammunition seized and the subsequent incriminatory statements warrant suppression.

While it is unfortunate from the standpoint of societal protection that a felon caught red handed in possession of a firearm may escape the consequences of his behavior, Fourth Amendment safeguards must be paramount. The sparse facts known to Howell during his encounter with Hardy are those which law enforcement confront at times, that is situations where law enforcement officers act upon a hunch that criminal activity (a hunch which they think at the time is objectively reasonable suspicion) is afoot and discover that criminal activity is indeed afoot. While such hunches are part of what officers must rely upon for survival, they alone are short of the reasonable suspicion necessary to sustain a prosecutable case. While the ultimate crime uncovered by mere hunches may escape prosecution, in such instances law enforcement yet fulfills its duty to protect and serve the public. The public is protected from the criminal activity because the instrumentality of crime is taken away from the criminal and the rights of the public, to remain secure in their personal liberties remain intact. Otherwise, Constitutional

---

circumstances here, the Government's case falls short. Yet, this finding does not negate that Officer Howell ultimately removed a weapon from a person who is legally barred from having a firearm which also provides a benefit to society independent of prosecution.

safeguards would sway and hinge upon mere hunches instead of objectively reasonable, articulable suspicion.

IV. CONCLUSION

Accordingly, it is the **RECOMMENDATION** of the Magistrate Judge that Defendant Hardy's *Motion to Suppress* (Doc. 16) be **GRANTED**.

It is further **ORDERED** that the parties file any objections to this Recommendation on or before **June 26, 2018.** Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation to which the party is objecting. Frivolous, conclusive or general objections will not be considered by the District Court. The parties are advised that this Recommendation is not a final order of the court and, therefore, it is not appealable.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from a *de novo* determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982); *see Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982); *see also Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981, *en banc*) (adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981).

DONE this 14th day of June, 2018.

/s/Terry F. Moorer
TERRY F. MOORER
UNITED STATES MAGISTRATE JUDGE