

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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UNITED STATES OF AMERICA,            )  
  )  
                  Plaintiff,            )  
  )  
vs.                                        )  
  )  
MARVIN KING,                         )  
  )  
                  Defendant.         )

No. 02-20196 GV

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REPORT AND RECOMMENDATION  
ON DEFENDANT'S MOTION TO SUPPRESS

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The defendant in this case, Marvin King, has been indicted on one count of possessing a firearm as a convicted felon in violation of 18 U.S.C. § 922(g). The charge arises out of an investigative stop and frisk by a City of Memphis police officer and the subsequent seizure of a loaded .22 caliber handgun from King's person. King moved to suppress the handgun, alleging that it was obtained in violation of his Fourth Amendment right to be free from unreasonable searches and seizures. His motion was referred to the United States Magistrate Judge for a report and recommendation under 28 U.S.C. § 636(b)(1)(B) and (C).

Pursuant to the reference, an evidentiary hearing was held on December 11, 2002. At the hearing, the government presented one witness, Officer Parz Boyce of the Memphis Police Department. The

defendant called Mr. Keith Blair Garner II, a resident of Finger, Tennessee. After careful consideration of the statements of counsel, the testimony of the witnesses, and the briefs of the parties, the court submits the following findings of facts and conclusions of law and recommends that the motion to suppress be denied.

#### PROPOSED FINDINGS OF FACT

At about 6:00 p.m. on March 15, 2002, Officer Parz Boyce of the Memphis Police Department was patrolling the 2800 block of Kimball, in the Southeast Precinct, Memphis, Tennessee. Officer Boyce had just finished a routine check of a store and was backing his marked police vehicle out of its driveway, preparing to proceed east on Kimball. He saw the defendant, Marvin King, standing in the road and apparently flagging down a white Toyota. According to Officer Boyce, the Toyota had stopped or was stopping in a westbound traveling lane of Kimball near the center of the street, a few yards away from the entrance to an apartment complex. Suspicious because the pedestrian and vehicle had not pulled into the apartment complex driveway and concerned that they were obstructing traffic on Kimball, Officer Boyce made a U-turn with his police vehicle and pulled in behind the Toyota with his blue police vehicle lights flashing. Officer Boyce exited his police vehicle, and as he approached the Toyota, he saw King talking to

the driver of the Toyota through the driver's window. King turned slightly toward Officer Boyce, revealing the silhouette of a gun in the pocket of the jogging pants he was wearing. Officer Boyce saw the silhouette, "talked [King] back" to the police vehicle, and placed King's hands on the vehicle. Officer Boyce saw the butt of a handgun protruding from King's pocket. Officer Boyce frisked King and seized a .22 caliber handgun loaded with five rounds of ammunition.

The testimony of Garner, the driver of the white Toyota, differed slightly, but not in critical detail. Garner testified that he was dropping off King after the two had spent an hour of work repairing tire ruts in landscaping. Garner acknowledged that the Toyota was stopped in one lane of Kimball, but he did not believe it was obstructing traffic. Garner testified that he pulled his vehicle over near the curb to let King out. King had left Garner's Toyota and started to cross Kimball when Garner hailed him, saying that he might call on King for more work in the future. King stopped partway across Kimball, returned to Garner's vehicle, and stood near the driver's side window to discuss the details. Garner also testified that, while working with King that day, he saw nothing in King's pocket and no silhouette that appeared to be handgun. However, he could not remember what King was wearing that day, and he did not testify as to whether he saw

anything in King's pocket while King was standing next to the Toyota. There was no other evidence presented concerning what King was wearing that day.

Both witnesses testified credibly although Garner's testimony that he never saw a gun in King's pants pocket is somewhat suspect because Garner could not recall what King was wearing that day. Regardless, the only significant difference in the testimonies of the two witnesses concerned the location of Garner's car when it was stopped. Because the testimonies of the two witnesses do not contradict each other on any point other than the location of the vehicle, which, the court submits, is not germane to the suppression analysis, Officer Boyce's testimony should be accepted as fact insofar as it pertains to the events which led to the search of King and the seizure of the gun.

#### PROPOSED CONCLUSIONS OF LAW

When a search and a seizure are undertaken without a warrant, the government has the burden of proving probable cause or that the conditions of a temporary *Terry* investigative stop have been met. See *Terry v. Ohio*, 392 U.S. 1 (1968) (permitting an investigative stop and a frisk for weapons); *United States v. Winfrey*, 915 F.2d 212, 216 (6th Cir. 1990) (citing *Florida v. Royer*, 460 U.S. 491, 500 (1983) to place the burden of proof upon the government). A warrantless search is *per se* unreasonable except for a few well-

defined exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967); *United States v. Lewis*, 504 F.2d 92, 100 (6th Cir. 1974). Among these exceptions are so-called *Terry* "stop and frisk" searches in connection with an investigative stop. *Terry v. Ohio*, 392 U.S. 1 (1968). In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court held that:

[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

*Terry*, 392 U.S. at 30-31. The inquiry in such cases is two-part: whether the initial stop and the subsequent frisk were reasonable under the Fourth Amendment.

A. Reasonableness of Initial Stop

The fundamental inquiry under *Terry* is whether officers "have a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-18 (1981). This requirement of a particularized suspicion has two prongs. *Id.* at 418. The assessment of whether the officer had a particularized suspicion must be based on the

totality of the circumstances known to the officer at the time of the stop, *id.*, and that assessment must "arouse a reasonable suspicion that the particular person being stopped has committed or is about to commit a crime," *United States v. Montero-Camargo*, 208 F.3d 1122, 1129-30 (quoting *Cortez*, 449 U.S. at 418, and *Terry*, 392 U.S. at 21 n.18). "The officer must be able to articulate more than an 'inchoate and unparticularized suspicion' or a 'hunch' that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123-24 (2000) (quoting *Terry*, 392 U.S. at 27, n.2).

Officer Boyce's initial stop of King was reasonable under the totality of the circumstances. The stop occurred in the evening hours. It appeared to Officer Boyce that a pedestrian was flagging down a vehicle in an area known for high drug activity. The vehicle had stopped in the road, rather than pulling into the nearby apartment complex driveway. Officer Boyce testified that this series of events was sufficiently unusual to draw his attention. In the course of more than one hundred drug-related arrests in his law enforcement career, according to Officer Boyce's testimony, an approach by a pedestrian of a vehicle and a subsequent conversation at the driver's side window often involved a drug or weapon transactions. Officer Boyce further testified that he not only has patrolled the Southeast Precinct for three years, but that he also grew up in the Southeast Precinct area and

is familiar with the kind of illegal activity that frequently occurs there. Officer Boyce candidly admitted that, in light of his experience and the circumstances, he intended to investigate whether the events he saw indicated a drug or weapon exchange in progress. The fact that Officer Boyce's assessment turned out to be incorrect is not relevant; the inquiry is whether he made a reasonable interpretation of the events leading up to the stop. *United States v. Montero-Camargo*, 208 F.3d 1122, 1130 n.11 (6th Cir. 2000) (citing *United States v. Robert L.*, 874 F.2d 701, 703 n.2 (9th Cir. 1989)). A reasonable officer with Officer Boyce's background and experience likely would have made the same assessment and approached King to confirm or dispel that suspicion. Accordingly, it is submitted that the stop was lawful under the *Terry* doctrine.

B. Reasonableness of Frisk

Once an officer has the requisite reasonable suspicion based upon the totality of the circumstances to conduct a stop, the officer may conduct a pat-down search to determine whether the person is carrying a weapon, if the officer has a justifiable belief that the individual stopped is armed and presently dangerous to the officer or to others. *Terry*, 392 U.S. at 24.

Here, Officer Boyce testified that he saw the silhouette of a gun in King's pocket as soon as he began to approach King. He also

testified that King was wearing jogging pants. Garner's testimony did not contradict or impeach Officer Boyce's testimony on this point. Garner testified for the defense that he had not seen any silhouette in King's pocket earlier that day, but he did not testify as to what he saw at the time of Officer Boyce's approach nor could he recall what King was wearing that day. Accepting Officer Boyce's testimony as fact, it is submitted that Officer Boyce developed a reasonable suspicion that King was armed as soon as he saw the silhouette of a gun in King's pocket. Given the time of evening, the fact that Officer Boyd was patrolling alone, the fact that Officer Boyd was in uniform, driving a marked vehicle, and easily identifiable as a law enforcement officer, and the high-crime nature of the area, Officer Boyd was justified in frisking King, out of concern for the safety of himself and others, as soon as he saw the silhouette that he identified as a gun. See *Terry v. Ohio*, 392 U.S. 1, 23-24 (1968) (approving the reasonableness of a frisk conducted from concern for officer safety). Accordingly, it is submitted that the frisk was lawful under the *Terry* doctrine.

#### CONCLUSION

King's case presents a classic *Terry* stop. Under the totality of the circumstances, Officer Boyce had a reasonable, particularized suspicion that a drug or weapon exchange was afoot when he saw a vehicle stop in the roadway and saw a pedestrian

approach a vehicle in an area that the officer knew to have a high incidence of drug and weapon exchanges. This justified an initial stop of King, at which time Officer Boyce saw the silhouette of a gun in King's pants. Officer Boyce's observation of the silhouette of gun gave Officer Boyce a justifiable belief that King was armed. Officer Boyce was therefore justified in frisking King out of concern for officer and bystander safety. Accordingly, it is recommended that King's motion to suppress the fruits of the frisk be denied.

Respectfully submitted this 16th day of December, 2002.

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DIANE K. VESCOVO  
UNITED STATES MAGISTRATE JUDGE