NO. 10-2031

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ERNEST R. SNOW,
Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Indiana, Indianapolis Division,
Case No. 1:09-CR-00087-LJM-KPF-01
The Honorable Judge Larry J. McKinney

BRIEF OF THE PLAINTIFF-APPELLEE UNITED STATES OF AMERICA

JOSEPH H. HOGSETT
United States Attorney

James M. Warden
Assistant United States Attorney

Melanie Conour
Criminal Appellate Chief

Attorneys for the Plaintiff-Appellee
United States of America

Office of the United States Attorney
10 West Market Street, Suite 2100
Indianapolis, Indiana 46204-3048
Telephone: (317) 226-6333

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No.

Cases:

Page No.

Statutes:

Rules:

State Statutes:

I. JURISDICTIONAL STATEMENT

Defendant-Appellant Ernest R. Snow's ("Snow") jurisdictional statement is complete and correct.

II. STATEMENT OF THE ISSUE

Whether the district court erred in denying Snow's motion to suppress where police had reason to believe that Snow was the suspect identified in a residential burglary 911 call and his resistance following a *Terry* stop resulted in the recovery of the firearm he sought to suppress.

III. STATEMENT OF THE CASE

A. Nature Of The Case

This is a direct appeal by Snow of his judgment of conviction. Snow pled guilty to and was convicted of one count of unlawful possession of a firearm by a convicted felon and being an Armed Career Criminal in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e). Pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, Snow entered a conditional

plea of guilty reserving his right for this Court to review the district court's denial of his motion to suppress.

B. Course Of The Proceedings

On June 3, 2009, a federal grand jury returned a one count indictment charging Snow with unlawful possession of a firearm by a convicted felon as an Armed Career Criminal, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e). (R. 1)[1] On November 12, 2009, Snow filed a motion to suppress evidence seized from him by police officers following his apprehension on January 16, 2009. Specifically, Snow sought to suppress the firearm recovered by officers from his person, which he unlawfully possessed due to his uncontested status as a previously convicted felon. (R. 17) The government responded in opposition on November 27, 2009. (R. 20) The district court held a hearing on November 30, 2009, at which time the court heard testimony from

---

[1]The following abbreviations will apply throughout this brief:
A. = Appellant's Appendix
R. = Record on Appeal

three witnesses, considered the arguments of counsel, and then proceeded to deny Snow's motion. (R. 24) Pursuant to a memorandum of plea agreement filed on December 29, 2009, Snow pled guilty to the charged offense on January 28, 2010, reserving his right to appeal the district court's denial of his motion to suppress. (R. 35) The district court sentenced Snow to 180 months of imprisonment and 5 years of supervised release on April 14, 2010. (R. 44) Snow filed a timely notice of appeal on April 20, 2010. (R. 46)

IV. STATEMENT OF THE FACTS

In the late afternoon of January 16, 2009, officers of the Indianapolis Metropolitan Police Department (IMPD) were dispatched to the area of 5138 Thrush Drive, Indianapolis, based upon a 911 caller reporting a residential burglary in progress at that address. (A.18, 24) The dispatcher advised officers that the subject of interest was a male of unknown race wearing a black hooded sweatshirt and loose fitting blue jeans, and that he was at the house as the dispatch was being transmitted. (A. 64) As the

dispatch continued, officers were advised that the subject was seen leaving the house in a pickup truck which was described as green in front and black in back. (A. 65)

The series of transmissions from the police dispatcher to the officers was based upon an ongoing conversation between an eyewitness to the reported burglary in progress and a 911 operator. The eyewitness reported that, "Across the street from me there's somebody trying to get into a house through the windows" and later stated that, "They're still trying ... to get in from the back..." The caller continued to report her observations and indicated that the perpetrator had gotten into the truck she described, and was heading in a certain direction. The caller provided her name and telephone number to the 911 operator. (A. 58-59)

IMPD Officer Nicholas Andrews was the first officer who responded to the dispatch. He observed, and then stopped, a pickup truck with a green colored front end and a different colored back end within two blocks of where the burglary was reported to

have been undertaken. (A. 23) He arrived at that location approximately two minutes after receiving the dispatch. (A. 18)

Officer Andrews approached the vehicle and observed that the driver and sole occupant was a male wearing a black hooded sweatshirt and baggy blue jeans, consistent with the description given by the 911 operator. The man identified himself as Ernest R. Snow. (A. 27)

Believing that he was dealing with a possible residential burglary suspect, and before conducting further investigation, Officer Andrews directed Snow to exit the truck and place his hands on the side of the truck. The officer's intention was to then pat Snow down in order to insure his own safety. (A. 27) The pat-down never occurred. When Snow was ordered to place his hands on the side of the vehicle, rather than comply with the officer's order, he aggressively spun around and faced the officer. Based on Snow's resistance, Officer Andrews grabbed Snow's left arm and placed it behind his back. (A. 27-28)

By this time, two other IMPD officers had arrived near where Snow's vehicle was stopped. When they observed the struggle between Snow and Officer Andrews, they ran up to Snow's truck to assist. Despite repeated oral commands from Officer Andrews to terminate his resistance, Snow refused to comply and repeatedly shoved his right hand toward the front of his waistband and his right front pocket. (A. 28)

Seeing this, the second responding officer, Michael Wolley, grabbed Snow's right hand from Snow's waist area and put it behind Snow's back. At this point, the third officer, Emily Perkins, saw a handgun protruding from Snow's waistband and yelled "gun" so that the other officers were aware of Snow's possession of it. As Officer Wolley pulled Snow's arm away from his waistband, Officer Perkins pulled the gun out of Snow's pants. The handgun was a loaded Glock semi-automatic 9 millimeter firearm. (A. 43)

Snow's status as an Armed Career Criminal precluded his lawful possession of the firearm he possessed on January 16, 2009. (A. 74)

V. SUMMARY OF THE ARGUMENT

Following a lawful stop of Ernest R. Snow, it was appropriate for a police officer to initiate a pat-down frisk of him for officer safety. The officer had reason to believe that Snow was armed and dangerous because immediately preceding the stop he had been identified as a suspect in a violent crime. Snow was detained within two minutes of a 911 call reporting and describing Snow as the perpetrator of an ongoing residential burglary. Snow and his vehicle fit the description provided by the eyewitness, who identified herself to the 911 operator and he was stopped within two blocks of the reported crime. Therefore, Snow was lawfully detained and subject to a search for weapons. While Snow was legally subject to being frisked for weapons, his weapon was located and seized before a *Terry* frisk could occur. The firearm seized from Snow was lawfully recovered when he resisted the pat-down and aggressively confronted the detaining officer. Another officer observed the firearm in Snow's waistband and removed it as Snow attempted to reach for it. Whether discovered during a pat-down search for

weapons or inadvertently disclosed by Snow during his unlawful resistance to law enforcement, Snow's firearm was not subject to suppression. Therefore, the district court committed no error in denying the motion to suppress.

VI. ARGUMENT

The District Court Did Not Err In Denying Snow's Motion To Suppress Where Police Had Reason To Believe That Snow Was The Suspect Identified In A Residential Burglary 911 Call And His Resistance Following a *Terry* Stop Resulted In The Recovery Of The Firearm He Sought To Suppress

1. Standard Of Review

When reviewing a district court's ruling on a motion to suppress, the appellate court reviews the questions of law de novo and the questions of fact for clear error. *United States v. Montgomery*, 555 F.3d 623, 629 (7th Cir. 2009); *United States v. Thomas*, 512 F.3d 383, 385 (7th Cir. 2008); *United States v. Riley*, 493 F.3d 803, 808 (7th Cir. 2007).

2. Legal Analysis

In the district court, Snow argued that the seizure of the firearm seized from him by police officers following his detention

was unlawful for two reasons: first because police officers lacked reasonable suspicion to conduct a stop of him, and second because there were not specific and articulable facts that would lead officers to believe that Snow was armed and dangerous. On appeal, Snow has abandoned the first assertion and argues only that a pat-down frisk of him was not justified by the facts known to the officers at the time of the stop. While the seizure of the subject firearm occurred without a warrant and thus invokes the Fourth Amendment restrictions on warrantless searches and seizures, a review of the facts demonstrates that no constitutional violation occurred and that the evidence sought to be suppressed was lawfully obtained.

In *Terry v. Ohio*, 392 U.S. 1(1968), the United States Supreme Court recognized the necessity of considering officer safety concerns in the context of Fourth Amendment issues. The Court explained:

> We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking

> steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.
>
> . . .
>
> [W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

Id. at 23-24 (footnote omitted.)

With these concerns in mind, the Court concluded that there is authority for police officers to:

> search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.

Id. at 27.

In determining whether a police officer had sufficient cause to conduct a pat-down search, as was approved in the *Terry* decision, the reviewing court must consider the circumstances and the knowledge of the officer at the time. "With *Terry* stops relating to vehicles, such as the present case, the description, proximity of the vehicle to the suspected criminal activity and the proximity to the reported crime are two important factors to be considered in determining reasonable suspicion." *United States v. Johnson*, 383 F.3d 538, 543 (7th Cir. 2004); *see also United States v. Wimbush*, 337 F.3d 947 (7th Cir. 2003) (finding reasonable suspicion where police stopped vehicle matching description of suspect vehicle and stop occurred eight blocks from scene of crime.)

Here the police officers responding to a dispatch based upon a 911 call of ongoing criminal activity stopped Snow's vehicle within two minutes and two blocks of the reported burglary attempt. The

vehicle operated by Snow fit the description given by the 911 caller and Snow's attire fit the description as well.

As the district court concluded, the officers were authorized to conduct a *Terry* pat-down of Snow. Snow was identified as a suspect in a residential burglary. Burglary is a crime "normally and reasonably expected to involve a weapon," *United States v. Barnett*, 505 F.3d 637, 640 (7th Cir. 2007) and is statutorily defined as a violent felony. 18 U.S.C. § 924(e)(2)(B)(ii). "[S]ome crimes by their very nature are so suggestive of the presence and use of weapons that a frisk is always reasonable when officers have reasonable suspicion that an individual might be involved in such a crime." *Barnett*, 505 F.3d at 640. The right to frisk is automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence. *Terry*, 392 U.S. at 33.

Snow's claim that the facts known to Officer Andrews at the time of the stop were insufficient to support a reasonable suspicion that Snow was armed and dangerous is not supported by the facts. His assertion that the officer needed "more concrete proof of actual

criminal activity or a first-hand observation ... that establishes reasonable suspicion" (Appellant's Brief at page 12) is not supported by the law. This Court has recognized "the particular duty of police officers to respond to emergency situations reported by individuals through the 911 system." *United States v. Drake*, 456 F.3d 771, 774 (7th Cir. 2006). Contrary to Snow's assertions, the responding officers are not required to second guess the police dispatcher's report of a burglary in progress to determine the weight of the evidence. Police must respond based upon what is known to them at the time the information is provided. "[I]formation turned up later neither vindicates nor condemns a search." *United States v. Wooden*, 551 F.3d 647, 650 (7th Cir. 2008). *See United States v. Hampton*, 585 F.3d 1033, 1038-39 (7th Cir. 2009). Police delay while attempting to seek corroboration of the 911 caller's report might undermine public safety and thus courts should presume the reliability of an eyewitness 911 caller "for purposes of establishing reasonable suspicion, particularly when the caller identified herself." *Drake*, 456 F.3d at 775.

The decision in *Florida v. J.L.*, 529 U.S. 266 (2000) relied upon by Snow is clearly distinguishable. In that case, the Court held that an anonymous and uncorroborated tip did not justify a *Terry* stop. The tip in question came from an unknown caller at an unknown location. *Id* at 271. Here the caller identified herself and described her direct and immediate view of what she logically believed was a house burglary underway. The government's critical interest in officer safety clearly outweighed the minimal intrusion of requiring Snow to exit his vehicle. Once outside the vehicle, a pat-down was lawful because under the totality of the circumstances, and the information provided to police, it was reasonable to conclude that Snow might be armed and dangerous. *Arizona v. Johnson*, 129 S. Ct. 781, 786 (2009).

Although a pat-down frisk of Snow was lawfully valid, it never occurred. After being directed to exit his vehicle, Snow resisted the apprehending officer *before a pat-down frisk* was undertaken. This conduct constituted resisting law enforcement, which is a misdemeanor criminal offense under Indiana law. *See* Indiana

Code § 35-44-3-3. The commission of this offense by Snow authorized the officers to arrest him and conduct a search incident to arrest, which certainly would have resulted in the discovery of the firearm in Snow's possession. *Thomas*, 512 F.3d at 387. The firearm would have been lawfully recovered without the frisk. Accordingly, under either analysis, the motion to suppress was without merit.

VII. CONCLUSION

For the reasons stated herein, this Court should affirm the judgment of the district court.

Respectfully submitted,

JOSEPH H. HOGSETT
United States Attorney

By: _____
James M. Warden
Assistant United States Attorney

VIII. CERTIFICATE OF SERVICE

This is to certify that I have served two copies of the foregoing BRIEF OF PLAINTIFF-APPELLEE, and one copy of the BRIEF OF PLAINTIFF-APPELLEE on a computer disk using Adobe Acrobat .pdf formatting, upon the defendant-appellant herein, by U.S. mail to the following counsel of record on the 28th day of December, 2010.

Sarah O'Rourke Schrup
Attorney at Law
Bluhm Legal Clinic
Northwestern University School of Law
375 East Chicago Avenue
Chicago, IL 60611

_____

James M. Warden
Assistant United States Attorney

Office of the United States Attorney
10 West Market Street, Suite 2100
Indianapolis, Indiana 46204-3048
Telephone: (317) 226-6333