

APPENDIX 2

I. Background¹

Serrano was charged on July 25, 2013 with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). On the evening of July 31, 2012, several police officers on patrol in the Bronx received a radio run alerting them to a possible crime. An anonymous 911 caller had phoned in a description of a male and a female in possession of a weapon, standing in front of 575 Southern Boulevard. The caller also stated that the male was wanted in connection with a homicide. Officers responded to the Location and found Serrano and Christina Colon ("Colon"). When the police arrived, Serrano was on the sidewalk and Colon was sitting on a stoop with a large Coach tote bag nearby her. Groups of officers separately approached Serrano and Colon and began asking them questions. The officers who had approached Colon looked inside the bag and observed a gun, and signaled to the officers with Serrano to

¹ For purposes of this memorandum and order, I consider Serrano's Motion to Suppress (Dkt. No. 50), Memorandum of Law (Dkt. No. 53), the affidavit of Andy Serrano ("Serrano Aff.") (Dkt. No. 51), and additional supporting documents (Dkt. Nos. 52, 50-1, 50-2, 50-3), filed January 9, 2015; the Government's opposition, filed January 23, 2015 (Dkt. No. 54); the testimony and other evidence from the suppression hearing held on May 4, 2015; the Government's post-hearing brief, filed May 15, 2015 (Dkt. No. 61); Serrano's post-hearing brief, filed May 27, 2015 (Dkt. No. 64); the Government's post-hearing reply filed June 8, 2015 (Dkt. No. 66); Serrano's post-hearing reply filed June 29, 2015 (Dkt. No. 68); and other portions of the proceedings before me in this matter as described herein.

arrest him. The officers directed Serrano to place his hands behind his back so that they could handcuff him, but Serrano refused. After a brief scuffle, the officers subdued Serrano and transported him to the police station. Colon was also arrested and taken to the police station.

At the station, the police officers interviewed Serrano. At approximately 1:45 a.m. on August 1, Serrano signed a written statement taking responsibility for the gun. (GX-6.) In the statement, Serrano claimed that he placed the weapon in a purse that he gave to Colon to hold, and Colon was unaware that the weapon was there. Serrano stated that he planned to sell the weapon. Serrano's statement was written on a form that also included a Miranda waiver, which he initialed and signed.

Colon signed two written statements. The first, taken at 11:30 p.m. on July 31, 2012, states that Colon discovered the gun on the street, took it, and placed it in her bag, with the expectation that she could sell it. (GX-7.) Colon's second statement, dated August 1, 2012 at 8:15 a.m., claims that Serrano had handed the bag to Colon without informing Colon that it contained a gun. (GX-11.) Both the first and second statements were accompanied by signed Miranda warnings.

Colon was prosecuted in state court, and successfully moved to suppress the weapon and both statements. (See Dkt. No. 50-1.) Serrano was initially charged in state court and then his

prosecution was transferred to federal court. Serrano pleaded guilty before me on October 22, 2013 (Dkt. No. 9 ("Plea Tr.")), but I permitted him to withdraw his guilty plea by order dated November 17, 2014 (Dkt. No. 41).

II. The Motion

By motion filed January 9, 2015, Serrano moved for suppression of the weapon and the post-arrest written statement. (Dkt. No. 50.) Serrano claims that he was stopped without reasonable suspicion and was arrested without probable cause because the anonymous tip was not sufficiently credible to justify a stop, and the stop was not based on a belief that Serrano was engaged in illegal activity. (Dkt. No. 53 at 6; Dkt. No. 64 at 7.) Serrano claims that his written statement was taken in violation of his Fifth Amendment rights for two reasons. First, he claims that his statement was made before he was properly Mirandized. (Dkt. No. 53 at 8.) Second, Serrano claims that the police used the threat of prosecuting his pregnant girlfriend to pressure him to confess. (Id.) In his post-hearing briefs, Serrano also asserts that the search of the handbag was improper because it belonged to him and the police had no legal basis to search it. (Dkt. No. 64 at 10.)

Serrano also moved to preclude the Government from inquiring into his prior bad acts or convictions. (Dkt. No. 50.)

The Government opposed the Motion on January 23, 2015, and this Court held a hearing on May 4, 2015.

III. Suppression Hearing

At the hearing, the Government called four witnesses and introduced a number of exhibits, including physical evidence. Serrano testified on his own behalf and introduced several exhibits.

a. The Government's Evidence

i. Ernest Santiago's Testimony

Officer Ernest Santiago of the New York City Police Department testified for the Government. (Tr. 2.)² On July 31, 2012, the evening that Serrano was arrested, Officer Santiago was on patrol with Officer Bradley McLaurin in a marked police car. (Tr. 3.) At approximately 8:51 p.m., Officers Santiago and McLaurin received a radio run directing them to 575 Southern Boulevard (the "Location") in the Bronx.³ (Tr. 4.) The

² Citations to "Tr." are to the transcript of the suppression hearing held on May 4, 2015. (Dkt. No. 62.)

³ A transcription of the radio run is in evidence as GX-10-T. In relevant part, the dispatcher stated as follows:

4-1 receiving a 10-10 with a firearm for 575 Southern, 575 Southern Blvd., 149 to St. John's. This is a female, White, with a black shirt, approximately 35, black pocket book with a male Hispanic, red shirt, black shorts. States the male wanted for a homicide, standing in front of, female carries the gun.

10-4 this is a third party, anonymous caller, calling from a cell phone, again, it was 575 Southern for a female,

dispatcher described a "Male Hispanic with a gun, with a female Hispanic standing in front of 575 Southern Boulevard, that he was wanted for a homicide," and was wearing "a red shirt and black shorts." (Tr. 4-5.) The dispatcher described the female as 35 years old, white, wearing a black shirt, and carrying a black handbag. (Tr. 46.) The dispatcher also relayed that the gun was located "[i]n the female's purse." (Tr. 5.) On arrival at the scene, Officer Santiago saw that the description of the two individuals' clothing was accurate. (Tr. 74.) Officer Santiago testified that the contents of the radio run made it

White, I'm sorry, female White and a male Hispanic. The female White is who has the gun, she's wearing a black shirt, about 35 with a black purse. Male Hispanic is wanted for a homicide. He's wearing black shorts, standing again in front of. . . .

(GX-10-T at 2; see also GX-15 ¶¶ 6-7.)

A transcription of the 911 call received at approximately 8:52 p.m. on July 31, 2012 is in evidence as GX-8-T. The 911 caller stated, in relevant part:

I have an individual walking with a white lady. He's got red - red shirt, black shorts, and standing in front of 575 Southern Blvd. The woman has a bag and she's carrying like a 357 on, on her, but he's actually . . . he's wanted for homicide She's about 36 - got a black shirt on Yeah about 35, 36 and she's got a black purse . . . she's with the male. They-they're like, they work together. . . . He's like um, Hispanic . . . [wearing] [r]ed shirt, black shorts. . . . but they both, like what they both do, um like, robberies and everything together but she carries the weapon for him. . . .

(GX-8-T; see also GX-15 ¶ 2.)

sound "legitimate." (Tr. 5.) The radio run stated that the caller was anonymous, and was calling from a cell phone. (Tr. 47.) Officer Santiago noted that, based on his experience and training, an anonymous caller's tip cannot be "validate[d]" or "verif[ied]," and that an arrest could not be made based on an anonymous tip absent additional indication of criminal behavior. (Tr. 48, 51-52.)

Officer Santiago testified that between two and four other police vehicles were at the Location before he arrived. (Tr. 7, 53.) Upon arrival, Officer Santiago "saw a male stopped in front of [the Location] that fit the description" provided in the radio run, and a female "sitting by the steps." (Tr. 7.) Officer Santiago testified that the male was standing at least twelve to fifteen feet up the street from the female. (Tr. 9; 55.) Officer Santiago did not see any other individuals at the Location. (Tr. 8.) The male in question was Serrano.

Upon exiting the police vehicle, Officer Santiago saw Serrano talking calmly with another police officer. (Tr. 9-10.) The other officer was not touching Serrano and did not have his handcuffs out or his weapon drawn. (Tr. 10-11.) Officer Santiago approached and asked Serrano for identification, which he did not have. (Tr. 11.) Officer Santiago testified that Serrano's lack of identification raised his suspicion because, in his experience, individuals who are wanted for crimes do not

carry identification. (Tr. 12.) Officer Santiago also asked Serrano what he was doing in the neighborhood, and he replied that he was visiting family. (Tr. 11.) Officer Santiago further testified that as he spoke with Serrano, Serrano "look[ed] around, fidget[ed], and walk[ed] back and forth." (Tr. 12.) Officer Santiago testified that that behavior suggested to him that Serrano "had something to hide." (Tr. 12.) Officer Santiago testified that to that point, neither he nor the other officer had drawn a weapon, touched Serrano, or given Serrano any commands. (Tr. 12-13.)

According to Officer Santiago, at the same time that he was talking with Serrano, Officer Iniabell Torres was talking with the female. (Tr. 13.) The female was Christina Colon. (Tr. 35.) Officer Santiago testified that Officer Torres gave him a nonverbal signal to place Serrano in custody. (Tr. 13, 61.) Officer Santiago testified that at that time, he had not seen a weapon and was never told that a weapon had been observed. (Tr. 66.) On cross-examination, Officer Santiago testified that at the time he received the signal to handcuff Serrano, Serrano had not—to Santiago's knowledge—committed any crime in Officer Santiago's presence. (See Tr. 62.) When asked on cross-examination "[a]t what point was Mr. Serrano not free to leave the scene?" Officer Santiago responded that Serrano would not be free to leave "[u]ntil we finished [the] investigation because

it was not only the weapon but he was also wanted f[o]r homicide. He didn't have any identification on him, so we wouldn't just let him leave the scene without verifying who he is and the fact that he is wanted for a crime." (Tr. 63.) Officer Santiago did not ask Serrano about the handbag or its contents because "[h]e didn't have the bag on him." (Tr. 57, 58.)

Officer Santiago testified that he "told [Serrano] that [he was] going to place him under arrest and to put his hands behind his back. [Officer Santiago] attempted to secure him with [his] hands. At that point [Serrano] just pushed [Officer Santiago] and then began running towards [Santiago's] right," in a northward direction. (Tr. 14.) Officer Santiago chased Serrano, and they "both tripped, [] land[ing] on the sidewalk" with Officer Santiago on top of Serrano. (Tr. 14.) Serrano "started swinging" at officer Santiago, and Officer Santiago "started swinging at him" until other officers assisted in successfully handcuffing Serrano. (Tr. 14.) Officer Santiago testified that over the course of the encounter, the first time he touched Serrano was when he received the signal to make the arrest. (Tr. 76.) Officer Santiago testified that the encounter with Serrano lasted approximately five to seven minutes. (Tr. 73.)

Officer Santiago drove Serrano to the police station, arriving at 9:10 p.m. (Tr. 15-17.) Officer Santiago began an interview with Serrano just after midnight on the night of the arrest. (Tr. 25.) Officer Santiago testified that after sitting down with Serrano, the "first thing" he did was inform Serrano of his Miranda rights using an advice of rights form. (Tr. 25-26.) According to Officer Santiago, Serrano was neither reluctant nor confused about the Miranda waiver, and he initialed each section of the waiver as each right was read to him. (Tr. 27.) Later, Serrano made a written statement. (Tr. 28.) At the time Serrano made his written statement, Officer Santiago was not aware of whether Colon had also made a statement. (Tr. 30.) Officer Santiago testified that he did not suggest that Colon would be released in exchange for Serrano's statement. (Tr. 33.) He also testified that he never brought Colon to Serrano's cell during the course of the evening. (Tr. 37.) The interview concluded at 1:45 a.m., at which point Officer Santiago left Serrano in the lodging cell area. (Tr. 26, 33.) At about 8:30 a.m., Officer Santiago participated in taking a statement from Colon. (Tr. 33-34.)

ii. Christopher Pasquale's Testimony

Sergeant Christopher Pasquale of the New York City Police Department was the next witness. (Tr. 80.) Sergeant Pasquale was not among the group of officers that participated in the

arrest of Serrano (Tr. 81-82), but spoke with the arresting officer, Officer Santiago, and ran Serrano's criminal history upon Serrano's arrival at the police station. (Tr. 82.) There, Sergeant Pasquale spoke briefly with Colon, who was placed in the juvenile room. (Tr. 82.) Sergeant Pasquale stated that to his knowledge, that is where she remained. (Tr. 83.) Sergeant Pasquale then spoke with Serrano in the lodging cells, and interviewed him "immediately outside the lodging cells." (Tr. 83-84, 86.)

Sergeant Pasquale testified that the "first thing" that occurred during the interview was that Officer Santiago read Serrano the advice of rights form, and Serrano concurrently initialed each portion of the form. (Tr. 86-88.) Sergeant Pasquale testified that Serrano seemed neither reluctant nor confused about the form or waiver. (Tr. 88.) Later on in the interview, Serrano made a written statement. (Tr. 89.)

Sergeant Pasquale testified that at the time Serrano made the written statement, he was not aware of whether Colon had made a written statement. (Tr. 91.) He also testified that he did not bring Colon to Serrano's cell at any point during the night of July 31-August 1, 2012 (Tr. 95), and that while Serrano was in his presence, Serrano and Colon were kept separate. (Tr. 100.) Sergeant Pasquale testified that he did not have a conversation

with Serrano about "fessing up" or "taking the responsibility for" the weapon. (Tr. 98.)

Sergeant Pasquale testified that in addition to discussing the circumstances of that night's arrest, Serrano provided information pertaining to two cold case homicides, which information Pasquale was able to verify. (Tr. 92, 93.)

iii. Edgar Padilla's Testimony

Sergeant Edgar Padilla of the New York City Police Department also testified. (Tr. 105.) On the evening of Serrano's arrest, Sergeant Padilla was on patrol with Officer Torres in a marked police car. (Tr. 106-07.) Sergeant Padilla testified that he and Officer Torres received a radio run directing them to the Location. (Tr. 107.) According to Sergeant Padilla, the radio run described "a male Hispanic wearing a red shirt and a female white wearing a black shirt. . . . [T]he male Hispanic was wanted in a homicide and [] they were in possession of a firearm." (Tr. 107-08.) Sergeant Padilla considered the radio run "very distinct and descriptive about that the person in question was wanted in a homicide" and found the "clothing description [to be] very detailed." (Tr. 108; but see Tr. 128-29 (cross-examination on missing details).) Sergeant Padilla testified that the Location was in a high crime area where calls about robberies and shootings were common. (Tr. 118-19.)

Sergeant Padilla and Officer Torres were the first officers to arrive at the Location. (Tr. 112.) Upon arrival, Sergeant Padilla saw "a male Hispanic wearing a red shirt at the stoop of the building and a female white sitting on the stoop in front of the building." (Tr. 109.) The male and female were "[l]ess than one foot" from each other. (Tr. 109-10.) He noted that they matched the description provided in the radio run, and that no other individuals appeared at the Location. (Tr. 111, 112.) Then, Sergeant Padilla observed "the male Hispanic wearing the red shirt walk[ing] away from the scene . . . northbound in front of the building" at a "normal" pace. (Tr. 110, 111.) Sergeant Padilla indicated to Officer Santiago to question Serrano, but not to arrest or handcuff him. (Tr. 113.)

Meanwhile, Sergeant Padilla and Officer Torres approached Colon. (Tr. 114.) Sergeant Padilla testified that the encounter with Colon lasted approximately fifteen seconds. (Tr. 134-35.) Sergeant Padilla testified that Officer Torres asked Colon "if this was her bag" and he did not recall Colon's reply. (Tr. 114, 128.) Sergeant Padilla testified that next, "Officer Torres picked up the bag that was . . . to [Colon's] left . . . opened the bag. . . . looked inside. . . . saw that there was a firearm" and without taking the firearm out of the bag, held the bag open to let Sergeant Padilla observe the firearm. (Tr. 114-15.) As a result, Sergeant Padilla "took possession of the bag"

and yelled to Officer Santiago to handcuff Serrano. (Tr. 115.) He testified that a nonverbal signal was not given to Officer Santiago. (Tr. 132.) Sergeant Padilla testified that he believed that the gun belonged to both Serrano and Colon based on the information in the radio run. (Tr. 116.) He also believed that by walking away, Serrano "was trying to walk away from the actual scene and deny possession." (Tr. 116.) He testified that neither he nor Officer Torres asked Serrano's permission to search the bag. (Tr. 128.) Sergeant Padilla testified that he did not see what happened with Serrano after he gave the order to handcuff him because his attention was on the arrest of Colon. (Tr. 117.) As supervising officer that evening, Sergeant Padilla approved the paperwork related to the arrests but did not participate in the interviews. (Tr. 118.)

iv. Bradley McLaurin's Testimony

Officer Bradley McLaurin of the New York City Police Department also testified. (Tr. 137.) Officer McLaurin was on patrol with Officer Santiago on the night of Serrano's arrest. (Tr. 137.) He testified that he received a radio run directing him to the Location, where he saw a male and female who matched the description from the radio run. (Tr. 137-38.) Officer McLaurin testified that he did not recall seeing Serrano walk away from the stoop, but rather observed him standing "at the fence," (Tr. 142) which, according to GX-1 and GX-2, was several

feet northeast of the stoop. Officer McLaurin testified that Serrano and Officer Santiago spoke calmly to each other, but he did not recall most of the substance of their communication.

(Tr. 138-39.) He testified that during the conversation, neither he nor Officer Santiago had a weapon drawn, but did not recall whether either of them touched Serrano. (Tr. 139.)

Officer McLaurin testified that when Officer Santiago asked Serrano to place his hands behind his back so that Officer Santiago could handcuff him, Serrano "attempted to run away" "pretty fast." (Tr. 139, 140.) Officer McLaurin stated that Serrano ran about ten feet and then he, Officer Santiago, and a third officer who had been talking with Serrano "got him to the ground, and there was a scuffle to cuff him, and [they] cuffed him." (Tr. 141.)

Officer McLaurin helped with the post-arrest paperwork but did not participate in the interviews of Serrano or Colon. (Tr. 142.)

b. The Defendant's Evidence

i. Andy Serrano's Testimony

Serrano took the stand. (Tr. 146.) Serrano testified that at the time police cars appeared at the Location, he was on his way into a store next to the Location to purchase a cigar. (Tr. 147, 149, 161.) He stated that he was talking with a friend named Tone who was going into the store with him but was not

involved with the arrest.⁴ (Tr. 159-60, 165.) Serrano testified that he had his back to the approaching police vehicles, and had "one foot in the store" when he was "tapped on [the] shoulder by [Officer Santiago] who directed [him] back out of the store and placed [him] over to the side of the building," approximately ten to fifteen feet from the stoop. (Tr. 149-50.) Serrano testified that next, the officers asked his name, and he provided the name Jose Lopez. (Tr. 151.) He stated that at that time, he did not feel free to leave because the officers had directed him out of the store and the "authorities [were] standing before" him. (Tr. 151.) Serrano testified that he looked to his right and saw that Sergeant Padilla was holding Colon on the stoop, and that Officer Torres had the purse in her hand. (Tr. 152.) He said that "in that same instance, as I guess they w[ere] checking through the purse or bag, the male officer, [S]ergeant Padilla, yelled out to the officer that was talking to me to cuff me." (Tr. 152.)

Serrano testified that the bag in question belonged to him, and he "gave it to [Colon] to hold for [him]." (Tr. 153.) Serrano testified that the bag contained the gun, but that he had not so informed Colon. (Tr. 153.) He testified that no one

⁴ As the Government elicited from Serrano on cross-examination, the details regarding the store and the friend were omitted from Serrano's affidavit submitted in connection with the Motion. (Tr. 172-73, 174.)

sought his consent to search the bag, and he did not tell the officers that the bag belonged to him.⁵ (Tr. 153, 167.) On cross, he explained that although he was walking away from the bag, he did so because his girlfriend was holding onto it, and not because the officers were arriving. (Tr. 161.)

Serrano testified that he had not tried to run away when the officers moved to arrest him. (Tr. 155.) Rather, after he "heard [S]ergeant Padilla scream out to [O]fficer Santiago to cuff [him] and to arrest [him], and when [the officer] put his hand on [Serrano's] shoulder to usher [Serrano] to turn around, [Serrano] . . . wanted to turn around to ask him why [he was] being arrested." (Tr. 155.) Serrano further explained, "I guess me turning around to ask him that question, I don't know if he [saw] it as an act of aggression or what, but they just all jumped on me and took me down to the ground." (Tr. 155; see also Tr. 168.) He said that six or more officers brought him to the ground. (Tr. 155.)

On cross-examination, the Government challenged Serrano's account that he had been lawfully standing on the sidewalk during the encounter with the police:

⁵ As the Government elicited on cross-examination, the details regarding the claim that the bag belonged to Serrano were omitted from Serrano's affidavit submitted in connection with the Motion. (Tr. 173.)

Q. And Mr. Serrano, you state in the affidavit that you were lawfully standing on the sidewalk when you were arrested and that at the time you had done nothing wrong?

A. Yes, ma'am.

Q. Now, at the time of your arrest you had been convicted previously of a felony; is that correct?

A. Correct.

Q. And you testified that you were there with a gun; is that correct?

A. Correct.

Q. And wasn't it a fact that you were there to sell that gun?

A. That's what I told the officers.

Q. Is that true?

A. Correct.

Q. So at the time that you were standing on the sidewalk you were a felon in possession of a gun and you intended to sell that gun, is that correct?

A. Correct.

(Tr. 174-75.)

Serrano testified that at the police station, Officer Pasquale asked if Serrano would "let [his] [pregnant] girlfriend take the blame for the weapon[,] because she wrote a statement taking blame for the weapon." (Tr. 156.) Serrano stated that before providing a statement, he asked to speak to Colon and whether it would be possible "that her first statement . . . be erased." (Tr. 156.) Serrano stated that "[t]he officer then told [him] that he cannot erase her first statement, but they can allow her to write a second one," and then Serrano said that he would not provide a statement before speaking to Colon. (Tr. 156.) Serrano testified that the officer then brought Colon to his holding cell and let them speak. (Tr. 156-57.)

Serrano testified that the officers read him his Miranda rights after he wrote out his statement, not before. (See Tr. 157.) Serrano disclaimed having any conversation with the police about cold cases. (Tr. 158, 182-84.)

IV. Analysis

The officers' testimony is largely consistent and based on my observations of the officers' demeanors, I deem their testimony generally credible. Where Serrano's testimony is in conflict with the officers', I find that it is generally non-credible due to its internal inconsistencies and omissions (particularly when considered alongside his affidavit and other conflicting testimony before me in this matter), as well as my observations of Serrano's demeanor.

For the reasons described herein, the police had reasonable suspicion to stop Serrano and properly searched the bag. In addition, Serrano's Fifth Amendment rights were not violated by the manner in which his written statement was procured. As such, Serrano's motion to suppress the weapon and written statement will be denied. Also, as described herein, I reserve decision on Serrano's motion to preclude certain impeachment evidence.

a. The Police Had Reasonable Suspicion to Stop Serrano

Serrano argues that the police did not have reasonable suspicion to stop him because the stop was based on an

unreliable anonymous tip and was not based on an assertion that Serrano had done anything illegal. In analyzing Serrano's claim, the first question is when the stop occurred. See California v. Hodari D., 499 U.S. 621, 623 (1991); United States v. Freeman, 735 F.3d 92, 96 (2d Cir. 2013). The second question is whether the police had reasonable suspicion to stop Serrano at the time the stop occurred. See Freeman, 735 F.3d at 97. I address those questions in turn.

"[A] police officer is free to approach a person in public and ask a few questions; such conduct, without more, does not constitute a seizure." United States v. Lee, 916 F.2d 814, 819 (2d Cir. 1990) (citations omitted). "In a consensual encounter, which need not be based on suspicion, officers may permissibly ask questions, such as why the subject is at that location, and may make requests for identification and permission to inspect luggage." United States v. Peterson, 100 F.3d 7, 10 (2d Cir. 1996). A consensual encounter does not implicate Fourth Amendment concerns, and such concerns are only triggered once a person has been stopped by the police. United States v. Veloz-Lopez, 574 F. App'x 43, 43-44 (2d Cir. 2014); United States v. Glover, 957 F.2d 1004, 1008 (2d Cir. 1992). A stop occurs, triggering the Fourth Amendment, when "in view of all of the circumstances surrounding the incident, a reasonable person [in the same situation] would have believed that he was not free to

leave.'" Veloz-Lopez, 574 F. App'x at 43 (alteration in original) (citation omitted).

The test for whether a reasonable person would feel free to leave is objective. It does not consider "the subjective intentions or beliefs of the officer." United States v. Doughty, No. 08 Cr. 375 (RPP), 2008 WL 4308123, at *3 n.9 (S.D.N.Y. Sept. 19, 2008) ("[T]he test is objective, asking whether 'police conduct would have communicated to a reasonable person that the person was not free to decline the officer's request or otherwise terminate the encounter.'" (citation omitted)); United States v. Baptist, 556 F. Supp. 284, 287 (S.D.N.Y. 1982). Nor does the test focus on the subjective experience of the suspect. Hodari D., 499 U.S. at 628 ("[T]he test for existence of a 'show of authority' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person.").

To determine whether a reasonable person would feel free to leave, I consider "the overall coercive effect of the police conduct." Lee, 916 F.2d at 818. The following factors inform whether a seizure has taken place: "the threatening presence of several officers; the display of a weapon; physical touching of the person by the officer; language or tone indicating that compliance with the officer was compulsory; prolonged retention

of a person's personal effects, such as airplane tickets or identification; and a request by the officer to accompany him to the police station or a police room." Id.; accord Glover, 957 F.2d at 1008. "[P]olice questions may constitute a stop if the surrounding circumstances 'convey a message that compliance with [the officers'] requests is required.'" Veloz-Lopez, 574 F. App'x at 44 (citation omitted).

I find that the police did not stop Serrano, for Fourth Amendment purposes, at least until the signal was given to handcuff him. Prior to that, the police asked Serrano for his name, and he provided it (albeit falsely). (Tr. 151.) Then, the police asked Serrano for identification, which he was unable to produce. (Tr. 11.) They asked him what he was doing in the neighborhood, and he answered. (Tr. 11.) The police and Serrano had been speaking calmly. (Tr. 10, 139.) Moreover, prior to Officer Santiago's receipt of the signal to make the arrest, the police had not touched Serrano (Tr. 12, 76), had not displayed their weapons (Tr. 11, 12, 139), had not raised their voices (Tr. 10, 139), had not received or retained any of Serrano's possessions or identification (see Tr. 11), had not given Serrano any commands (Tr. 13), and had not requested or

instructed Serrano to accompany the police anywhere.⁶ See Glover, 957 F.2d at 1009 ("plain that no seizure had occurred" when single officer non-threateningly asked defendant questions, requested identification, and asked for consent to search bag, but had not made physical contact or displayed a weapon); United States v. Torres, 949 F.2d 606, 607-08 (2d Cir. 1991).

Once the instruction was given to handcuff Serrano—whether that signal was verbal or nonverbal⁷—a reasonable person would not have felt free to leave and a stop, implicating the Fourth Amendment, had occurred. See Freeman, 735 F.3d at 96.

It is of no moment that Officer Santiago testified that Serrano was not free to leave once he failed to produce identification. (See Tr. 63.) An officer's subjective understanding of when an individual is free to leave does not govern the seizure analysis; rather, the analysis is objective, and proceeds from the vantage point of a reasonable, innocent

⁶ Though Serrano testified that Officer Santiago tapped Serrano's shoulder when Serrano was walking into the store and asked him to turn around (Tr. 149-50), Serrano's account is contradicted by the testimony of Officer Santiago (Tr. 9, 11-12), and undermined by the omission of those facts from his Affidavit (see Serrano Aff. ¶¶ 3, 5), and thus I do not find it credible. In any event, such a minimal intrusion would not transform the consensual encounter into a stop for Fourth Amendment purposes. See United States v. Torres, 949 F.2d 606, 608 (2d Cir. 1991).

⁷ If the signal had been nonverbal, then perhaps the seizure only occurred moments later when Serrano perceived that the officers were acting on the signal. In any event, I find that the seizure occurred no earlier than the communication of the signal to arrest Serrano.

person. Glover, 957 F.2d at 1008, 1010. Likewise, because Serrano's subjective experience of the encounter is not part of the analysis, his assertion that he did not feel free to leave at the time the police began asking him questions (Tr. 151) is not relevant.

I turn next to the question of whether the police had reasonable suspicion to stop Serrano at the time the stop occurred. A police officer may "briefly [] detain" a person if the officer has "reasonable suspicion based on articulable facts" that that person "'is, has been, or is about to be engaged in criminal activity.'" United States v. Colon, 250 F.3d 130, 134 (2d Cir. 2001); Glover, 957 F.2d at 1009 (citation omitted). "[T]he amount of suspicion needed to justify the encounter is less than a 'fair probability' of wrongdoing, and 'considerably less than proof of wrongdoing by a preponderance of the evidence.'" United States v. Padilla, 548 F.3d 179, 186-87 (2d Cir. 2008) (citations omitted). "In determining whether there is reasonable suspicion under the totality of the circumstances," I "must evaluate those circumstances 'through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training.'" Colon, 250 F.3d at 134 (citation omitted).

"Anonymous tips, without further corroboration by the police to demonstrate that the tip has sufficient indicia of

reliability, are insufficient to provide the reasonable suspicion necessary for a valid Terry stop." Freeman, 735 F.3d at 97. "[R]easonable suspicion . . . requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." Id. "Even a reliable tip will justify an investigative stop only if it creates reasonable suspicion that 'criminal activity may be afoot.'" Navarette v. California, 134 S. Ct. 1683, 1690 (2014) (quoting Terry v. Ohio, 392 U.S. 1, 30 (1968)). "[P]ersonal observations made by the officers that corroborate information furnished by an unknown and unaccountable tipster may provide the basis for a reasonableness finding." United States v. Muhammad, 463 F.3d 115, 122 (2d Cir. 2006). "[R]easonable suspicion 'need not rule out the possibility of innocent conduct.'" Navarette, 134 S. Ct. at 1691 (citation omitted). "The grounds for a stop must exist at the time of the seizure." United States v. Simmons, 560 F.3d 98, 107 (2d Cir. 2009).

With the determination that Serrano was not stopped until the order to handcuff him was communicated, the question of reasonable suspicion becomes an easy one. Contrary to Serrano's position, the evaluation of reasonable suspicion is not based solely on the information provided to the officers by the anonymous 911 call. Rather, at the time the stop occurred, the police were aware of the following objective facts: (1) an

anonymous caller indicated that a gun belonging to Serrano and Colon was in Colon's bag (Tr. 5); (2) Serrano lacked identification, which, in Officer Santiago's experience, was behavior common among those wanted for crimes (Tr. 12); (3) Serrano was seen walking away from the bag, which to Sergeant Padilla, meant that Serrano was trying to "deny possession" of it (Tr. 116); (4) Serrano was looking around and fidgeting, which suggested to Officer Santiago that Serrano "had something to hide," (Tr. 12); (5) Serrano and Colon were in a high crime area (Tr. 118-19); and (6) most importantly, Officer Torres and Sergeant Padilla observed a weapon in the bag, which served to corroborate the 911 tip that they had received, and which, based on the tip, the officers believed belonged to both Serrano and Colon (Tr. 115-16). Thus, by the time the stop occurred, the anonymous tip had been corroborated in part, the police had observed Serrano behave in articulable, suspicious ways, and

they had observed a weapon. As such, the police had reasonable suspicion to stop Serrano.⁸

b. The Search of the Bag Did Not Violate Serrano's Fourth Amendment Rights

Serrano argues that the search of the bag violated his Fourth Amendment rights because the police lacked cause or consent to conduct the search, and no other exception to the warrant requirement applied. (Dkt. No. 64 at 10-11.) Serrano further argues that he has standing to challenge the search because the bag belonged to him, and that his lack of possession at the time of the search does not diminish his privacy interest in the bag. (Dkt. No. 64 at 12; Dkt. No. 68 at 2-5.) I find that Serrano lacks standing to challenge the search of the bag, and therefore do not address the reasonableness of the search itself.

"In order to prevail on a contention that a search violated the Fourth Amendment, an accused must show that he had a

⁸ To the extent that Serrano also argues that the police did not have probable cause to arrest him (Dkt. No. 53 at 2; Dkt. No. 64 at 13), that argument is rejected. By the time the police arrested Serrano, they had seen the weapon, had a basis to believe that the weapon belonged to Serrano and Colon (Tr. 116), and when they attempted to handcuff Serrano, he tried to flee (Tr. 14, 139, 140). As such, the police had "'knowledge or reasonably trustworthy information of facts and circumstances'" "'sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime,'" and the arrest was therefore proper. See United States v. Delossantos, 536 F.3d 155, 158 (2d Cir. 2008) (citations omitted).

legitimate expectation of privacy in a searched place or item." United States v. Rahme, 813 F.2d 31, 34 (2d Cir. 1987). "First, the person challenging the search must demonstrate a subjective desire to keep his or her effects private; and, second, the individual's subjective expectation must be one that society accepts as reasonable." United States v. Paulino, 850 F.2d 93, 97 (2d Cir. 1988); accord United States v. Hamilton, 538 F.3d 162, 167 (2d Cir. 2008). Among the factors to consider are whether Serrano had the "right to exclude others" from the bag, Paulino, 850 F.2d at 97, and whether he "took normal precautions to maintain his privacy," Rawlings v. Kentucky, 448 U.S. 98, 105 (1980). Whether the bag belonged to Serrano, while significant, is not dispositive. Rawlings, 448 U.S. at 105; Rahme, 813 F.2d at 34 ("Ownership of the searched item, though a fact to be considered, is neither in itself sufficient to establish a legitimate expectation of privacy nor a substitute if the requisite legitimate expectation of privacy is lacking."). Serrano "'bears the burden of proving . . . that he had a legitimate expectation of privacy'" in the bag. United States v. Watson, 404 F.3d 163, 166 (2d Cir. 2005) (quoting Rawlings, 448 U.S. at 104).

Serrano has not met that burden. First, his claims and evidence regarding ownership of the bag are thoroughly inconsistent and therefore difficult to credit. No fair reading

of Serrano's sworn affidavit includes an assertion that the bag belonged to him. Rather, Serrano repeatedly referred to the bag as though it belonged to Colon. (Serrano Aff. ¶¶ 2, 4, 6 ("The police did not question me about the purse or the gun, either before or after the police searched Christina's handbag.")) Even where Serrano's affidavit does not necessarily imply Colon's ownership, it suggests a deliberate distance between Serrano and the bag using language inconsistent with his ownership. (Serrano Aff. ¶ 2 (the police "searched a handbag next to Ms. Colon"); ¶ 4 ("I could see that Ms. Colon had a purse on the ground between her legs."); see also Tr. 171 ("Q. So just to be clear you didn't state in this affidavit, this sworn affidavit to the court, that it was your purse. A. No.")) In addition, Colon's first statement to the police referred to "my purse" (Dkt. No. 50-2; GX-7), while her second statement implied that the purse belonged to Serrano (Dkt. No. 50-3; GX-11). Serrano's written statement to the police, though clearly claiming ownership of the gun, does not clearly claim or disclaim ownership of the bag. (Dkt. No. 50-2; GX-6).⁹ Even Serrano's August 2012 statements during prison phone calls are

⁹ I note that in the typewritten copy of the statement submitted by the defense, Serrano's written statement reads "the weapon being in her purse" (Dkt. No. 50-2) (emphasis added), whereas the handwritten version of the statement, as submitted by the Government, reads "the weapon being in purse" (GX-6) without any possessive adjective.

internally inconsistent. (GX-14-T ln. 117 (referring to "their . . . purse"); GX-114 ln. 244 (referring to "a purse from my closet"))).

In contrast, at the hearing, Serrano stated that the bag was his, and Colon had it "[b]ecause [he] gave it to her to hold for [him]." (Tr. 153). Serrano also stated that he "gave her the bag with the gun inside to hold, but [he] didn't inform her of the contents that was inside the bag." (Tr. 153.) When asked, "you were turning and walking away from your bag which contained your gun" Serrano testified that he was walking away "[b]ecause [he] had somebody that was a girlfriend of mine[] holding on to my bag" and "not . . . because the officers [were] arriving." (Tr. 161.) Serrano later testified that he "saw [the police] searching [his] bag," but "didn't tell the officers that that was [his] bag" because "[t]hey never asked" him. (Tr. 167.) Serrano's testimony at the hearing conflicts, again, with his testimony at the hearing on the withdrawal of his guilty plea, where he denied the truth of the statement he had made to the police and asserted his innocence. (See Dkt. No. 37 at 13.)

Even if I could credit Serrano's assertion of ownership of the bag, Serrano nevertheless did not manifest an expectation of privacy over the bag. First, Serrano gave the bag to Colon to carry—and presumably to feign ownership—apparently without taking any steps to prevent her from disclosing (inadvertently

or otherwise) what was in the bag. See Rahme, 813 F.2d at 34 ("The absence of possession . . . may often result in a finding that an accused had no legitimate expectation of privacy because the absence of a right to exclude others from access is an important factor militating against a legitimate expectation of privacy."); cf. United States v. Perea, 986 F.2d 633, 641 (2d Cir. 1993) (comparing Rawlings, where an "owner [] had relinquished custody" and therefore lacked privacy expectations, with the privacy maintained by the custodian of an item that did not belong to him); see also GX-6 (claiming that items were "sneakily" given to Colon). Moreover, although they disagree on the reason, the parties do not dispute that as the police were arriving on the scene, Serrano was walking away from Colon and the bag. (Tr. 116, 161.) That fact, taken in conjunction with Serrano's affidavit, leads me to believe that Serrano was intentionally distancing himself from the bag and its contents.

Given that Serrano's various statements as to the bag's ownership are in conflict, Colon's statements to the police are in conflict, and the undisputed facts that Serrano willingly gave up possession of the bag and walked away from it, Serrano has not met his burden of proving that he had a legitimate expectation of privacy in the bag. Though some of Serrano's evidence does give me pause—his point that the bag contained none of Colon's personal effects (Dkt. No. 68 at 3), and his

August 2012 statement concerning the origin of the bag (GX-14-T ln. 244)—on the whole, the evidence tips decidedly against him. As such, Serrano lacks standing to challenge the search of the bag, and the weapon discovered therein will not be suppressed.

c. Serrano's Fifth Amendment Rights Were Not Violated

Serrano argues that his statement to police on August 1, 2012 was made in violation of his Fifth Amendment rights. He claims that by putting him in contact with Colon, his pregnant girlfriend, the police coerced him into making an inculpatory statement. He also claims that he was not given Miranda warnings prior to giving his statement, and that the waivers were signed after he made the statement. The Government bears the burden of proving, by a preponderance of the evidence, that a Miranda waiver was given knowingly and voluntarily. United States v. Plugh, 648 F.3d 118, 127 (2d Cir. 2011); United States v. Corbett, 750 F.3d 245, 252 (2d Cir.), cert. denied, 135 S. Ct. 261 (2014).

Serrano's claim that his statement was involuntary because of pressure related to Colon fails. First, I cannot credit Serrano's version of the events in the face of Officer Santiago's and Sergeant Pasquale's testimony. Both Officer Santiago and Sergeant Pasquale denied having a conversation with Serrano about taking responsibility for the weapon or suggesting that Colon would be released in exchange for Serrano's

statement. (See Tr. 33, 98.) Both testified that they never brought Colon to Serrano's cell during the course of the evening. (Tr. 37, 95.) Both also testified that at the time Serrano made his written statement, they were not aware of whether Colon had also made a statement. (Tr. 30, 91.) Serrano's conflicting account is not credible.

I also find that even if the police pressured Serrano to take responsibility for the weapon in Colon's stead, any such pressure did not render Serrano's statement involuntary. "'A confession is not voluntary when obtained under circumstances that overbear the defendant's will at the time it is given.' The voluntariness inquiry should examine 'the totality of all the surrounding circumstances, including the accused's characteristics, the conditions of interrogation, and the conduct of law enforcement officials.'" United States v. Taylor, 745 F.3d 15, 23-24 (2d Cir. 2014) (citations omitted). The circumstances that Serrano describes do not amount to a situation where his "will was overborne." See Corbett, 750 F.3d at 253 (after officer communicated with suspect's grandfather, and suspect then confessed, "the evidence suggests that [the suspect] was moved to cooperate, rather than coerced"); see also United States v. Medunjanin, 752 F.3d 576, 588 (2d Cir.), cert. denied, 135 S. Ct. 301 (2014) (suggestion that defendant "accept responsibility" for his family's benefit not coercive). This

conclusion is supported by Serrano's background, experience with the criminal justice system, and the evidence before me regarding his relationship with Colon. See United States v. Ruggles, 70 F.3d 262, 265 (2d Cir. 1995); see also Tr. 146-47 (35 years old); Plea Tr. at 3-4 (criminal history).

Serrano's assertion that he was not properly Mirandized prior to giving his written statement is undermined by the facts set forth at the hearing. Officer Santiago and Sergeant Pasquale both testified that after sitting down with Serrano, the "first thing" they did was inform Serrano of his Miranda rights using an advice of rights form. (Tr. 25, 86-88.) Both testified that Serrano was neither reluctant nor confused about the Miranda waiver, and that Serrano initialed each section of the waiver as each right was read to him. (Tr. 27, 88.) I find that Serrano's testimony to the contrary is not credible. Moreover, the waiver of rights is located on the same form as the written statement, so he was very likely aware of the waiver before he wrote out his statement.

As such, Serrano's statement to the police was not made in violation of his Fifth Amendment rights, and will not be suppressed.

d. Admissibility of Evidence of Serrano's Prior Convictions

Serrano also asks this Court to preclude the Government "from referring to, introducing into evidence or cross-examining [him] concerning prior bad or immoral acts and/or criminal convictions" during the trial of this case. (Dkt. No. 50.) The Government asserts that it "would seek to cross-examine the defendant about his 2005 conviction for criminal possession of a weapon pursuant to Federal Rule of Evidence 609(a)." (Dkt. No. 54 at 8.) Serrano asserts that such evidence is inadmissible because it "will only serve to demonstrate propensity, not credibility, to commit a crime." (Dkt. No. 53 at 9.)

Rule 609(a) of the Federal Rules of Evidence requires the admission of impeachment evidence about a defendant's conviction if the crime of conviction "was punishable by death or imprisonment for more than one year" and "if the probative value of the evidence outweighs its prejudicial effect to that defendant." Fed. R. Evid. 609(a)(1) & (a)(1)(B). Rule 609 also provides that "if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later," the evidence "is admissible only if . . . its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect"

and the adverse party has notice of the proponent's intent to use it. Fed. R. Evid. 609(b).

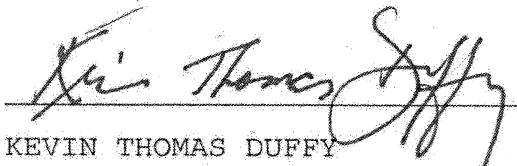
According to the Government, the conviction by guilty plea was entered on approximately August 15, 2005 and was for criminal possession of a loaded firearm, but further details are not given. See Dkt. No. 54 at 8-9; see also Plea Tr. at 4. I therefore must reserve ruling on the admissibility of that evidence pending a showing on the circumstances of the conviction, including the date of conviction or release.

Conclusion

For the reasons described herein, Serrano's motion to suppress the weapon and his statement to the police is DENIED. Serrano's motion to preclude the Government from introducing evidence of his prior convictions is reserved pending sufficient factual showing.

SO ORDERED.

Dated: New York, N.Y.
July 20, 2015


KEVIN THOMAS DUFFY
United States District Judge

USDC SDNY
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