APPENDIX

96 F.4th 67
United States Court of Appeals, First Circuit.

UNITED STATES of America, Appellee,

v.

Derek GERRISH, Defendant, Appellant.

No. 23-1317

March 15, 2024

Synopsis

Background: After the United States District Court for the District of Maine, Jon David Levy, Chief Judge, 2022 WL 1156057, denied his motion to suppress, defendant pled guilty to possession with intent to distribute fentanyl, and he appealed.

[Holding:] The Court of Appeals, Selya, Circuit Judge, held that defendant's bail conditions for pretrial release requiring that he submit to searches without suspicion justified police officers' warrantless search of his vehicle.

Affirmed.

West Headnotes (2)

[1] **Criminal Law** ⇐ Review De Novo

Criminal Law ⇐ Evidence wrongfully obtained

When presented with challenge to denial of motion to suppress, Court of Appeals examines district court's factual findings for clear error and its legal conclusions, including its ultimate constitutional determinations, de novo.

[2] **Bail** ⇐ Imposition of conditions in general

Defendant's bail conditions for pretrial release requiring that he submit to searches without suspicion justified police officers' warrantless search of his vehicle, even if they lacked reasonable suspicion of wrongdoing; state law required that judicial officers impose the least restrictive bail conditions that reasonably ensured defendant's appearance, and that conditions be tailored to defendant's individual circumstances. U.S. Const. Amend. 4; 15 Me. Rev. Stat. § 1026(3)(A), (4)(C).

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE [Hon. Jon D. Levy, U.S. District Judge]

Attorneys and Law Firms

Robert C. Andrews on brief for appellant.

Darcie N. McElwee, United States Attorney, and Shira Furman, Assistant United States Attorney, on brief for appellee.

Before Gelpí, Selya, and Montecalvo, Circuit Judges.

Opinion

SELYA, Circuit Judge.

***68** Defendant-appellant Derek Gerrish moved to suppress evidence that local police officers uncovered from a search of his vehicle after observing suspicious conduct in the lot in which it was parked. Concluding that the officers possessed reasonable suspicion and the defendant's bail conditions authorized the search, the district court denied his motion. The defendant subsequently entered a conditional guilty plea, see Fed. R. Crim. P. 11(a)(2), to a federal drug offense and, on appeal, continues to challenge the constitutionality of the search. After careful consideration, we affirm.

I

We briefly rehearse the relevant facts and travel of the case. We start with the fundamental facts.

A

In June of 2021, the police department in Scarborough, Maine received a complaint from a staff member at a local hotel,

which alerted them to the possible involvement of hotel guests in drug trafficking and prostitution. In response to this tip, two plainclothes police officers staked out the hotel from an unmarked car in the adjacent parking lot. During their stakeout, the officers observed two cars enter the hotel's parking lot and proceed to park a distance from the building's main entrance even though the lot was only partly populated.

After tracking several events not relevant here, the officers noticed the driver of one of the cars (a Toyota Avalon) flick a syringe as though she was preparing to inject it. They subsequently approached the two cars, identified themselves as police officers, and searched the Toyota, which revealed additional drug paraphernalia. Upon further questioning, the defendant — who had occupied the other car (a Chrysler 300) — identified himself and acknowledged that he was on pretrial release pending resolution of several Maine state criminal charges. He added that the terms of his release authorized searches without reasonable suspicion — a fact that the officer confirmed with dispatch before proceeding. As matters turned out, the defendant was subject to at least six separate sets of bail conditions pursuant to Maine law. Five of these strictures provided for searches of his person, vehicle, or residence at any time and without suspicion to determine if he had violated other bail conditions.

The officer who questioned the defendant provided two justifications for his ensuing search of the Chrysler: the bail conditions authorized the search, and the defendant had been seen speaking to someone in the Toyota whose driver they had observed preparing to inject a syringe. Searching the Chrysler produced a substance that later was confirmed to be fentanyl, along with an assortment of other contraband. The defendant subsequently pleaded guilty to possession with intent to distribute fentanyl in violation of 21 U.S.C. § 841(a)(1). The district court sentenced him to serve a ninety-month term of immurement.

In this venue, the defendant challenges the district court's denial of his motion to suppress the evidence from the search of the Chrysler (which he filed prior to tendering his guilty plea). See United States v. Gerrish, No. 21-132, 2022 WL 1156057, at *1 (D. Me. Apr. 19, 2022).

***69 B**

The district court denied the defendant's motion to suppress the evidence obtained from the search of the Chrysler on two independent grounds. See id. at *4-5. First, it concluded that the officers had reasonable suspicion of criminal activity to detain and search the defendant under the doctrine of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Second, it determined that the defendant's bail conditions requiring that he submit to searches without suspicion also justified the officers' conduct. See Gerrish, 2022 WL 1156057, at *5. It rejected the defendant's suggestion that the search was unconstitutional under Maryland v. King, 569 U.S. 435, 133 S.Ct. 1958, 186 L.Ed.2d 1 (2013), because that case stands for the unrelated proposition that a person arrested for offenses of a violent nature or burglary could be forced to submit to a buccal swab for DNA collection. See Gerrish, 2022 WL 1156057, at *5. The more relevant question, the court believed, was whether a bail condition requiring searches without suspicion was constitutionally permissible. See id. It proceeded to answer this question in the affirmative based on our opinion in United States v. Gates, 709 F.3d 58 (1st Cir. 2013). There, we could discern "no reason why we should not give the plain language of such a bail condition [authorizing searches without suspicion] force and effect."[1] Id. at 64.

In defense of his position, the defendant raised an apparent conflict between Gates and the decision in United States v. Scott, 450 F.3d 863 (9th Cir. 2006). There, the Ninth Circuit held that probable cause was required to drug test or search the home of a defendant on pretrial release even though he had consented to searches without suspicion as a condition of his release. See id. at 865-66, 874-75. The court below countered that the bail conditions in Scott were unsupported by individualized judicial findings. See Gerrish, 2022 WL 1156057, at *5 (citing Scott, 450 F.3d at 865, 872 & n.12). In contrast, the Maine Bail Code mandates that judicial officers impose the least restrictive bail conditions that, inter alia, reasonably ensure a defendant will appear wherever and whenever required. See Me. Rev. Stat. Ann. tit. 15, § 1026(3)(A), (4)(C). And Maine law requires that the bail decision be predicated on "an interview with the defendant, information provided by the defendant's attorney and information provided by the attorney for the State or an informed law enforcement officer if the attorney for the State is not available and other reliable information." Id. § 1026(4). Thus, the court held that the Ninth Circuit's reasoning in Scott was inapplicable to the defendant's circumstances here. See Gerrish, 2022 WL 1156057, at *5.

II

[1] The defendant contends that both of the district court's rationales for denying his motion to suppress were erroneous. When presented with a challenge to the denial of a motion to suppress, "we examine the district court's 'factual findings for clear error and its legal conclusions, including its ultimate constitutional determinations, de novo.' " United States v. Sheehan, 70 F.4th 36, 43 (1st Cir. 2023) (quoting United States v. Moss, 936 F.3d 52, 58 (1st Cir. 2019)). Because we ***70** conclude the bail conditions that plainly permitted the challenged search were constitutional, we need not reach the investigatory detention rationale.

A

In a contrary vein, the defendant asserts, "[t]o the extent that bail searches are a matter of discretion by law enforcement in both scope and place[,] they do not fit within the" Supreme Court's reasoning in King. The King Court held that a buccal swab of a person under arrest was a reasonable search because: "[t]he arrestee [was] already in valid police custody for a serious offense supported by probable cause"; "[t]he DNA collection [was] not subject to the judgment of officers whose perspective might be colored by their primary involvement in the often competitive enterprise of ferreting out crime"; and "such intrusions are defined narrowly and specifically in the regulations that authorize them." 569 U.S. at 448, 133 S.Ct. 1958 (internal quotations omitted).

The defendant seems to suggest that the search of him did not feature these characteristics that led the Court to endorse the search of the defendant in King. But the defendant's reliance on King overlooks the fact that he knowingly agreed to — and does not challenge the reasonableness of — bail conditions that authorized searches of him without suspicion. As the district court correctly noted, the analysis in King is inapposite because the issue here is not necessarily the search itself but, rather, the bail conditions that authorized the search. See Gerrish, 2022 WL 1156057, at *5.

B

As to the soundness of the bail conditions, the defendant asserts that — in contrast to his pretrial release status — the cases approving the use of bail conditions that authorize searches without suspicion involve defendants who were serving sentences at the time of the search. That is, the guilt of a person on parole already has been determined, and any parole conditions, therefore, are incident to a lawfully imposed sentence. Whereas — as he argues here — such constraining bail conditions cannot be imposed, without further judicial process, on one who has yet to stand trial or plead guilty. He adds, moreover, that our treatment of the issue in Gates is dictum because we recognized that "the district court took a belt-and-suspenders approach," which "supportably found that the search was independently justified by the extant bail conditions." 709 F.3d at 64.

[2] Dictum or not, we see no reason to retreat from the language in Gates. Indeed, reasoning from Samson v. California, 547 U.S. 843, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006) — to which Gates cites — illustrates the point. There, the Court held that a person on parole could be searched without suspicion because he had submitted to these searches as a condition of his parole. See id. at 852, 126 S.Ct. 2193. In so holding, the Court reasoned "that acceptance of a clear and unambiguous search condition 'significantly diminishe[s] [one's] reasonable expectation of privacy.' " Id. (quoting United States v. Knights, 534 U.S. 112, 120, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001)). Because bail provides a similar mechanism for a defendant to avoid custody while the criminal legal process unfolds, one who is on pretrial release likewise faces a diminished expectation of privacy. And a state maintains legitimate interests — such as ensuring the integrity of the criminal legal process — in supervising persons on pretrial release.

C

Finally, the defendant highlights the apparent conflict between our decision in ***71** Gates and the Ninth Circuit's decision in Scott. But as the defendant's own brief admits, we are bound by the law of the circuit doctrine, which "commands our adherence to our own prior panel decisions." United States v. Gonzalez, 949 F.3d 30, 39 (1st Cir. 2020). In other words, it is not our role to overturn binding circuit precedent for the purpose of resolving what the defendant perceives as a circuit split.

Even so, as the district court identified, the defendant's circumstances meaningfully differ from those of the defendant in Scott. See Gerrish, 2022 WL 1156057, at *5. Because Maine law requires that a judicial officer impose the

"least restrictive" bail conditions and tailor these conditions to the defendant's individual circumstances, Me. Rev. Stat. Ann. tit 15, § 1026(3)(A), (4)(C), the Ninth Circuit's concerns about a defendant's mandatory waiver of rights as a condition for pretrial release vanish.

III

We need go no further. For the reasons elucidated above, the judgment of the district court is

Affirmed.

All Citations

96 F.4th 67

Footnotes

1 District courts in this circuit have consistently relied on Gates to give effect to this type of bail condition, placing the burden on the defendant to show that the condition was unreasonable or that the defendant did not understand it. See, e.g., United States v. Kissh, 433 F. Supp. 3d 1, 4 (D. Me. 2020); United States v. Drane, No. 13-31, 2014 WL 2940857, at *9 (D.N.H. June 30, 2014). Neither set of circumstances was relevant here.

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United States District Court, D. Maine.

UNITED STATES of America

v.

Derek GERRISH, Defendant.

2:21-cr-00132-JDL-1

Signed 04/19/2022

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ORDER ON DEFENDANT DEREK GERRISH'S MOTION TO SUPPRESS

JON D. LEVY, CHIEF UNITED STATES DISTRICT JUDGE

***1** Defendant Derek Gerrish moves to suppress (ECF No. 49) evidence seized during a search of his vehicle.[1] Gerrish argues that there was no reasonable suspicion to detain him and that his initial detention was an arrest without probable cause, so the fruits of that detention must be suppressed. Gerrish also argues that his state bail conditions authorizing searches of his person, vehicle, and residence at any time without articulable suspicion or probable cause violate the Fourth Amendment. For the reasons that follow, I deny the motion.

I. FACTUAL FINDINGS

The Scarborough Police Department received a complaint on June 1, 2021 from a hotel's staff member about possible drug trafficking and prostitution at the hotel by some of its guests. Criminal activity, including drug trafficking, has occurred with some frequency at the hotel, and staff had previously provided tips that resulted in successful investigations.

In response to the June 1 tip, two plainclothes officers stationed themselves in a parked, unmarked police car in the parking lot of the business next-door, which gave them an elevated vantage point to observe the hotel's parking lot. Shortly after 2 p.m., the officers saw two cars pull into the hotel's parking lot and back into adjacent spots directly downhill from the officers' location, approximately 10 to 12 feet away. Although the hotel's parking lot was relatively empty, the cars had parked far from the hotel's main entrance. One of the vehicles was a Chrysler 300, and the other was a Toyota Avalon. Each had two occupants. Both cars were registered to owners with Maine addresses not far from the hotel.

The officers saw a woman exit the front passenger door of the Chrysler and walk unsteadily to the main entrance of the hotel. She appeared either intoxicated or sick. The woman then returned from inside the hotel to the Chrysler and lay down so that her torso was inside the car and her legs were outside. One of the officers called the hotel's front desk to ask what the woman had done while inside. He was told that she had rented a room and that it was not ready.

While this was happening, Defendant Gerrish, the driver of the Chrysler, was speaking and gesturing to the male passenger of the Toyota. He also exited his car and then reentered it. Because of the incline, the officers were well positioned to see into both cars through their back windshields. The officers saw the driver of the Toyota holding a syringe and flicking its top as if she was getting ready to inject it.

***2** Upon seeing the syringe, one of the officers radioed to a uniformed officer who was nearby in a police cruiser. As that third officer drove into the hotel parking lot with his lights and siren off, the two plainclothes officers exited their car and approached the Chrysler and the Toyota, one toward the passenger side of the Chrysler where the unsteady woman was lying down and the other toward the driver side of the Toyota where the other woman had the syringe. The two officers identified themselves as police. The third police officer parked his cruiser in front of the Toyota at a 45-degree angle, blocking the Toyota without blocking the Chrysler. The uniformed officer exited his car and approached the passenger of the Toyota, the man who had been speaking with Gerrish.

The woman in the Toyota who had been holding the syringe identified herself to the plainclothes officer who had approached her. Now closer, the officer saw that the

syringe contained a reddish-brown liquid resembling heroin or fentanyl. The uniformed officer asked the male passenger of the Toyota what was in the syringe, and the passenger responded that it was "dope." The officers directed the woman and the man to exit the Toyota, which they did. The woman stated that there were two more loaded syringes in the car, which the officers found during a search, along with other drug paraphernalia. The woman also stated that she was there to meet Gerrish, who she identified by name.

While those events were unfolding at the Toyota, Gerrish and his unsteady passenger identified themselves to the plainclothes officer who had approached the Chrysler. Gerrish asked if he could get out of the car. The officer agreed and met Gerrish by the front of the Chrysler. The officer asked Gerrish whether he was on any bail conditions, and Gerrish stated that he was. The officer asked if the conditions allowed for searches, and Gerrish said yes. In response to a question about what he was on bail for, Gerrish told the officer "everything." Asked what "everything" referred to, Gerrish said robbery, theft, and assault. The officer radioed to dispatch to confirm that Gerrish was on bail and that his conditions allowed for searches.

At the time of the stop, Gerrish was subject to at least six separate sets of bail conditions, including for charges related to drug trafficking and possession of hypodermic apparatuses. Five contained provisions requiring him to submit to suspicionless searches at any time of his person, vehicle, or residence to determine whether he had violated other bail conditions relating to alcohol, drugs, or weapons. The officer who had been questioning Gerrish told Gerrish that he would search the Chrysler for two reasons: first, because the bail conditions allowed it, and, second, because Gerrish was talking to a person in the Toyota and the officers had observed the driver of that vehicle preparing to inject drugs. During the Chrysler search, Gerrish was standing 5 to 10 feet away with a fourth officer who had just arrived. A fifth officer had also responded to the scene by this time.

The search of the Chrysler revealed a bag containing what the officer immediately recognized as fingers of either heroin or fentanyl.[2] At that point, the officer placed Gerrish in handcuffs. The officer then found two handguns, several magazines, and additional illegal drugs in the passenger's side floorboard of the Chrysler. Upon the discovery of the guns, an officer handcuffed the woman who had been observed in the other car with the syringe.

II. LEGAL ANALYSIS

A. The *Terry* Stop

Gerrish first argues that the officers lacked reasonable suspicion that he was engaged in criminal activity and that the officers' approach of him was tantamount to an arrest without probable cause. Thus, he contends that his encounter with the police was unconstitutional from its inception and that the fruits of it should be suppressed. The Government counters that the officers had reasonable suspicion with respect to Gerrish and that his detention was an investigatory stop in accordance with *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

***3** "Included in the Fourth Amendment's protective ambit are *Terry* stops—those 'brief investigatory stops of persons or vehicles that fall short of traditional arrest.' " *United States v. Tiru-Plaza*, 766 F.3d 111, 115 (1st Cir. 2014) (quoting *United States v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002)). *Terry* stops are reasonable and thus do not violate the Fourth Amendment when officers have a reasonable suspicion that criminal activity may be afoot. *Id.* "Reasonable suspicion is a less exacting requirement than probable cause, but requires 'something more than an inchoate and unparticularized suspicion or "hunch." ' " *Id.* at 116 (quoting *Sokolow*, 490 U.S. at 7, 109 S.Ct. 1581). Whether reasonable suspicion exists is an objective inquiry under the totality of the circumstances. *Id.*

A *Terry* stop begins "when a reasonable person would not feel free to refuse to answer police questions and proceed along his way." *United States v. Dapolito*, 713 F.3d 141, 147 (1st Cir. 2013). But "[i]f an officer's actions during the encounter become 'too intrusive,' the temporary detention may 'morph into a de facto arrest,' which must be supported by probable cause." *United States v. Gonzalez*, 16 F.4th 37, 44 (1st Cir. 2021) (quoting *United States v. Rasberry*, 882 F.3d 241, 247 (1st Cir. 2018)). To distinguish between a *Terry* stop and a de facto arrest, "we inquire, in light of the totality of the circumstances, whether a reasonable person in the suspect's position would have understood her position 'to be tantamount to being under arrest.' " *United States v. Chaney*, 647 F.3d 401, 409 (1st Cir. 2011) (quoting *United States v. Zapata*, 18 F.3d 971, 975 (1st Cir. 1994)). "Where an investigatory stop is justified at its inception, it will generally not morph into a de facto arrest as long as 'the actions undertaken by the officers following the stop were reasonably responsive to the circumstances justifying the stop

in the first place as augmented by information gleaned by the officers during the stop.' " *Id.* (alterations omitted) (quoting *United States v. Trueber*, 238 F.3d 79, 92 (1st Cir. 2001)). "This objective, suspect-focused inquiry is informed by our assessment of the reasonableness of the detaining officer or officers' actions in response to developing conditions." *Id.*

Gerrish primarily relies on *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968). In *Sibron*, the Supreme Court reasoned that when an officer merely saw a defendant talking to people with known substance use disorders and saw nothing pass between them, "[n]othing resembling probable cause existed." *Id.* at 62, 88 S.Ct. 1889; *see also Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979) ("[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person."). However, the First Circuit has distinguished, for purposes of probable cause, between "mere propinquity and culpable propinquity." *United States v. Lee*, 317 F.3d 26, 32 (1st Cir. 2003). Physical proximity to wrongdoing does not, standing alone, suffice, but probable cause may be found where there was "substantially more than a momentary, random, or innocent association ... between" the defendant and suspected criminal activity. *Id.* at 33. More specifically, to analyze probable cause, the First Circuit has asked "whether the known criminal activity was contemporaneous with the association and whether the circumstances suggest that the criminal activity could have been carried on without the knowledge of all persons present." *United States v. Martinez-Molina*, 64 F.3d 719, 727, 729 (1st Cir. 1995). It bears repeating that "the level of suspicion required for a *Terry* stop is obviously less demanding than that for probable cause." *Sokolow*, 490 U.S. at 7, 109 S.Ct. 1581.

*4 When the officers detained Gerrish, he was situated differently from the defendant in *Sibron* who merely spoke to people with substance use disorders. Gerrish arrived with and then parked in a suspicious location with a woman who appeared ready to inject illegal drugs. Gerrish had been speaking with the woman's passenger. Gerrish's own passenger appeared impaired. The police were responding to a tip about drug trafficking at a site known for the same. Both cars were at a hotel suspiciously close to their registered addresses. Although Gerrish points to innocent explanations for many of these facts, "[u]nder *Terry*, the test is whether the circumstances give rise to a reasonable suspicion of criminal activity, not whether the defendant's actions are subject to no reasonable innocent explanation." *United States v. Stanley*, 915 F.2d 54, 57 (1st Cir. 1990). Given the timing of Gerrish's association with the woman flicking the syringe, the likelihood that he was aware of her conduct due to his proximity to her and his communications with her passenger (and the fact that the syringe was visible to the officers 10 to 12 feet away), the apparent impairment of Gerrish's own passenger, and Gerrish's independently suspicious conduct (i.e., parking in a suspicious location close to the car's registered address), the officers had reasonable suspicion—a "minimal level of objective justification"—to initiate an investigatory detention of Gerrish. *Sokolow*, 490 U.S. at 7, 109 S.Ct. 1581 (quoting *INS v. Delgado*, 466 U.S. 210, 217, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984)).

Contrary to Gerrish's argument, the *Terry* stop did not morph into a de facto arrest before the search of his car such that probable cause was necessary for his detention. At all times leading up to the search, "the officers were assiduously engaged in activities in furtherance of the investigation." *Rasberry*, 882 F.3d at 248. The officers asked Gerrish who he was, granted his request to get out of the car, inquired about whether he was on bail conditions, investigated the nature of those conditions, and confirmed the conditions with dispatch. These steps were responsive to the original rationale for the stop—the reasonable suspicion of drug-related misconduct by Gerrish—as augmented by the developing circumstances, including Gerrish's confirmation that he was on bail conditions for "everything" and that those conditions allowed for suspicionless searches. Gerrish was not placed in handcuffs until after drugs were discovered in his car, and there is no evidence that the officers ever drew their weapons. Although five officers were present when the search was initiated and a police cruiser had blocked the car that Gerrish had parked next to, a reasonable person in Gerrish's position would not have interpreted the situation as an arrest, as opposed to an investigatory detention.

Thus, the officers did not violate Gerrish's Fourth Amendment rights when they initially detained him or at any point before their search of his car. I next analyze whether the search was constitutionally permissible.

B. The Bail Conditions

Gerrish argues that his state bail conditions regarding suspicionless searches are unconstitutional. The Government responds that identical conditions have already been endorsed by the First Circuit and a court in this District.

In *United States v. Gates*, the First Circuit reasoned that the search of a defendant's house had been consented to and then, as an alternative basis for affirming the denial of the motion to suppress, concluded that the district court had "supportably found that the search was independently justified by the extant bail conditions." 709 F.3d 58, 64 (1st Cir. 2013). Like Gerrish's bail conditions, the condition in *Gates* provided that the defendant would submit to searches of his person, vehicle, and residence at any time without articulable suspicion or probable cause. *Id.* at 63. The First Circuit stated, "We see no reason why we should not give the plain language of such a bail condition force and effect." *Id.* at 64.

The approach suggested in *Gates* has since been embraced by multiple courts in this circuit. *United States v. Kissh*, 433 F. Supp. 3d 1, 4 (D. Me. 2020); *United States v. James*, Docket No. 2:17-CR-156, 2018 WL 2027084, at *6 (D. Me. May 1, 2018); *United States v. Drane*, Criminal No. 13-CR-31, 2014 WL 2940857, at *9 (D.N.H. June 30, 2014). Most recently, *Kissh* held that "[t]he Government can meet its burden of establishing consent to a search by pointing to bail conditions —agreed to by the Defendant—that permit such a search" and then "the burden shifts to the Defendant to show that his bail conditions were unreasonable under the circumstances or that he did not fully understand them." 433 F. Supp. 3d at 4.

***5** The Government introduced into evidence multiple sets of bail conditions demonstrating that Gerrish consented to searches without articulable suspicion or probable cause. Gerrish does not argue that these conditions were unreasonable under the circumstances or that he did not fully understand them. Rather, he argues, without explanation, that the constitutionality of the conditions did not survive *Maryland v. King*, 569 U.S. 435, 462-63, 133 S.Ct. 1958, 186 L.Ed.2d 1 (2013). But a review of that decision reveals that it is inapposite because it analyzed—approvingly—the reasonableness of a very different type of search under quite different circumstances: DNA collection through cheek swabs from persons arrested for violent crimes or burglary. *See id.* at 443, 465, 133 S.Ct. 1958.

Gerrish also argues that *Gates* conflicts with *United States v. Scott*, 450 F.3d 863 (9th Cir. 2006). In *Scott*, the Ninth Circuit held that probable cause was necessary to perform drug testing on a suspect on pretrial release or search his house notwithstanding his consent to such searches as a condition of his release. *Id.* at 865, 875. Gerrish argues that, under *Scott*, suspicionless searches authorized by bail conditions run afoul of the Fourth Amendment.

Gates was decided after *Scott*. Additionally, as explained in *Kissh*, the bail conditions at issue in *Scott* were not based on individualized findings by a judicial officer. *See Kissh*, 433 F. Supp. 3d at 4 n.3; *Scott*, 450 F.3d at 865, 872 & n.12. Here, Gerrish has not argued that his bail conditions were not based on individualized findings. This is not surprising because the Maine Bail Code requires judicial officers to determine the least restrictive combination of conditions that reasonably ensure, among other goals, the appearance of the defendant at the time and place required based on enumerated considerations, including the history and characteristics of the defendant. *See* 15 M.R.S.A. § 1026(3)(A), 4(C) (West 2022). A Maine judicial officer's bail decision must be based on "an interview with the defendant, information provided by the defendant's attorney and information provided by the attorney for the State or an informed law enforcement officer[,] ... and other reliable information." *Id.* § 1026(4). This process bears little resemblance to the one found wanting in *Scott*. *See Scott*, 450 F.3d at 865 ("There is no evidence that the conditions were the result of findings made after any sort of hearing; rather, the United States concedes that the conditions were merely 'checked off by a judge from a standard list of pretrial release conditions.' ").

Because Gerrish has not shown that his bail conditions violate constitutional requirements, the plain language of the bail conditions governed the search and officers did not need articulable suspicion or probable cause for their search.

III. CONCLUSION

Gerrish's Motion to Suppress (ECF No. 49) is **DENIED**.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2022 WL 1156057

Footnotes

1 Gerrish's motion to suppress references both a search of his vehicle and a search of his person, and the motion specifies that he is seeking "an order suppressing all evidence collected in violation of the United States Constitution." ECF No. 49 at 1. There was no testimony at the evidentiary hearing, which was held on March 25, 2022, as to any search of Gerrish. However, if Gerrish was himself searched during his investigatory detention, I would conclude that such a search was permissible for the same reasons that I conclude the same about the search of his car. *See infra* Section II.B.

2 "[A] 'finger' is a ten-gram cylinder of drugs in powder form." *United States v. Balser*, Criminal No. 19-cr-230, 2020 WL 7496097, at *1 (D.N.H. Dec. 21, 2020).

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