No. _____

In the

Supreme Court of the United States

SAMUEL LEE MURCHISON,

Petitioner,

– v. –

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Fourth Circuit err by employing a "particularly defer[ential]" standard of review to findings of fact by the trial court that did not involve a credibility determination?

PARTIES TO THE PROCEEDINGS

All Parties are listed in the caption on the cover page.

TABLE OF CONTENTS

Page

INDEX TO APPENDICIES

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia, at Richmond, (3:19-cr-00138-HEH) (Hudson, J.), denying Mr. Murchison's Motion to Suppress can be found in Appendix B and in the Joint Appendix ("JA") at 117.[1] The decision of the Fourth Circuit Court of Appeals affirming the lower court's denial of his motion to suppress was entered on December 13, 2019, is in Appendix A.

STATEMENT OF JURISDICTION

This Court has jurisdiction to consider Mr. Murchison's petition from the Fourth Circuit Court of Appeals pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution reads: 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.

[1] Citations to JA refer to the appellate record compiled in the joint appendix on file with the Fourth Circuit. *See United States v. Murchison*, 20-4468, Joint Appendix, (ECF No. 12 and 13) (4th Cir. filed September 3, 2020).

STATEMENT OF THE CASE

I. FACTUAL HISTORY

On November 5, 2018, Mr. Murchison was the driver and sole occupant of a car traveling in the 900 block of St. Paul Street in Richmond, Virginia that was stopped by City of Richmond police officers Patrick Digirolamo and Patricia Bruington. JA, pp. 117, 129-30. The reason for the traffic stop was that one of the two lights meant to illuminate the license plate was out. JA pp. 39 – 40. Both officers wore body cameras which captured the entire incident from the time they exited their patrol car. The body worn camera footage was included in the record before the Fourt Circuit. *See* JA, Vol. II, Ex. 1A and 2B.

Officer Digirolamo approached Mr. Murchison's car from behind on the driver's side, while Officer Bruington approached the passenger side. JA, p. 118. Officer Digirolamo requested Mr. Murchison's identification. Ex. 1A, at 4:30:29; JA, p. 118. Mr. Murchison provided his identification. Id. at 4:30:43, JA, p. 118. He quizzed Mr. Murchison about where he lived, and then asked, "Is there any weapons or drugs in the car that I need to know about?" Id. at 4:31:06; JA, p. 118. And then, "Do you mind if we check real quick?" Id. at 4:31:10, JA, p. 118. Mr. Murchison declined consent, explaining that the car was not his. Id.

Meanwhile, Officer Bruington shined her flashlight into Mr. Murchison's vehicle, stating that she wanted to ensure that there were no weapons. JA, pp. 41, 118. Her attention was drawn to what appeared to be something black and metallic protruding from Defendant's right pocket that caused what Officer Bruington

described as "a large bulge." JA, pp. 42 – 43, 118. She told Officer Digirolamo, "Ask him what's in his right pocket." Ex. 2B, at 4:31:35; JA, p. 118. Officer Digirolamo then asked Mr. Murchison what was in his right pocket. Ex. 1A, at 4:31:37; JA, p. 118. Mr. Murchison responded "keys and stuff." Ex. 1A, at 4:31:41; JA, pp. 44, 118. Officer Digirolamo asked him to pull them out. Ex. 1A, at 4:31:41; JA pp. 44, 118. Officer Bruington told Officer Digirolamo there was something else in there that was black and metallic. Ex. 2B, at 4:31:50; JA, pp. 44 – 45, 118. Both officers testified that Mr. Murchison was leaning in a position that appeared to be concealing his right pocket. JA, pp. 46, 84-85, 118.

When asked to remove the other items in his pocket, Mr. Murchison declined and protested that he had been pulled over for no reason. JA, at 119. Officer Digirolamo stated, "we just want to know what's in your right pocket, bud." Ex. 1A, at 4:32:02. Officer Bruington interjected at this point, saying "Alright. Protective sweep." Ex. 2B, at 4:32:05; JA pp. 46, 119. Officer Digirolamo then told Mr. Murchison they were going to take him out of the car and "do a protective sweep." Ex. 1A, at 4:32:17; JA, p. 119. He opened the car door. Mr. Murchison got out. Officer Bruington came from the passenger side around the back of the car to assist, and told Mr. Murchison "we're just doing a patdown." Ex. 1A, at 4:32:35; JA, p. 46 - 47. Officer Digirolamo put handcuffs on Mr. Murchison, who did not physically resist but continued to respectfully express his disagreement with how he was being treated. Ex. 1A, at 4:33:55.

Officer Digirolamo testified that after Mr. Murchison was handcuffed, he placed his right hand along the side of Mr. Murchison's pants with an open palm, and that as he slid his hand down Mr. Murchison's pant leg, he felt something heavy and believed it to be a firearm. JA, p. 86 – 87. He then pushed his hand up the outside of Mr. Murchison's pocket to remove the firearm. *Id*. However, the body-worn camera footage, when viewed frame by frame, shows Officer Digirolamo, standing behind the handcuffed Mr. Murchison and reaching into his right front pants pocket; he momentarily pulls out a cell phone before dropping it back into the pocket and then dips his hand back into the pocket and removes a handgun. Ex. 1A, at 4:33:03-09; Ex. 2B, at 4:33:03-09.

The trial court, in its Memorandum Opinion, states that "the videos do not fully and clearly depict the frisk the officers conducted. In particular, the videos are not fully focused and trained on the officers' search, nor their hand placement, throughout the entirety of the patdown. Thus, the Court finds it cannot rely solely on these videos." JA, p. 126. Rather, "[b]ased on the officers' testimony that Officer Digirolamo performed a patdown, with an open palm, on the outside of Defendant's clothing before pulling the firearm out of his pocket, this Court finds that the officers complied with Terry and its progeny by performing a proper—and justified—frisk prior to reaching into Defendant's pocket to remove the firearm." Id. at 127 (citation omitted).

Once the officers determined that Mr. Murchison was a convicted felon, he was placed under arrest, searched incident to arrest and cocaine was recovered from his pants pocket. JA, pp. 49 – 50; 128.

II. PROCEEDINGS BELOW

On September 18, 2019, a grand jury sitting in the Richmond Division of the Eastern District of Virginia returned a two-count indictment against Samuel Lee Murchison. Joint Appendix, ("JA"), pp. 7 – 9. Count One of the indictment charges that, on November 5, 2018, Mr. Murchison possessed a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1); Count Two charges that, on the same date, Mr. Murchison possessed cocaine with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1). *Id*.

Following his arraignment, Mr. Murchison filed a motion to suppress the stop of his car by City of Richmond police officers and the subsequent search of his person, which recovered a firearm and cocaine. JA, pp. 10 -19. The government filed a response, JA, pp. 20-32, and a hearing was held before District Court Judge Henry E. Hudson on November 22, 2019, where evidence was adduced and argument of counsel was heard. JA, pp. 33 – 116. The court took the case under advisement and, on December 13, 2019, issued a Memorandum Opinion denying the motion. JA, pp. 117 – 129.

Mr. Murchison entered a conditional guilty plea to Count One of the indictment pursuant to a plea agreement with the Government on January 9, 2020. JA, p. 7 (docket entry 21), 130 – 40. Count Two was dismissed on motion of the

government. JA, p. 147. The plea agreement specifically reserved Mr. Murchison's appellate rights as to the issues raised in the motion to suppress. JA, p. 136. Mr. Murchison was sentenced on August 28, 2020 to a term of incarceration of 78 months and three years of supervised release. JA, p. 145 – 46. On September 6, 2020, Mr. Murchison noted his appeal to the Fourth Circuit. JA, p. 150. On August 11, 2021, the Fourth Circuit issued a Per Curiam Opinion affirming the findings of the trial court.

REASONS FOR GRANTING THE PETITION

In evaluating the trial court's conclusion that the body-worn camera footage was not clear, the Fourth Circuit improperly employed a heightened scrutiny, stating that "we particularly defer to a district court's credibility determinations, for it is the role of the district court to observe witnesses and weigh their credibility during a pre-trial motion to suppress." Per Curiam Opinion, App. A, p. 2. The review of body-worn camera footage, however, does not require a credibility determination and the trial court's conclusion that it was unclear should not receive particular deference. While it is not suggested that the video evidence should be reweighed *de novo*, the video evidence should have been reviewed under a standard "clear error" analysis rather than the heightened deference employed by the Fourth Circuit.

ARGUMENT

I. The Fourth Circuit erred in applying a particularly deferential standard of review, meant for weighing credibility determinations, to the question of whether the trial court properly concluded that video evidence was ambiguous.

The Fourth Circuit begins its analysis by correctly reciting the standards applicable when a defendant seeks review of a motion to suppress:

> "When reviewing a district court's ruling on a motion to suppress, [we] review[] conclusions of law de novo and underlying factual findings for clear error." *United States v. Fall*, 955 F.3d 363, 369-70 (4th Cir.), *cert. denied*, 141 S. Ct. 310 (2020) (alterations and internal quotation marks omitted). "If, as here, the district court denied the motion to suppress, [we] construe[] the evidence in the light most favorable to the government." *Id*. (alterations and internal quotation marks omitted).

Per Curiam Opinion, p. 2. App. B. However, the appellate court next conflates the clear error standard for evaluating documentary with the even more deferential standard when weighing the trial court's credibility determinations, stating:

> "When reviewing factual findings for clear error, we particularly defer to a district court's credibility determinations, for it is the role of the district court to observe witnesses and weigh their credibility during a pre-trial motion to suppress." *United States v. Palmer*, 820 F.3d 640, 653 (4th Cir. 2016) (alteration and internal quotation marks omitted). Reversal is not warranted unless we are "left with the definite and firm conviction that a mistake has been committed." *United States v. Crawford*, 734 F.3d 339, 342 (4th Cir. 2013) (internal quotation marks omitted).

Id. While the trial court did make credibility determinations in this case regarding the testimony of the police officers, the threshold determination was whether the body-worn camera evidence was ambiguous or unclear. The Fourth Circuit does not parse out the two determinations and, it appears from this brief opinion, employed the higher credibility standard of review to the entirety of the matter. The review of

the video evidence in this case, however, did not involve a credibility determination and was thus not entitled to even greater deference than the clear error standard.

The debate regarding what standard of review appellate courts should apply when weighing video evidence has primarily played out in the state courts. A number of jurisdictions favor a de novo approach. *See, e.g., People v. Madrid* , 179 P. 3d 1010, 1014 (Colo. 2008) ("[W]here the statements sought to be suppressed are audio- and video -recorded, ... we are in a similar position as the trial court to determine whether the statements should be suppressed."); *State v. Akuba* , 686 N.W. 2d 406, 418 (S.D. 2004) (" '[B]ecause we had the same opportunity to review the videotape ... as the trial court,' we review [it] de novo." (second alteration in original) (quoting *State v. Tuttle*, 650 N.W. 2d 20, 34 n.11 (S.D. 2002))); *State v. Binette*, 33 S.W. 3d 215, 217 (Tenn. 2000) (stating that "rationale underlying a more deferential standard of review is not implicated" when court's fact findings in suppression hearing based solely on video evidence). Other jurisdictions have applied a deferential standard. *See e.g.*, *Robinson v. State*, 5 N.E. 3d 362, 365 (Ind. 2014) (noting that deferential "appellate standard of review remains constant," even "when faced with video evidence "); *State v. Williams*, 334 S.W. 3d 177, 181 (Mo. Ct. App. 2011) (applying clearly erroneous standard of review to video evidence in suppression hearing because "trial court's findings of fact are entitled to deference even where they are based on physical or documentary evidence "); *Montanez v. State*, 195 S.W. 3d 101, 109 (Tex. Crim. App. 2006) (holding that "deferential standard of review ... applies to a trial court's determination of historical facts when

that determination is based on a videotape recording admitted into evidence at a suppression hearing"); *State v. Walli*, 334 Wis. 2d 402, 799 N.W. 2d 898, 904 (Wis. Ct. App.) ("[W]hen evidence in the record consists of disputed testimony and a video recording, we will apply the clearly erroneous standard of review when we are reviewing the trial court's findings of fact based on that recording."), petition for review denied, 806 N.W. 2d 639 (Wis. 2011). The New Jersey Supreme Court recently reviewed the issue, holding that: "We now conclude—after weighing all sides of the issue—that a standard of deference to a trial court's fact findings, even fact findings based solely on video or documentary evidence, best advances the interests of justice in a judicial system that assigns different roles to trial courts and appellate courts." *State v. S.S.*, 229 N.J. 360, 379 (N.J. 2017).

Federal courts have not addressed this issue head-on. The policy reasons for a deferential approach, however, are set forth in *Anderson v. City of Bessemer City*, 470 U.S. 564, 574–75, 105 S.Ct. 1504, 1511–12, 84 L.Ed. 2d 518, 528–30 (1985). There, the United States Supreme Court stated:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.

Id. at 574–75, 105 S. Ct. at 1512, 84 L.Ed. 2d at 529. The *Anderson* case, however, does not address the question of whether non-credibility determinations are entitled to additional "particular deference" as applied in the underlying decision in this

case. Thus, while *Anderson* forecloses an argument that a *de novo* standard is appropriate in this case, it is argued here that the question of whether the Fourth Circuit improperly applied a heightened standard, above and beyond clear error, is still an open one. Certiorari to the Fourth Circuit would allow this Court to address this issue.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari in this case.

Respectfully submitted,

_____/s/_____

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Dated: November 9, 2021

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4468

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SAMUEL LEE MURCHISON,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Henry E. Hudson, Senior District Judge. (3:19-cr-00138-HEH-1)

Submitted: August 2, 2021 Decided: August 11, 2021

Before AGEE, WYNN, and HARRIS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

William J. Dinkin, WILLIAM J. DINKIN, PLC, Richmond, Virginia, for Appellant. G. Zachary Terwilliger, United States Attorney, Alexandria, Virginia, Stephen E. Anthony, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee.

PER CURIAM:

Samuel Lee Murchison entered a conditional guilty plea to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Murchison reserved the right to appeal the district court's denial of his motion to suppress a firearm found by Officers Patricia Bruington and Patrick Digirolamo during a patdown, and a bag of cocaine found shortly thereafter in a search incident to arrest. On appeal, Murchison contends only that the district court committed clear error when it found that the officers performed a proper patdown of Murchison's outer clothing before reaching into Murchison's pocket and removing the firearm. We affirm.

"When reviewing a district court's ruling on a motion to suppress, [we] review[] conclusions of law de novo and underlying factual findings for clear error." *United States v. Fall*, 955 F.3d 363, 369-70 (4th Cir.), *cert. denied*, 141 S. Ct. 310 (2020) (alterations and internal quotation marks omitted). "If, as here, the district court denied the motion to suppress, [we] construe[] the evidence in the light most favorable to the government." *Id.* (alterations and internal quotation marks omitted). "When reviewing factual findings for clear error, we particularly defer to a district court's credibility determinations, for it is the role of the district court to observe witnesses and weigh their credibility during a pre-trial motion to suppress." *United States v. Palmer*, 820 F.3d 640, 653 (4th Cir. 2016) (alteration and internal quotation marks omitted). Reversal is not warranted unless we are "left with the definite and firm conviction that a mistake has been committed." *United States v. Crawford*, 734 F.3d 339, 342 (4th Cir. 2013) (internal quotation marks omitted).

"To justify a patdown of the driver or a passenger during a traffic stop . . . the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Arizona v. Johnson*, 555 U.S. 323, 327 (2009); *United States v. Robinson*, 846 F.3d 694, 696 (4th Cir. 2017) (en banc) ("[A]n officer who makes a lawful traffic stop and who has a reasonable suspicion that one of the automobile's occupants is armed may frisk that individual for the officer's protection and the safety of everyone on the scene.").

Here, the district court found that the officers' dash cam footage did not clearly show whether Digirolamo performed a lawful patdown. Consequently, the district court relied on the two officers' testimony and ultimately found that Digirolamo conducted a proper patdown of Murchison's outer clothing before retrieving the firearm from Murchison's pocket. Having reviewed the record, we cannot say that the district court clearly erred in this determination. Accordingly, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: August 11, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4468
(3:19-cr-00138-HEH-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

SAMUEL LEE MURCHISON

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Case No. 3:19cr138–HEH
	)	
SAMUEL LEE MURCHISON,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION
(Defendant's Motion to Suppress Evidence)

Defendant's Motion to Suppress evidence emanates from a traffic stop in the 900 block of St. Paul Street in Richmond, Virginia, on the evening of November 5, 2018. The 900 block of St. Paul Street is located in a development called Gilpin Court, and is known by the Richmond City Police as an area where violent crime and firearms are frequently encountered. The underlying traffic stop was occasioned by a defective tag light which only partially illuminated Defendant's license plate. The resulting encounter led to the seizure of a firearm and a quantity of cocaine from Defendant.

This case is presently before the Court on Defendant's Motion to Suppress both items (ECF No. 12). He contends that Richmond City police officers had no justification to either stop his vehicle or pat him down for weapons. Both Defendant and the United States have filed memoranda supporting their respective positions, and the Court heard evidence and oral argument on November 21, 2019.

The evidence revealed that Richmond Police Officers Patricia Bruington and Patrick Digirolamo observed Defendant's vehicle in the 900 block of St. Paul Street on

the evening of November 5, 2018. Their attention was drawn to the vehicle because the license plate was not clearly visible from at least 50 feet behind the vehicle, as required by Virginia law. It was apparent to the officers that only one of the two tag lights was illuminated. The other appeared to be defective or not functioning. Both officers were wearing body cameras, which captured their actions that followed. When the officers alighted from the vehicle, Officer Digirolamo approached the driver's side of Defendant's vehicle, and Officer Bruington approached the passenger side. When Officer Digirolamo requested identification, Defendant complied. The officer then asked a number of follow-up questions—Defendant's address and whether there were any weapons or drugs in the car. Defendant denied the presence of any drugs or weapons in the car. Officer Digirolamo then asked if Defendant would permit the officers to quickly check his vehicle. Defendant declined, responding that it was not his car.

Meanwhile, Officer Bruington shined her flashlight into Defendant's vehicle to ensure that there were no weapons. Her attention was drawn to what appeared to be something black and metallic protruding from Defendant's right pocket. She described it as a large bulge. (Hr'g Tr. at 10:12–11:4, ECF No. 18 (hereinafter "Tr.").) Officer Bruington asked Officer Digirolamo to ask Defendant what was in his right pants pocket. Defendant replied "keys and stuff." (*Id.* at 12:9–16.) Officer Digirolamo asked Defendant to remove the keys from his pocket, and Defendant complied. Officer Bruington testified that her flashlight still illuminated a metallic object in the pocket. (*Id.* at 12:24–13:4.) Both officers stated that during the encounter, Defendant was leaning in a position which appeared to be concealing his right pocket. (*Id.* at 14:4–9, 52:18–53:1.)

When the officers asked Defendant to remove the other items in his pocket, he refused and claimed that they had pulled him over for no reason. Officer Digirolamo replied that the officers just wanted to know what was in the right pocket. Officer Bruington then concluded that they needed to conduct what they called a protective sweep, and Officer Digirolamo removed Defendant from the vehicle.

Officer Digirolamo testified that Defendant's body movements were suggestive of concealment. (*Id.* at 52:1–5; 52:18–53:1.) He also noticed what appeared to be a bulge in Defendant's right pocket. He concurred that Defendant should be removed from the vehicle and patted down for the officers' protection. Officer Digirolamo then opened the driver's side door of the vehicle and assisted Defendant in stepping out. He testified that the decision to remove Defendant from the vehicle was based on the bulge in his right pocket coupled with what he described as a "blading" movement to conceal the right part of his body. (*Id.* at 53:12–21.)

As Defendant alighted from the vehicle, both officers advised him that he was not in trouble, and that their sole objective was to ensure that there were no weapons. After Defendant was handcuffed, Officer Digirolamo testified that he placed his right hand along the side of Defendant's pants with an open palm. As he slid his hand down Defendant's pant leg, he felt something heavy and believed it to be a firearm. The officer pushed his hand up Defendant's pocket revealing the muzzle of a firearm.

After determining that Defendant was a prior convicted felon, he was placed under arrest. Incident to arrest, Officer Bruington conducted a search of Defendant that revealed a cell phone and a baggie, which was later determined to contain crack cocaine.

During the evidentiary hearing, portions of the body camera videos were placed into evidence. Both sides argued that the videos supported their position on the motion.

Defendant's challenge begins with the initial stop of his vehicle. He argues that Virginia Code Ann. § 46.2-1013 governing rear tail lights does not apply to tag lights. In his view, the statute only requires the rear tail lights to illuminate license plates sufficiently to make them readable 50 feet from the vehicle. Consequently, Defendant contends that the officer had no reason to stop his vehicle.

Officer Bruington stated that it was her understanding that all lights on a motor vehicle must be operable. In this case, she testified that with the right tag light out, she could not read the tag from 50 feet, as required by law. (*Id.* at 7:25–8:24.)

Section 46.2-1013 of the Virginia Code reads as follows:

> Every motor vehicle and every trailer or semitrailer being drawn at the end of one or more other vehicles shall carry at the rear two red lights plainly visible in clear weather from a distance of 500 feet to the rear of such vehicle. Such tail lights shall be constructed and so mounted in their relation to the rear license plate as to illuminate the license plate with a white light so that the same may be read from a distance of 50 feet to the rear of such vehicle. Alternatively, a separate white light shall be so mounted as to illuminate the rear license plate from a distance of 50 feet to the rear of such vehicle. Any such tail lights or special white light shall be of a type approved by the Superintendent [of the Virginia Department of State Police]. . . .

Officer Bruington's construction of Virginia law is consistent with that of the Circuit Court of the City of Richmond and the Court of Appeals of Virginia. In *Lewis v. Commonwealth of Virginia*, the Court of Appeals of Virginia affirmed a lower court's rejection of the same argument advanced by Defendant in the immediate case. No. 1089-16-2, 2017 Va. App. LEXIS 272 (Va. Ct. App. Oct. 31, 2017) (unpublished) (reviewing

an appeal from the Circuit Court of the City of Richmond). "We disagree with appellant's assertion that Code § 46.2-1013 does not mandate a certain number of lights to achieve its purpose of illuminating a license plate." *Id.* at 8 (quotations omitted). Relying on *Otey v. Commonwealth*, 735 S.E.2d 255 (Va. Ct. App. 2012), the appellate court noted that in order "to pass inspection under the Virginia Administrative Code, a vehicle's rear light assembly must 'work as designed by the manufacturer,' and all rear lamps must be 'in operating condition.'" *Id.* at 9 (quoting *Otey*, 735 S.E.2d at 258). The court in *Lewis* therefore concluded that "if a vehicle is equipped with two license plate lights, both must function properly." *Id.* Therefore, in this case, the officers' observation of a defective tag light on the vehicle being operated by Defendant justified the traffic stop for equipment violation.[1]

Defendant next argues that the officers could not have reasonably believed that Defendant was armed and dangerous to justify a patdown, if a patdown occurred at all. In *Arizona v. Johnson*, the Supreme Court held that

> [I]n a traffic-stop setting, the first *Terry* condition—a lawful investigatory stop—is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation. . . . [Then] [t]o justify a patdown of the driver or a passenger during a traffic stop, . . . just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.

[1] Even if the officers' construction of Virginia law had been technically incorrect, their interpretation was objectively reasonable. *Heien v. North Carolina*, 574 U.S. 54, 67–68 (2014). However, unlike in *Heien*, the statute in question has been construed by the Court of Appeals of Virginia consistent with the officers' testimony.

555 U.S. 323, 327 (2009). As discussed above, the first condition has been met. The Court now turns to the second condition—whether Officers Bruington and Digirolamo had reasonable suspicion that Defendant was armed and dangerous justifying them to conduct a frisk.

Reasonable suspicion is an objective standard, and the Court considers "the 'totality of the circumstances' to determine if the officer had a 'particularized and objective basis' for believing that the detained suspect might be armed and dangerous," in deciding whether reasonable suspicion exists. *United States v. George*, 732 F.3d 296, 299 (4th Cir. 2013) (quoting *United States v. Arvizu*, 534 U.S. 266, 273 (2002)). "A host of factors can contribute to a basis for reasonable suspicion, including the context of the stop, the crime rate in the area, and the nervous or evasive behavior of the suspect. A suspect's suspicious movements can also be taken to suggest that the suspect may have a weapon." *Id.* Importantly, "[b]ased on the inordinate risk of danger to law enforcement officers during traffic stops, observing a bulge that could be made by a weapon in a suspect's clothing reasonably warrants a belief that the suspect is potentially dangerous, even if the suspect was stopped only for a minor violation." *United States v. Baker*, 78 F.3d 135, 138 (4th Cir. 1996) (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 112 (1977)). While one factor on its own may be insufficient, multiple factors may be combined to create reasonable suspicion. *See George*, 732 F.3d at 300.

This Court concludes that, under the totality of circumstances, the officers had reasonable suspicion, based on objective and particularized facts, that Defendant was armed and dangerous.

First, the stop occurred in Gilpin Court, a high-crime area, as the officers testified. Officer Bruington stated that she patrols that area often, understands the particular problems and issues that occur there, and that Gilpin Court is a high crime area, with "a large amount of violent crime," including crime involving firearms. (Tr. 5:25–6:15.) Officer Digirolamo testified that he has patrolled Gilpin Court since he began at the police department, and that "[i]t's a high drug and violent crime area" and the violent crime "more than likely" includes firearms. (*Id.* at 45:12–21.) He further stated that it "was [his] main job" to respond to calls regarding firearms in that area, and did so "at least once or twice a week." (*Id.* at 45:22–25.) Finally, defense counsel seemingly conceded the dangerousness of the area, stating "yes, it's Gilpin Court. I get the high crime area stuff . . . . (*Id.* at 78:7–8.)

"[A]lthough general evidence that a stop occurred in a high-crime area, standing alone, may not be sufficiently particularized to give rise to reasonable suspicion, it can be a contributing factor." *George*, 732 F.3d at 300; *see also United States v. Lender*, 985 F.2d 151, 154 (4th Cir. 1993) ("While the defendant's mere presence in a high crime area is not by itself enough to raise reasonable suspicion, an area's propensity toward criminal activity is something that an officer may consider."). Furthermore, the fact that this stop occurred in the evening is another factor to be considered. *See George*, 732 F.3d at 300 ("Likewise, that the stop occurred late at night may alert a reasonable officer to the possibility of danger."). Thus, the fact that the stop occurred in a high-crime area at night contributes to the finding of reasonable suspicion.

Second, Defendant's furtive behavior and movements indicated to the officers that he was carrying a weapon. The video depicts Defendant turning his back almost entirely away from Officer Digirolamo to reach for his identification, which Officer Digirolamo confirmed at the hearing. (Tr. 49:4–7.) Officer Digirolamo testified that "[i]n [his] training and experience, that's a very uncommon way to get your license out of your pocket," stating that he had only seen that one other time "where in the same situation they were concealing something." (*Id.* at 49:8–18.) After Officer Digirolamo asked Defendant what was in his right pocket, Defendant again turned almost entirely away from Officer Digirolamo, who testified that he believed Defendant was "trying to conceal something from [him]." (Id. at 51:18–52:5.) After removing his keys, the officers told Defendant that there was still something in that pocket, upon which Defendant responded by leaning up in his seat. (*Id.* at 52:14–16.) Officer Digirolamo specifically testified that "at that point [he] knew there was something else in that right pocket" and could "see what was a bulge because [Defendant] was leaning back, so [he] tried to put [his] flashlight, as you can see in the video, to see closer what that bulge was, and then [Defendant] just leaned up so [he] couldn't see it." (*Id.* at 52:18–23.) He also testified that he thought Defendant leaned that way to conceal the bulge in his pocket. (*Id.* at 52:18–53:1.)

Officer Bruington testified that after Officer Digirolamo asked Defendant a second time what was in his pocket, "he leaned forward and stated he had nothing left in his pocket. He asked more questions about why we stopped him as if to change the subject." (*Id.* at 13:12–18.) She further stated that Defendant "was evasive in his body language

when [they] asked him about what was in his pocket" and "he leaned forward as if to try to conceal it." (*Id.* at 14:7–9.) Such collective behavior contributes to a finding of reasonable suspicion.

Third, and perhaps most importantly, the officers noticed a "large bulge" in Defendant's pocket. (*Id.* at 14:5–6; 52:17–23.) Officer Bruington, in particular, with her flashlight trained on Defendant, also "witnessed a black metallic looking object sticking out of the pocket." (*Id.* at 9:16–10:19, 14:4–5.) Officer Bruington still saw that black metallic object remaining in Defendant's pocket after he removed his keys. (*Id.* at 12:9–13:1.) Officer Bruington testified that, based on her training and experience, she had reason to believe that there was a firearm in Defendant's pocket due to Defendant's evasive behavior and the bulge in his pocket. (*Id.* at 13:19–14:9.) On cross-examination, Officer Bruington further testified that, in reviewing the video, she believed that she saw the magazine of the gun protruding from Defendant's pocket. (*Id.* at 29:23–30:1.)

Officer Bruington also testified that although she told Defendant that she was unsure if the bulge was a gun or a phone, "normally with citizens, to kind of keep them calm in that situation, [she] kind of explain[s] to them, hey, this is just for safety reasons. And [she] relay[s], hey, we don't know if it's a phone or if it's a gun." (*Id.* at 22:20–23:7.) Despite this statement to Defendant, Officer Bruington testified that she "had very good reason to believe that it was a gun." (*Id.* at 23:14–18.) Officer Digirolamo also testified that after Defendant removed his keys but before he leaned forward, he also could see a bulge in Defendant's pocket. (*Id.* at 52:14–23.) He further testified that "for [their] safety," they wanted to conduct a protective sweep. (*Id.* at 53:14–17.)

Thus, under the totality of circumstances—particularly given the officers' observations of a bulge in Defendant's pocket, and a black and metallic object protruding out of it—this Court concludes that the officers had reasonable suspicion, based on particularized and objective facts, that Defendant was armed and dangerous.

Defendant next argues that, even if the officers had reasonable suspicion to conduct a patdown, the officers' search for the firearm was unreasonable. Relying on the Supreme Court's decision in *Sibron v. New York*, 392 U.S. 40 (1968), and the Second Circuit's decision in *United States v. Casado*, 303 F.3d 440 (2d Cir. 2002), Defendant contends that the officers did not search Defendant's outer clothing but instead immediately reached into Defendant's pocket in violation of *Terry v. Ohio*, 392 U.S. 1 (1968).[2]

Defendant largely relies on the videos from the officers' body cameras. However, the videos do not fully and clearly depict the frisk the officers conducted. In particular, the videos are not fully focused and trained on the officers' search, nor their hand placement, throughout the entirety of the patdown. Thus, the Court finds it cannot rely solely on these videos.

However, both officers testified that Officer Digirolamo conducted a patdown of Defendant's outer clothing with the palm of his hand. Officer Bruington testified that she saw Officer Digirolamo brush down the side of Defendant's pocket and then push the gun

[2] In both *Sibron* and *Casado*, the officers failed to conduct a patdown before reaching into the suspects' pockets, and both courts ultimately held that the searches were unreasonable. *See Sibron*, 392 U.S. at 45, 65–66; *Casado*, 303 F.3d at 442, 449. However, as discussed below, the officers in this case testified that a patdown did precede the search of Defendant's pocket.

out of the pocket when he slid his hand back up. (Tr. 15:18–16:18, 39:25–40:2.) She stated that this was consistent with her training as to patdowns. (*Id.* at 16:19–17:7.) Officer Digirolamo testified that, with his palm open, he placed his hand against the side of Defendant's pocket and slid his hand down the pant leg. (*Id.* at 54:2–15.) He testified that he felt something heavy, which he believed to be a firearm, based upon his training and experience. (*Id.* at 54:16–18.) He testified that he then "put [his] hand on the outside of his pocket to force it up because it was a large pocket," and then he pulled the firearm out. (*Id.* at 54:19–24.)

Based on the officers' testimony that Officer Digirolamo performed a patdown, with an open palm, on the outside of Defendant's clothing before pulling the firearm out of his pocket, this Court finds that the officers complied with *Terry* and its progeny by performing a proper—and justified—frisk prior to reaching into Defendant's pocket to remove the firearm. *See Johnson*, 555 U.S. at 326, 330 ("In a pathmarking decision, *Terry v. Ohio*, the Court considered whether an investigatory stop (temporary detention) and frisk (patdown for weapons) may be conducted without violating the Fourth Amendment's ban on unreasonable searches and seizures. . . . Recognizing that a limited search of outer clothing for weapons serves to protect both the officer and the public, the Court held the patdown reasonable under the Fourth Amendment." (citation omitted)). Officer Digirolamo limited the frisk and the search to Defendant's pocket, where the officers had seen—and later felt—the black and metallic object. He testified that he believed the object was a firearm based on this patdown, and consequently, removed it.

The Court finds that Officer Digirolamo's actions were reasonable under the Fourth Amendment.

Accordingly, this Court finds that the search that uncovered the firearm did not violate Defendant's Fourth Amendment rights.

The final issue before the Court is whether the officers' removal of the baggie containing crack cocaine was unreasonable, which was removed subsequent to the officers' discovery of the firearm and Defendant's arrest for possession of a firearm by a convicted felon. As defense counsel conceded at the hearing, this search "stands or falls on whether this initial search [of the firearm] was proper." (Tr. 76:15–17.) The officers conducted the search of Defendant that unveiled the baggie after he was arrested. (*Id.* at 17:8–18:2.) Because this Court finds that the search for the firearm was proper, the arrest was also properly executed. Accordingly, the subsequent search revealing the drugs located on Defendant's person was reasonable as a search incident to arrest. *See United States v. Currence*, 446 F.3d 554, 556 (4th Cir. 2006) ("It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment. This exception provides that when law enforcement officers have probable cause to make a lawful custodial arrest, they may—incident to that arrest and without a warrant—search the arrestee's person and the area within his immediate control." (internal citations and quotations omitted)).

Therefore, for the foregoing reasons, the Court finds that the officers' actions, as challenged, were reasonable under the Fourth Amendment. Accordingly, Defendant's Motion to Suppress will be denied.

An appropriate Order will accompany this Memorandum Opinion.

/s/
Henry E. Hudson
Senior United States District Judge

Date: Dec. 13, 2019
Richmond, VA

APPENDIX C

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Richmond Division

UNITED STATES OF AMERICA

v.

SAMUEL LEE MURCHISON,
Defendant.

Case Number: 3:19CR00138-001

USM Number: 39462-083

Defendant's Attorney: William J. Dinkin, Esq.

JUDGMENT IN A CRIMINAL CASE

The defendant pleaded guilty to Count 1 of the Indictment.

Accordingly, the defendant is adjudged guilty of the following counts involving the indicated offenses.

Title and Section	Nature of Offense	Offense Class	Offense Ended	Count
18 U.S.C. § 922(g)(1)	POSSESSION OF FIREARM BY FELON	Felony	11/5/2018	1

On motion of the United States, the Court has dismissed the remaining counts in the indictment (Count 2) as to defendant SAMUEL LEE MURCHISON.

As pronounced on August 28, 2020, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

/s/
Henry E. Hudson
Senior United States District Judge

Dated: September 3, 2020

Case Number: **3:19CR00138-001**
Defendant's Name: **MURCHISON, SAMUEL LEE**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of SEVENTY-EIGHT (78) MONTHS.

The Court makes the following recommendations to the Bureau of Prisons:

1) Substance abuse treatment program consistent with defendant's designation;
2) Mental health treatment and counseling;
3) Educational courses and vocational training.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows: _____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

Case Number: **3:19CR00138-001**
Defendant's Name: **MURCHISON, SAMUEL LEE**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS.

The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of supervised release.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution obligation, it is a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court set forth below:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance or any paraphernalia related to such substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer for a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Case Number: **3:19CR00138-001**
Defendant's Name: **MURCHISON, SAMUEL LEE**

SPECIAL CONDITIONS OF SUPERVISION

While on supervised release pursuant to this Judgment, the defendant shall also comply with the following additional special conditions:

1) The defendant shall participate in a program approved by the United States Probation Office for substance abuse, which program may include residential treatment and testing to determine whether the defendant has reverted to the use of drugs or alcohol, with costs to be paid by the defendant, all as directed by the probation officer.

2) The defendant shall provide the probation officer access to any requested financial information.

3) The defendant shall pay for the support of his children in any amount ordered by any social service agency or court of competent jurisdiction. In the absence of any such order, payments are to be made on a schedule to be determined by the probation officer at the inception of supervision, based on the defendant's financial circumstances.

4) The defendant shall participate in vocational, educational, and/or job readiness programs as directed by this Court and as identified by the United States Probation Office.

5) The defendant shall pay the balance owed on any court-ordered financial obligations in monthly installments of not less than $25.00, starting 60 days after supervision begins until paid in full.

Case Number: **3:19CR00138-001**
Defendant's Name: **MURCHISON, SAMUEL LEE**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Page 6.

	Count	Assessment	Fine	Restitution
	1	$100.00	$0.00	$0.00
TOTALS:		**$100.00**	**$0.00**	**$0.00**

FINES

No fines have been imposed in this case.

RESTITUTION

No restitution has been imposed in this case.

Case Number: **3:19CR00138-001**
Defendant's Name: **MURCHISON, SAMUEL LEE**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

The special assessment shall be due in full immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed. Payments shall be applied in the following order: (1) assessment (2) restitution principal (3) restitution interest (4) fine principal (5) fine interest (6) community restitution (7) penalties and (8) costs, including cost of prosecution and court costs.

Nothing in the court's order shall prohibit the collection of any judgment, fine, or special assessment by the United States.

The defendant shall forfeit the defendant's interest in the following property to the United States:

See *Consent Order of Forfeiture* entered by the Court on January 9, 2020.