No. 19-3894

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 14, 2020
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

REGINALD FERGUSON,

Defendant-Appellant.

ORDER

BEFORE: SUTTON, McKEAGUE, and NALBANDIAN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

A 1

NOT RECOMMENDED FOR PUBLICATION

No. 19-3894

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. REGINALD FERGUSON, Defendant-Appellant.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

ORDER

Before: SUTTON, McKEAGUE, and NALBANDIAN, Circuit Judges.

Reginald Ferguson, proceeding pro se, appeals his conviction for being a felon in possession of a firearm, challenging the denial of his motion to suppress evidence and the validity of the indictment. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

On the night of October 25, 2018, Cleveland Police Department Detective Robert Norman and three other officers were seeking to gain entrance into an apartment building in connection with their investigation of a recent shooting. After unsuccessfully attempting to open the locked front door, Norman and his partner, Detective Evans, walked around to the back of the building, where they saw Ferguson sitting in his car with the engine running. At the suppression hearing, Norman testified that he and Evans approached Ferguson solely to get information about the apartment building, that their guns were holstered, that they both went to the passenger side of his car, and that they spoke in a "relaxed" manner, "trying to be as nice as [they could] to get any kind of information."

According to Norman, he asked Ferguson several questions, such as whether he knew anyone in the building or knew how to get in, and Ferguson "seemed very helpful at first" as they engaged in a "back and forth conversation." It was only after they had been talking for approximately two minutes that Norman noticed what appeared to be a loaded firearm in the backseat of the car, at which point the two other officers approached and Norman told Ferguson to turn off the car. After attempting to pull away, Ferguson then stopped, exited his car, and was placed under arrest for improper handling of a firearm.

Ferguson, on the other hand, testified that he was already pulling out of his parking spot when the officers approached with flashlights pointed in his face, surrounded his car, and told him to "hold on" and "wait a minute" so that they could ask him some questions. According to Ferguson, the officers spoke in an "assertive tone" and "kept trying to get [him] to stay there to answer their questions" about the apartment building, and Norman stated that, if he would "just answer his questions, then [he] can go." Ferguson testified that he did not want to talk with the officers and repeatedly asked if he could leave, but Norman responded by telling him to "stay calm" and that he could leave after they asked him a few questions. Ferguson further testified that he began backing up because he thought that one of the officers told him he could go.

In his motion to suppress, Ferguson argued that he was seized without reasonable suspicion or probable cause and that the ensuing search was invalid. The district court denied the motion, concluding that the initial encounter between Ferguson and the officers was consensual and did not become a seizure until after Norman saw the firearm in plain view. Ferguson then pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g), but reserved his right to appeal the denial of his motion to suppress.

Ferguson now argues that his motion to suppress should have been granted, that the prosecutor presented false testimony at the suppression hearing, that the indictment failed to charge an essential element of the offense, and that § 922(g) is unconstitutionally vague. He also moves to dismiss the indictment, for reconsideration of the denial of his motion to expedite, for judicial notice, and for release pending appeal.

On appeal from the denial of a motion to suppress, we review the district court's factual findings for clear error and its legal conclusions de novo, considering "the evidence in the light most favorable to the government." *United States v. Beauchamp*, 659 F.3d 560, 565-66 (6th Cir. 2011). "[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Florida v. Bostick*, 501 U.S. 429, 434 (1991). But a seizure does occur when, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Jones*, 562 F.3d 768, 772 (6th Cir. 2009) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

The district court did not clearly err in determining, based on Norman's testimony, that the officers' initial contact with Ferguson was consensual. Had the district court credited Ferguson's testimony over Norman's, the result might have been different. *See United States v. Richardson*, 385 F.3d 625, 630 (6th Cir. 2004). But when viewed in the light most favorable to the government, the evidence shows a consensual encounter in which Norman and Evans approached Ferguson in a non-threatening manner and asked if he would answer a few questions, which he did. By asking us to find otherwise, Ferguson is essentially asking us to disregard Norman's testimony and credit his own, competing testimony, which we cannot do absent clear error. *See United States v. Wooden*, 945 F.3d 498, 502 (6th Cir. 2019) ("[T]he responsibility for weighing conflicting testimony lies primarily with the district court, and its conclusions are given due respect.").

Ferguson resists this conclusion in large part by arguing that Norman's testimony was inconsistent with his own written report and with Detective Evans's report. But these reports are not part of the district court record and, in any event, cannot bear the weight that Ferguson places on them. He points to Evans's statement that he was "reluctant" to roll down his window, but even if that were true, it does not contradict Norman's testimony that he and Evans did not act in a coercive or intimidating manner when they approached Ferguson to ask him about the apartment building. *See United States v. Hinojosa*, 534 F. App'x 468, 470-71 (6th Cir. 2013) (noting that, although a person may feel subjectively impelled to comply with an officer's request, "the law distinguishes a mere request . . . from a command"). Moreover, Norman was asked about this statement on cross-examination and testified that he did not recall Ferguson seeming reluctant.

Ferguson also points to Norman's statement in his own report that Ferguson "kept stating that he wanted to leave" and that Norman told him that "he needed to stay," but according to the report, these exchanges occurred after Norman saw the firearm in the backseat, which is consistent with Norman's hearing testimony.

Ferguson further argues that Norman's testimony that Ferguson spoke with him willingly is undercut by Norman's inability to remember how he got Ferguson's attention, such as by tapping the window or making a verbal request. According to Ferguson, the district court erroneously concluded that the encounter was consensual simply because Ferguson answered the officers' questions rather than driving away or otherwise resisting their authority. But an encounter is not "compulsory merely because a person identifies himself as a police officer." *United States v. Carr*, 674 F.3d 570, 573 (6th Cir. 2012). And none of the usual indicia of a seizure were present here—the officers did not approach Ferguson's car in a threatening manner, display their weapons, or engage in any physical contact with him, and, according to Norman, they spoke in a relaxed, friendly tone. *See id.* at 574. The cases on which Ferguson relies to argue that this encounter was a seizure involve different circumstances or additional displays of authority. *See, e.g.*, *Beauchamp*, 659 F.3d at 566-67 (officers pulled up to the defendant a third time after he refused to speak with them previously and ordered him to stop); *Richardson*, 385 F.3d at 630 (officers ordered the driver to "hang out right here" when he had already exited his car).

The district court therefore did not err by classifying the officers' initial approach as a consensual encounter that did become a seizure until Norman saw the firearm in the backseat of Ferguson's car, which provided reasonable suspicion of criminal activity. *See Carr*, 674 F.3d at 574; *see also Terry v. Ohio*, 392 U.S. 1, 27 (1968). Ferguson counters that the mere presence of the firearm did not provide a basis for reasonable suspicion because Ohio Revised Code § 2923.16(B) and (C), which generally prohibit having a firearm in a motor vehicle unless the firearm is unloaded and secured so that it is not readily accessible to the vehicle's occupants, do not apply to someone who is carrying a valid concealed carry license or who is an active member of the military and meets certain other requirements, as set forth in Ohio Revised Code § 2923.16(F)(5).

But in Ohio, a person with a concealed carry permit who is carrying a loaded firearm in a motor vehicle must "promptly inform any law enforcement officer who approaches the vehicle while stopped" that he possesses both the permit and the firearm, Ohio Revised Code § 2923.16(E)(1), which Ferguson did not do. Ohio state courts have held that police officers "are not required to verify the existence of a concealed carry license" before conducting a *Terry* stop and can detain the individual in order to investigate the possibility of violation of firearm handling laws. *State v. Higgins*, No. 104007, 2016 WL 6906307, at *7 (Ohio Ct. App. Nov. 23, 2016) (noting that the burden is on the defendant to establish that he has a concealed carry license with him at the time of the stop). In an analogous case, the Eighth Circuit held that a police officer reasonably suspected criminal activity when he saw the defendant tuck a gun in his waistband because, under Iowa law, carrying a concealed weapon is a criminal offense, to which possession of a concealed carry permit is merely an affirmative defense. *United States v. Pope*, 910 F.3d 413, 415-16 (8th Cir. 2018) (reasoning that a "suspect's burden to produce a permit should be [no] different on the street than in the courtroom"), *cert. denied*, 140 S. Ct. 160 (2019). The case on which Ferguson relies, *Northrup v. City of Toledo Police Department*, 785 F.3d 1128, 1132 (6th Cir. 2015), is distinguishable because the activity at issue in that case—openly carrying a firearm on one's person—is presumptively lawful, unlike having an unsecured, loaded firearm in a motor vehicle, which is not. Ferguson's reasonable suspicion argument is thus without merit, as is his related claim of prosecutorial misconduct based on Norman's testimony that the presence of the firearm in the backseat violated Ohio's improper handling statute.

Ferguson next argues that the charge against him should be dismissed because the indictment did not include an essential element of the offense—knowledge of his prohibited status. *See Rehaif v. United States*, 139 S. Ct. 2192, 2200 (2019). But we recently held that omission of the knowledge-of-status element required by *Rehaif* does not deprive the district court of jurisdiction. *United States v. Hobbs*, 953 F.3d 853, 856-57 (6th Cir. 2020). And Ferguson's argument that the scienter requirement also applies to the interstate commerce element of § 922(g) is without merit. *See Rehaif*, 139 S. Ct. at 2196 (noting that jurisdictional elements "are not subject to the presumption in favor of scienter").

Finally, Ferguson argues that § 922(g), along with the scienter requirement found in 18 U.S.C. § 924(a)(2), is unconstitutionally vague. But his reliance on Justice Alito's dissent in *Rehaif* is misplaced, because that dissent was advocating for a broader interpretation of § 922(g), not a narrower one. *See id.* at 2203-06 (Alito, J., dissenting). And the requirements of § 922(g)(1) are "straightforward and sufficient to provide fair warning of the proscribed conduct." *United States v. Smith*, 770 F. App'x 955, 960 (11th Cir. 2019); *see United States v. Lopez*, 929 F.3d 783, 785-86 (6th Cir. 2019) (rejecting a vagueness challenge to § 922(g)(5)).

For these reasons, we **AFFIRM** the district court's judgment, **GRANT** Ferguson's motion to take judicial notice, and **DENY** Ferguson's motions to dismiss the indictment, for reconsideration of the denial of his motion to expedite, for release pending appeal, and all other pending motions.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk