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## Under Totality of Circumstances, Stop Was Not Supported By Reasonable Suspicion



**U.S. v. Drakeford, 992 F.3d 255 (Mar. 26, 2021).** In August 2017, a confidential informant advised police that a light skinned black male, heavysset, with a full beard was trafficking cocaine and heroin. The informant provided the suspect's vehicle tags but did provide a name or address. The informant also never provided the police with any "predictive" information about when and where the suspect would be selling drugs.

Through further investigation, police linked the vehicle tag to the defendant and discovered he had a record of drug arrests (although police were not aware of any convictions arising from the prior arrests).

Two months after receiving the tip, police located an address believed to belong to the suspect. One month later, police conducted surveillance on the address over ten times and over the course of two more months but never saw the defendant. Police were then able to link the suspect to a female and surveilled her residence as well, where they did see the defendant over 30 times but, never witnessed any drug transactions.

On February 1, 2018, while police were watching the female's home, the defendant left that location and traveled to a gas station. Someone parked next to the defendant and entered his vehicle for 30-45 seconds, and then got back into their own vehicle and left. Police followed that vehicle and observed driving consistent with impairment. A search of that vehicle revealed syringes, but no drugs. Police believed that this was significant given that the person had just been in the defendant's presence. A few days later, the defendant traveled to a different convenience store and parked, but eventually left without anything happening.

A detective contacted the informant to try and arrange for a purchase of heroin. According to the informant, the defendant stated he was awaiting resupply. Later that day, officers observed the defendant travel to another home and walk inside. Another car arrived at the location and a person entered the home with several bags. The defendant left after about an hour and was

carrying a bag. Police followed the defendant. During the trip, the informant contacted police and informed them that the defendant had called and stated that he now had drugs to sell.

Several days later, the defendant was observed traveling to a car stereo store. He parked in front of the store, directly in front of surveillance cameras for the business, and sat inside the vehicle. The area was a public, busy parking lot in the middle of the day and was not considered a high crime area. Another car parked in the area and two men exited that vehicle. The defendant exited his car at the same time and the men approached each other. Officers saw a quick handshake between the defendant and one of the men, and a few minutes later observed another handshake, apparently of slightly longer duration than the first. Officers believed the latter to be a hand-to-hand drug transaction, although no money or drugs were observed. All three men then entered the store together. A detective followed and saw the men talking with a store employee at a counter. One of the men had a bookbag by his feet and used his foot to bring the bag closer to his body when the detective walked by. The men left the store and continued talking together outside. Officers approached and detained the defendant. A pat-down revealed a bulge in the defendant's pocket which the officer immediately knew to be drugs. Based on the drugs found in the defendant's pocket, police obtained a search warrant for the home of the female associated with the defendant and found additional contraband.

The defendant was charged with various drug distribution and firearms offenses. Defendant filed a motion to suppress the evidence from the frisk that occurred in the parking lot of the car stereo store as well as the evidence found through the search warrant, claiming that the stop was unlawful and the evidence found from the warrant was the fruit of an unlawful search. The district court denied the motion, finding the stop and frisk supported by reasonable suspicion. The defendant pled guilty, reserving his right to appeal the denial of the motion, and was sentenced to 210 months. On appeal, the Fourth Circuit unanimously reversed.

Throughout the investigation of defendant, officers relied on information provided by a confidential informant. There was little information in the record regarding the informant's reliability, and the informant provided no more information about the defendant other than his vehicle tags and a vague description. This was not sufficient to connect the defendant to drug activity. And, despite the informant's ability to communicate with the defendant, officers never attempted to confirm the informant's allegations by setting up a controlled buy between the informant and the defendant, nor did they seek any predictive information that would lend to her credibility. Thus, the tip was entitled to only "little weight" in the analysis.

The officers' extensive surveillance provided them with nothing more than a single suspected drug exchange in which officers found no drugs, even after searching the vehicle that was suspected to be involved, and another incident in which defendant simply drove to a gas station, parked, and left. Additionally, despite surveilling defendant over the course of several months – 10 times at the address associated with him and more than 30 times at the female's address – officers never observed suspicious behavior or drug transactions at these locations. Thus, these events do little to elevate the officers' hunch that defendant was involved in drug trafficking to reasonable suspicion.

Finally, officers waited about a week from the time they suspected that the defendant had resupplied before stopping him. Characterizing the defendant's actions in the car stereo parking lot as being typical of a drug transaction, the detective testified that he would expect one person to exit the vehicle, enter the other vehicle, exchange drugs, leave their vehicle, and then leave the transaction. Here though, the suspected transaction occurred outside of the cars and the men went shopping thereafter, instead of re-entering their respective vehicles and leaving the scene. That these events occurred in the middle of the day in a busy, public area under the eye of store security cameras further cut against reasonable suspicion. Moreover, the officers' testimony about the alleged hand-to-hand transaction in the parking lot was merely conclusory—no property was observed changing hands, and nothing about the handshake was otherwise suspicious, even considering all the circumstances. According to the court:

[W]e cannot hold that officers' bare suspicion of drug trafficking -- without more -- can allow even an experienced officer to reasonably conclude that such a benign and common gesture can be viewed as an exchange of drugs. This cannot amount to reasonable, particularized suspicion. The Fourth Amendment does not allow the Government to label a person as a drug dealer and then view all of their actions through that lens.

Concluding, the court observed:

Taken together with the uncorroborated informant information and the inconclusive surveillance detectives had conducted in which no drugs were ever located, [defendant]'s presence at the Car Stereo Warehouse failed to create reasonable suspicion sufficient to justify a Terry stop. Given all of the foregoing, 'we are skeptical of Government attempts to spin . . . largely mundane acts into a web of deception.'

## **Reasonable Suspicion Existed to Detain Armed Man Despite Open-Carry Laws**

**Walker v. Donahoe, 3 F.4th 676 (June 7, 2021).** In February 2018, one week after the Parkland, Florida high school shootings, the plaintiff was walking through a suburban area near a school in the Southern District of West Virginia while armed with an AR-15 assault rifle and dressed in military-style garb. In response to a 911 call about the armed man, police briefly detained the plaintiff. Open carry of weapons is permitted in the state, although state law restricts open carry to persons 18 years of age and older. The plaintiff was 24 years old at the time, but the officers believed he could have been under the legal age to carry based on his youthful appearance. The plaintiff was polite but largely uncooperative during the encounter, refusing to answer questions about the gun or his business and disputing the justification for his detention. After a background check revealed that the defendant was eligible to possess and carry the weapon, he was released. The interaction took less than nine minutes.

The plaintiff then initiated a civil action, alleging a Fourth Amendment illegal seizure. The trial court granted summary judgment to the officer, finding the seizure was brief, reasonable, and supported by reasonable suspicion. It held that the officer reasonably believed that the plaintiff could have been violating the age restrictions for open carry. The trial court further found that the totality of circumstances—the recent mass shooting which would cause a reasonable officer

to be on high alert for copycat crimes, the 911 report, the plaintiff's proximity to a school, his military-style dress, and young appearance— created reasonable suspicion to believe the plaintiff may have posed a threat to the nearby school. Plaintiff appealed the ruling to the Fourth Circuit Court of Appeals.

Where a state permits individuals to openly carry firearms, the exercise of this right, without more, cannot justify an investigatory detention. The district court correctly noted this rule and correctly found that the officer here had more than the mere fact of the plaintiff's open carrying of a rifle. A suspect's open possession of a weapon in open-carry states, while not enough on its own, may contribute to reasonable suspicion. Further, the type of firearm is a relevant consideration in the analysis. In *District of Columbia v. Heller*, 554 U.S. 570, 623 (2008), the U.S. Supreme Court noted that the right to possess and carry weapons "extends only to certain types of weapons," observing that weapons like handguns, commonly used for self- and home-defense, were protected by the Second Amendment, while military-style weapons may be regulated without offending the constitutional right. Following *Heller*, the Fourth Circuit held that Maryland's ban on AR-15 rifles and similar high-capacity rifles was constitutional. *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir.) (en banc), cert. denied, 138 S. Ct. 469 (2017). While both *Heller* and *Kolbe* dealt with Second Amendment rights rather than Fourth Amendment reasonable suspicion, the court found them "instructive" and agreed with the district court that circumstances here supported reasonable suspicion: "Simply put, the circumstances of Walker's firearm possession were unusual and alarming enough to engender reasonable suspicion," for all the reasons identified by the district court. The district court's ruling on reasonable suspicion was therefore affirmed.